SUPREME COURT ADVISORY COMMITTEE

THIRD SUPPLEMENTAL AGENDA

FEBRUARY 1997

INDEX

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cc: [redacted]
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Vamf

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

February 1, 1996

HHD, Some Appeals Sect + Discovery SBOT Staff.

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

General Comments

Dear Luke:

Enclosed are copies of letters from W. Hugh Harrell, Wendy Prater, and William Roberts regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

PATTON,
HALTOM,
ROBERTS,
McWILLIAMS
& GREER

A Registered Limited Liability Partnership

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DARBY V. DOAN

January 29, 1996

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

General Comments

Re: Discovery Rule Revisions

Dear Justice Hecht:

This letter is in response to the invitation to comment on the Supreme Court's consideration of new rules of discovery in civil litigation in the January 1996 Texas Bar Journal. Having reviewed the Bar Committee Proposals and those of the Supreme Court Advisory Committee, I must agree with my several litigator partners and other members of the local bar who have shared their views with me that the flexibility afforded by the recommendations of the State Bar Committee on Court Rules are preferable to the rigidity and gamesmanship which the recommendations of the Supreme Court Advisory Committee seem to foster, even though both are made in the spirit of reducing the cost of litigation.

Seeking agreement as to scope of discovery is laudable and should be the norm. If no discovery is required in a particular case, an agreement limiting discovery should be easy to reach. Default rules proposed by the Supreme Court Advisory committee would seem to make the defendant seek agreements differing from the rules in many cases, while allowing the plaintiff's attorney the negotiating advantage, thus making it difficult to agree, resulting in motions to the court regarding a discovery plan. On the other hand, some flexibility in the rules would tend to balance the playing field and produce agreements as to discovery plans.

Thank you and the members of the court for the time spent in trying to promulgate good rules of discovery.

Yours very truly,

William B. Roberts

William B. Roberts

cc: Chief Justice Thomas R. Phillips

WENDY L. PRATER
ATTORNEY AT LAW

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January 26, 1996

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

General Comments

RE: Proposed New Discovery Rules

Dear Judge Hecht:

I have reviewed the two proposals regarding the change and uniformity of the Texas discovery rules as presented in the January 1996 Texas Bar Journal, and felt that as a sole practitioner I must comment upon them to you.

I feel that the proposal of the Supreme Court of Texas Advisory Committee gives an advantage to larger firms with many lawyers and support staff. The rules seem more restrictive with many more deadlines to follow, and would make the otherwise fun practice of law even more burdensome to those of us who do not have the advantage of support staff. In addition, the limitations place upon a case are determined by the claim amount. Again, this puts smaller firms and sole practitioners at a disadvantage. Soon the claims will be over-inflated in order to increase the deposition hours, etc. It is unfair to put such limitations based only upon the amount in controversy, assuming that a lower dollar amount automatically means a simple case.

The proposal of the State Bar Committee on Court Rules is less restrictive and yet still provides much needed structure to the discovery process. This plan does not seem to favor one side of the bar over another, nor does it seem to be favorable to a certain size law firm. I think it is important to make sure that any rule regarding discovery be fair to all attorneys regardless of the size of the firm or practice. If not, the citizens of the State of Texas will no longer be able to choose their own attorney. Many small firms and sole practitioners would not be able to litigate cases.

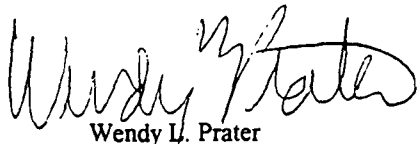
Please consider the overlooked sole practitioner. We are a group that has chosen to have our own practices, and should not be punished for that brave decision. The competition with large firms is hard enough on us without the addition of discovery rules that favor large firms as well.

Member of The College of The State Bar of Texas

Again, I believe that, of the two proposals, the State Bar Committee on Court Rules is the most favorable.

Thank you for your consideration.

Very truly yours,



Wendy L. Prater
Attorney at Law

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
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Jan. 25, 1996

Hon. Nathan L. Hecht, Justice
Supreme Court of Texas
Box 12248
Austin, Texas-78711

Re: Amendment-Proposed to
Rules of Civil Procedure
& Discovery

Dear Judge Hect:

Vol. 59, No. 1, Jan. 1996 of the Texas Bar Journal contained articles on the activities of the CRC and SCAC and the rule change. However, that issue apparently did not contain the actual suggested rule changes so I was left with the articles imterpretation of what each was seeking. If I may I would like to share with you and the Court my position as a sole practioner and one who for the most part represented parties who did not have the means to take depositions and hire experts.

1. I find nothing wrong with the old way of trying law suits by not disclosing everything you have and thereby ambushing the other side; if the other side has not proceeded to obtain discovery. The rules are in place and if the other side can not get with it and obtain what they feel is material facts in a case, then so be it.

2. Before making any other objections, I would say that I do like a rule similar to that in the Federal practice and that is the attorneys sitting down and formulating a pre-trial statement to the Court what the issues are amd what is controverted. For one thing it mak the attorneys and the Plaintiff & Defendant look carefully at their positions.

3. I would say that the other side can take ALL the depositions they want to take and for as long as they want to incur that expense; just as long as that does not become part of the Cost Bond and deprive an average litigant from proceeding to trial.

4. I think it ought to be in the rules that if I take a deposition of the other party that I must furnish them a copy of that deposition; but it does not necessarily have to be a copy made by the reporter.

5. I think it needs to be in the rules that after the Appellant has used the Statement of Facts and the Transcript they are required to deliver same within say 3 days after mailing their Brief to the Court of Appeals to the other side.

6. For example, our local trial Courts are looking at 9 mos. to prepare a case, and THEN sending the case to arbitration-Mandatory! Though a motion to remove from arbitration can be had the Judges here are reluctant to not make you go to mediation. Maybe arbitration should be discretionary and must be ask for within say 90 days of filing the case.

Re: Amendement to the Rules of Civil Procedure

7. I would like to make an observation relative to mandatory time periods in which to act. It is my impression that the members of the bar are being placed under greater emotional pressures than called for, since the practice of law is stressful. The more the rules require that some thing MUST be done by such and such time, I feel that we are going to have more members with heart attacks and other disorders.

8. Representing clients who do not have lots of money for depositions requires the use of written interrogatories, request for production, and admission of facts. It is the answers from the other side that require further hearings before the Court. Given a truthful answer to begin with would eliminate alot of time before the Judge.

9. Further on written interrogatories. IF, the Courts are going to allow the other side to take my clients oral deposition and ask him 500 questions, then it is NOT fair to only allow me 25-35 questions twice from that witness. We all recall the abuse of asking shades of the same question with 200 parts such as how close were you to the intersection and did you see the Defendant at 100 yds., 90 yds., 85 yds., etc. However, my position is that I am entitled to ask all the written interrogatories I want, and especially when you have no restrictions on an oral deposition. I have been sorely temped to walk out after 35 questions in an oral deposition, and they are only getting to what were your subjects in the 3rd grade of school and who sat next to you.

10. I think it needs to be made clear in the Rules that if a suit is in one county of venue, and the Defendant for example lives 500 miles away and has not filed a cross-action, that witness can or can not be forced to appear in the county of venue and give their oral depsition. I don't find that clearly stated in the Rules. That way you don't have to waste time looking for a case that says yes or no, and then leaving it to the discretion of the trial Judge.

11. Where practical the Rules should direct the Judge to order or permit such and such and not so much to the discretion of the Court. For example, where a Judge leans towards a particular side of a case (and they do that often enough) then discretion goes out the window and time again is taken up with an application for a writ of mandamus.

12. Lets take the guess work out of what is an appealable order or Judgment by listing as many as possible and say this one is a final order where it can be appealed, or this one is an interlocutory order and it can only be reviewed by an application for Mandamus.

Clearly, I could write several pages on these matters, but I will close for now and say that I feel sure that many, many hours of thought have gone into these changes suggested and I appreciate the effort made though I am sure that I will not agree with all of them. If I can be of further imput on any thing, please call on me by yourself or the committees.

Yours very truly,

Hugh Harrell

WHH:wh
cc: Ret.

02-28-96
4543.001
cc: LHS
hhd
Vamf

THE SUPREME COURT OF TEXAS

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February 27, 1996

AHP
SC Agenda
Subc
SBOT Staff

General Comments on Proposed Discovery Rules

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Oldham & Associates and Thomas Gendry regarding the proposed discovery rules and from Robert Cain regarding the Court's breifing practices.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

3RD00007

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February 20, 1996

Justice Nathan L. Hecht
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

As a member firm of the Texas Association of Defense Counsel, Inc. ("TADC"), we practice primarily on the defense side of the docket as do the over 2,300 other lawyers who are members of the TADC throughout the State of Texas. Through our communications with the TADC Board of Directors, we have been advised that the Board has unanimously passed a resolution urging the Texas Supreme Court to reject the changes in the Civil Discovery Rules proposed by the Supreme Court Advisory Committee and to adopt those proposed by the Court Rules Committee of the State Bar of Texas.

It is my firm's belief as well as that of the TADC that some of the rules proposed by the Supreme Court Advisory Committee unfairly favor Plaintiffs to the detriment of our clients, whereas the proposals of the Court Rules Committee are both fair and equitable to either side of the docket.

The underlying philosophy of the Court Rules Committee's proposal calls for a discovery plan for each case so that discovery can be focused on the claims and defenses actually existing in that particular case. Similar plans are widely used in certain state and Federal District Courts at this time. A discovery plan that is tailored to each particular case results in a reduction in costs, equally forces both sides to plan and prepare their cases in anticipation of scheduling a trial date, which likewise results in a overall increase in efficiency thus reducing crowded dockets.

It has come to our attention that the approach taken by the Supreme Court Advisory Committee was to fashion a set of rules for all cases. Such a broad sweep is somewhat misguided when discovery abuse is a problem in only a small percentage of the cases currently pending before the Courts of the State of Texas. Such an attempt to pass rules applicable to all of the cases in order to solve problems in only a small percentage of them will, in the long run, actually impose a greater burden on litigants in the form of costs than that which exists under the current rules.

The undersigned, along with many other members of the TADC, do not agree with certain aspects of even the preferable Court Rules Committee approach. We oppose any time limitation on oral depositions, but in some cases there is the need for a reasonable time limitation on individual oral depositions. However, we, like many other members of the TADC, believe that the Court Rules Committee approach is more workable concerning length of time for oral depositions than that proposed by the Supreme Court Advisory Committee.

There are specific examples under the proposed rules of the Supreme Court Advisory Committee of how they directly favor the Plaintiffs. First, Rule 1-1 of the Supreme Court Advisory Committee proposed rules limits discovery to six hours per party when the Plaintiff's pleadings seek only monetary damages of $50,000 or less excluding costs, pre-judgment interest and attorney's fees. Under that rule, each party is limited to 15 interrogatories. The following sentence from that rule provides:

> "No amendment seeking relief other than monetary recovery or bringing the amount of recovery above $50,000 shall be allowed within 30 days prior to trial."

That passage causes great alarm for the members of this firm and we anticipate that it will not sit well with other members of the TADC. For example, an attorney that represents several injured Plaintiffs or Wrongful Death Beneficiaries can sue for $50,000, limit us to six hours of depositions and 15 interrogatories, and continue to conduct discovery up and until 30 days prior to trial. Just before the 30 day deadline, the Plaintiffs can amend and sue for an unlimited amount of damages or any figure in excess of $50,000.

The rule further provides in those situations "discovery shall be reopened and completed within the limitations provided in Section 2 or 3 of this rule, and any person previously deposed may be redeposed." However, some Courts may grant only a 30 day continuance or some other very short period in which to allow us to adequately prepare a complex case for trial in light of the exorbitant damages requested by the Plaintiff just prior to the 30 day deadline. Such a rule allows and even promotes the proverbial "hiding behind the log" and results in unfairness in favor of the Plaintiff since the amount sought in their pleadings is entirely their decision.

Second, in those situations where the suit is for more than $50,000 and the parties are unable to reach an agreement and the Court fails to order a discovery plan pursuant to proposed Rule 1-2, the case is then governed by proposed Rule 1-3 because the suit falls under the heading "all other suits." The discovery plan is then limited to nine months or until 30 days prior to trial, whichever

is shorter, when there is no agreement between the parties. If the suit falls under this proposed Rule 1-3, the parties are precluded from agreeing to a discovery period of over 12 months. Then each "side," not individual parties, shall have no more than 50 hours to examine and cross-examine opposing parties and experts designated by those parties and persons who are subject to that party's control during oral depositions. As is apparent, dividing 50 hours among multiple Defendants is unfair to the individual Defendants and unworkable. Like selecting the amount of requested damages, the naming of Defendants is solely within the Plaintiff's attorney's control and once again the provision results in unfairness in favor of the Plaintiff.

Third, in many instances, Plaintiffs have several years in which to develop a case prior to filing their cause of action. In those situations the Plaintiff is far ahead of the Defendant in trial preparation before they have chosen to even file suit, especially in those cases when the Defendant may not even know about the accident or other events involved in the case. In those situations, under the Supreme Court Advisory Committee proposal, the Defendant would have only nine months to prepare for trial if a Court refuses to order a discovery plan. This problem is further aggravated by Senate Bill 28 which amended Chapter 33 of the Civil Practice & Remedies Code. Specifically, Section 33.004 (d) provides:

> "a third party claimed by a Defendant under this Section may be filed, even though the claimant's action against the responsible third party would be barred by limitations, if the third party claim is filed on or before 30 days after the date the Defendant's answer is required to be filed."

In some instances this actually encourages the Plaintiff's attorney to wait until limitations are about to expire prior to filing suit. In those situations, the Supreme Court Advisory Committee's proposed nine months discovery time frame is blatantly unfair to our clients.

Fourth, proposed Rule 10 sets forth the procedures for designating expert witnesses. These proposals significantly favor the Plaintiff in that proposed Rule 10-2b provides that experts testifying for a party who is seeking affirmative relief must be designated before the earlier of 75 days before the end of the discovery period or 75 days prior to trial. Afterwards, pursuant to proposed Rule 10-3a (4), the parties seeking affirmative relief would then be required to give two suggested dates for deposition of those experts within the next 30 days.

Our clients would then be required to designate experts the earlier of 45 days prior to the end of the discovery period or 45 days

before trial. In those instances, our clients may be placed in the position of having to designate an expert on the same day they first learn of the opinion of the expert designated by the party seeking affirmative relief. Almost assuredly, this party's attorney is going to give the 29th and 30th day following his client's expert's designation as the suggested dates for deposition in order to give our clients less time to prepare a designation of their experts.

In our opinion and most likely the opinion of other members of the TADC, the best way to handle complex cases is for all parties on both sides of a docket to agree to a discovery control plan or, in the alternative, ask the Court to set forth such a plan. The Court Rules Committee's approach recognizes this by making the discovery control plan available in any case even if Plaintiff or Defendant will not agree to it or the Court fails to order it.

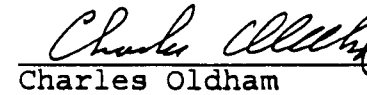
Being a small firm there is no way that we could address each and every problem that we believe befalls the philosophy of the Supreme Court Advisory Committee and their proposed rules. However, we felt it necessary and important to take the time to urge the members of the Supreme Court to adopt the discovery rules proposed by the State Bar Committee on Court Rules. We feel that the Committee is more representative of the lawyers who actually are involved in litigation in the Courts of the state and that the Committee has adopted a philosophy which addresses the difficult problems involved in discovery in a manner that is fair to parties on both sides of the docket.

We have been informed by the Board of Directors of the TADC and through other avenues that the proposed rules passed by the Court Rules Committee, which was comprised of lawyers on both sides of the docket, were enacted unanimously in most cases. It has been further brought to our attention that this is not the case with respect to the proposed rules of the Supreme Court Advisory Committee.

Thank you again for allowing us the opportunity to voice our opinions on this very important subject.

Sincerely yours,

OLDHAM & ASSOCIATES

By 
Charles Oldham

By _____
Anthony M. Kuehler

By _____
Scott M. Kidwell

01-12-96
4543.001
cc: LHS
NHD
Vamp

THE SUPREME COURT OF TEXAS

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NATHAN L. HECHT
JOHN CORNYN
CRAIG ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

January 11, 1996

NHD, see agenda Sub C ✓ SBOT Staff ✓
General Comments

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Frank Hunold, Jr. regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

FRANK A. HUNOLD, JR.
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January 5, 1996

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: Proposed new discovery rules

Dear Justice Hecht:

I am writing to comment on the proposed revisions to the discovery rules prepared by the State Bar of Texas Court Rules Committee (CRC) and by the Supreme Court of Texas Advisory Committee (SCAC). My comments are based on articles authored by O.C. Hamilton, Jr. and J.Shelby Sharpe and by Stephen D. Susman and appearing in the January, 1996 *Texas Bar Journal* and my 16 years experience practicing business litigation in Texas.

I strongly favor the philosophy and proposal of the SCAC.

Messrs. Hamilton and Sharpe state in their argument that "It is difficult, if not impossible, under the present rules to ever get eight attorneys to agree on a date for a deposition much less to agree on a division of 50 hours among the defendants." Yet, they admit that the success of the CRC proposal largely depends on attorneys acting "responsibly". The CRC apparently believes that under the CRC's proposed rules, attorneys who cannot now agree on a deposition date will suddenly be able to agree on a discovery control plan. I disagree. I strongly believe that, in "default situations", litigants should be subjected to the discovery plan proposed by the SCAC and that the discovery plan should be strictly enforced.

I agree that a suit involving a $45,000 claim can be as complex as one involving $450,000,000. However, the economies of the two suits are vastly different. In the business context, under the current rules, persons involved in a $45,000 dispute are often denied their day in court for the simple reason that the cost of discovery can easily exceed the amount of the dispute. This is especially true in those $45,000 cases that are complex. In my experience, persons with $45,000 complex disputes would gladly sacrifice their ability to obtain (and, I might add, be subjected to) scorched earth discovery for the opportunity to be able to afford to pursue their day in court.

Finally, I believe that a nine-month window of discovery is more than sufficient in the

vast majority of cases. If a lawyer believes that his case is one that will probably settle, he should advise his client of his belief and advise his client to settle. In this instance, the parties should settle the case or be required to immediately begin participating in discovery. The costs of litigation include not only direct monetary costs, but indirect costs as well, including disruption of a litigant's business and, in many instances, personal life. In my experience, the ultimate costs to the litigants of allowing a case to drag on endlessly in hopes of settlement are far greater than would be the costs of forcing immediate participation in discovery and an early resolution. This is just as true in the $45,000 case as in the $450,000,000 case.

Clearly, the public and our clients are demanding that we change the way we do business. In the discovery arena, I believe that the new discovery rules proposed by the SCAC will most effectively accomplish that change.

Sincerely,

Frank A. Hunold, Jr.

11/11/96
4543.001
cc: LHS
orig: hhd

F. SCOTT McCOWN
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HHD
SCAC Agenda
Discovery Subc
Staff

November 6, 1996

The

General Comments

The Honorable Tom Phillips
The Honorable Raul A. Gonzalez
The Honorable Nathan L. Hecht
The Honorable John Cornyn
The Honorable Craig Enoch
The Honorable Rose Spector
The Honorable Priscilla R. Owen
The Honorable James Baker
The Honorable Greg Abbott
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Re: Rules Advisory Committee

Dear Chief Justice & Justices:

I appreciate the opportunity to have served on the Rules Advisory Committee. My term expires at the end of the year, and other responsibilities prevent me from asking to be re-appointed. I do hope that you will appoint a district judge to take my place. The perspective and balance of the district judges is unique, and I think you have too few rather than too many on the committee.

I do have one last thought I wish to share regarding discovery changes. As you know, I was on the discovery subcommittee. I voted for the proposals that you now have before you.

A question has been growing in my mind, however, about whether change is needed. In the last year I have seen few discovery disputes--either pretrial or trial--and no discovery disputes that would not have arisen under the pending proposals. I wonder whether the unseen hand of the "market" has not already

disputes that would not have arisen under the pending proposals. I wonder whether the unseen hand of the "market" has not already addressed past problems, and whether further "regulation" would only create new problems, and with them new costs and reasons for delay. (Just the costs to the public of lawyers learning new rules is significant. The advantages must outweigh the costs.)

To use another metaphor, it seems we are no longer sinking, and the boat may have righted itself. Before the court promulgates new discovery rules, I recommend a careful canvas of the bench and bar to ascertain whether there are continuing problems that would really be addressed by any changes under consideration.

Again, thank you for this opportunity to have served.

Very truly yours,

F. SCOTT McCOWN
Judge, 345th District Court
Travis County, Texas

FSM/ak

cc: Advisory Committee Members

12-08-95
4543.001
NHd
Vam.

THE SUPREME COURT OF TEXAS

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December 7, 1995

HAD
Sept Agenda
✓ Discuss Subc
Staff
Tex

General Comments

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from the Texas Association of Defense Counsel, Inc. regarding the discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC.

400 West 15th Street, Suite 315, Austin, Texas 78701 512/476-5225 Fax 512/476-5384

December 5, 1995

Justice Nathan L. Hecht
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht,

At its meeting in Austin on November 3, 1995, the Board of Directors of this Association (consisting of over 2,300 lawyers who practice primarily on the defense side of the docket in this State) unanimously passed a resolution urging the Texas Supreme Court to reject the changes in the civil discovery rules proposed by the Supreme Court Advisory Committee and to adopt those proposed by the Court Rules Committee of the State Bar of Texas.

We have studied the proposals of both committees, and we commend the leadership and members of both committees on their diligence and hard work. However, after carefully considering both proposals, we believe that some of the rules proposed by the Supreme Court Advisory Committee unfairly favor plaintiffs to the detriment of defendants, whereas the proposals of the Court Rules Committee of the State Bar are fair and equitable to both sides of the docket.

The approach of the Court Rules Committee was to design rule changes which would fit the majority of cases and allow the exchange of basic information in a less cumbersome and costly manner than now occurs in some cases. The Court Rules Committee philosophy calls for a discovery plan for each case so that discovery can be focused on the claims and defenses actually existing in that particular case. Similar plans are now utilized in certain state and federal district courts. The utilization of a discovery plan tailored to a particular case, according to lawyers who have practiced in such courts, results in a reduction in costs, orderly planning, preparation and scheduling of a trial date, and an overall increase in efficiency in the administration of civil justice.

The approach taken by the Supreme Court Advisory Committee proposals, on the other hand, is to fashion a set of rules for all cases, even though discovery abuse is really a problem only in a relatively small percentage of cases. We believe that an effort to pass rules applicable to one hundred percent of the cases in order to solve a problem in only a small percentage of the cases is misguided, and will actually impose a greater cost burden on litigants than occurs under the existing rules.

Without doubt, many members of this Association do not and will not like certain aspects of even the preferable Court Rules Committee approach. For example, many of our members oppose any time limitation whatsoever on oral depositions, but others feel that because abuse does exist, reasonable time limitations on individual oral depositions are appropriate. In any event, we believe that the Court Rules Committee approach regarding the length of time of oral depositions is more workable than that proposed by the Supreme Court Advisory Committee.

There are concrete and specific examples of how the approach of the Supreme Court Advisory Committee favors plaintiffs. In the remainder of this letter, we will list a few of the more significant ones.

First, Rule 1-1 of the SCAC proposed rules limits discovery to six hours per party if the plaintiff's pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, pre-judgment interest and attorneys fees. Moreover, each party is limited to 15 interrogatories. The trap for an unsuspecting defendant lies in the following sentence: "No amendment seeking relief other than monetary recovery or bringing the amount of recovery above $50,000 shall be allowed within 30 days prior to trial." In other words, an attorney representing multiple seriously injured plaintiffs or wrongful death beneficiaries can sue for $50,000, limit the defense to six hours of depositions and 15 interrogatories, and conduct discovery up until 30 days before trial. Just over 30 days before trial, the plaintiff can amend and sue for $50 million. Rule 1 provides that when this occurs, "discovery shall be re-opened and completed within the limitations provided in Section 2 or 3 of this rule, and any person previously deposed may be re-deposed." Some courts, of course, may be disposed only to grant a 30-day continuance, or other very short period, in which to allow the defendant to prepare a complex case for trial, resulting in blatant gamesmanship and unfairness in favor of the plaintiff, since the amount sought in the plaintiff's pleadings is solely within plaintiff's control.

Second, if the suit is for more than $50,000 and the parties do not agree and the court does not order a discovery control plan pursuant to Rule 1-2, the case is governed by Rule 1-3 dealing with "all other suits." The discovery period is limited to 9 months or until 30 days before trial, whichever is shorter, absent an agreement of the parties. (The parties cannot even agree to a discovery period of over 12 months, if the suit is under Rule 1-3.) During the discovery period, each "side" shall have no more than 50 hours to examine and cross-examine in oral depositions opposing parties and experts designated by opposing parties and persons who are subject to the opposing party's control. In cases involving multiple defendants, which are becoming increasingly more common, dividing 50 hours among 20 or 30 or 100 defendants is, quite simply, unfair and unworkable. Again, the naming of defendants is within the control of the plaintiff's attorney, and this provision can result in unfairness in favor of the plaintiff.

Third, plaintiffs in many instances have several years in which to develop a case before it is filed. This can include interviewing witnesses, examining products, hiring expert witnesses and consultants, and gathering other facts in evidence. Therefore, the plaintiff is often very far "ahead" of the defendant in trial preparation before the suit is even filed, especially in the case in which the defendant may not even know about the accident or other events involved in the case. Under the SCAC proposal, the defendant would then have only 9 months to prepare for trial if a court refuses to order a discovery plan. This problem may be aggravated by S.B. 28 which significantly amended Chapter 33 of the Civil Practice & Remedies Code. Specifically, Section 33.004(d) provides, in pertinent part:

> "A third-party claim by a defendant under this section may be filed, even though the claimant's action against the responsible third party would be barred by limitations, if the third-party claim is filed on or before thirty days after the date the defendant's answer is required to be filed."

This provision may actually encourage plaintiffs' attorneys in some cases to wait until limitations are about to expire before filing suit, and the SCAC proposed nine-month discovery window is blatantly unfair to defendants.

Fourth, the procedures for designating expert witnesses set forth in Rule 10 significantly favor the plaintiff. Rule 10-2b provides that experts testifying for a party who seeks affirmative relief must be designated before the earlier of 75 days before the end of the discovery period or 75 days before trial. The plaintiff would then be required, pursuant to Rule 10-3a(4), to give two suggested dates for deposition within the next 30 days. However, the defendant must then designate experts the earlier of 45 days before the end of the discovery period or 45 days before trial, meaning that the defendant may be in a position of having to designate experts on the same day the defendant first learns of the plaintiff's expert's opinion. Gamesmanship will almost dictate that a plaintiff's attorney is going to give as the two suggested dates the 29th and 30th day following designation in order to give the defendant less time to prepare a designation of the defense experts.

Under the SCAC proposal, we anticipate the parties would agree to a discovery control plan or would approach the court about obtaining a discovery control plan. We feel that is the best way to handle large cases. The approach of the Court Rules Committee recognizes this probability by making the discovery control plan available in any case, even if one side or the other will not agree to it or the court will not order it.

While we believe there are many other problems with the approach of the Supreme Court Advisory Committee, we are well aware that other groups, including the State Bar Committee on Court Rules, have provided significant input to the Supreme Court on these matter. Therefore, this letter is not intended to be a totally exhaustive analysis of the SCAC proposals.

On behalf of the 2,300 members of our Association, we earnestly urge the Court to adopt the discovery rules proposed by the State Bar Committee on Court Rules. That committee is representative of the lawyers who practice in the courts of this state, and the members of that

committee have diligently addressed the difficult problems of discovery in a fair and even-handed way. We understand that the rules passed by the Court Rules Committee, which is composed of lawyers on both sides of the docket were, for the most part, enacted unanimously, whereas that is not the case with respect to the proposals of the Supreme Court Advisory Committee.

If any of us, or our members, can provide any further information or assistance to the Court about these very important rule changes, we will be more than happy to do so.

Yours very truly,

Russell B. Serafin
President

Thomas C. Riney
Executive Vice President

John H. Martin
President-Elect

Joseph V. Crawford
Immediate Past President

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[redacted]
hhd

THE SUPREME COURT OF TEXAS

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January 23, 1996

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Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

General Comments

Dear Luke:

Enclosed are copies of letters from David Chamberlain and Randy Howry regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

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DAVID E. CHAMBERLAIN

January 15, 1996

Justice Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Competing Proposals for Revisions to the Discovery Rules

Dear Justice Hecht:

I have just completed reading a copy of Casey Dobson's January 9, 1996 letter to you regarding revisions to the discovery rules. I agree wholeheartedly with his comments.

I am currently handling 294 cases, most of which are in state court. I primarily have a defense practice. I have attended less than five discovery hearings in the last eighteen months. Each of these discovery hearings involved a novel question which needed trial court resolution. Not one of these discovery hearings was caused by any so-called Rambo tactics of the lawyers.

I find no real need to change our discovery rules. I have seen only one instance in the past two years where I thought the opposing lawyer was taking unnecessary and lengthy depositions. That was my opinion only, and the opposing lawyer, whom I respect, would certainly disagree. In any event, we did not ask for a protective order and made it through that just fine.

"Rambo tactics" is truly a dated term. Our bar has matured greatly. Over ninety percent of the lawyers I deal with on a daily basis, and I deal with a lot of lawyers, are courteous and cooperative. I have never refused a reasonable discovery extension nor have I been refused one. Rarely does a lawyer notice a deposition without contacting me first for an agreed schedule. I do not find lawyers noticing too many depositions nor do I find lawyers taking depositions that are too lengthy. The vast majority of lawyers seek to settle cases with the least amount of work and expense possible.

It truly makes me wonder who these people are who necessitate such a radical, inflexible and restrictive revision of our rules. It is doubtless that there are a few bad apples who abuse discovery. They are only a small minority of our practicing bar. They suffer from a problem which is pathological in nature. No rules revision will stop them. They will continue to abuse whatever rule that may be in place. This small minority of lawyers should be dealt with in other ways. They can be isolated in our own communities and handled properly by their peers and local judges. Stated differently, we should not make changes to our discovery rules to deal with a few non-conforming lawyers.

I have some concern that our rules may be revised for reasons other than the stated purpose of controlling Rambo tactics. Does the general public perceive discovery as too expensive? If they do, then we should answer that hazy perception with the factual truth: the discovery system is not being abused nor is it expensive.

Are we going to amend our rules to simply prove that we are agents of change and progressive actors? This frightens me because it politicizes the rules of civil procedure. The rules should not bend to the winds of popular or political thought.

As a former trial judge, you know that the judiciary alone cannot successfully resolve the thousands of disputes that arise annually in Texas. It takes lawyers to resolve these disputes. It takes lawyers to resolve these cases somewhere outside the court arena. In order to resolve the bulk of these disputes, we, as practicing lawyers, must have flexibility to move around in the system. We should not be reduced to slaves or subjects of draconian laws.

Are we to amend these rules simply because much time and effort has been spent by CRC and SCAC? I hope not. Leaving the rules alone is not time wasted. Studies and task forces do not equate to automatic changes. Only well advised changes should be undertaken.

I do not believe the rules should be subject to popular whim. On the other hand, I should point out to the court that these proposed changes are not popular among the practicing bar. I am a board member of the Texas Association of Defense Counsel. When the proposed rules were reviewed in a recent board meeting, they did not meet with any degree of acceptance. In fact, I did not hear one supportive comment.

Judge, I appreciate your time and attention. I feel good that this issue is in your more than competent hands.

With best personal regards, I am,

Very truly yours,

David E. Chamberlain

DEC/tr

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January 16, 1996

Justice Nathan Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Competing Proposals for Revisions to the Discovery Rules

Dear Justice Hecht:

I recently had the opportunity to review the letter prepared by Casey Dobson with the Scott, Douglass, Luton & McConnico firm. I must say that I agree wholeheartedly with the comments presented by Casey. Although I am sure there are lawyers that are abusing our current system, those lawyers will abuse whatever system there is in place. I can count on two hands the number of times that I have been forced to go to the court for relief on a discovery matter in the last three years. I would submit that the current discovery rules are working and that repair is not needed at the current time.

As Casey offered, I am more than willing to serve on any committees to address the proposed rule changes. Thank you for your hard work.

Very truly yours,

Randy Howry

RH/ja
K:\RH\MISCLTR\HECHT

01-15-96
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cc: LHS
Nhd
Ven

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January 12, 1996

Mr. Luther H. Soules III
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San Antonio TX 78205

General Comments

Dear Luke:

Enclosed are copies of letters from Casey Dobson and Howard Waldrop regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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January 8, 1996

Chief Justice Thomas R. Phillips
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

I have recently reviewed the articles in the January *Texas Bar Journal* analyzing the rules revision proposals advanced by the Supreme Court Advisory Committee and the Court Rules Committee of the State Bar of Texas. I found this analysis to be particularly helpful in helping me to decide the rules that would be most helpful in the administration of justice in this state. Actually, I have followed the work of these two committees for several months. I strongly commend the members of both groups for their diligent work and efforts, and know that they all share with me a desire for change that will make litigation more nearly affordable for most of the state.

It is my opinion that the rules proposed by the Court Rules Committee of the State Bar best fits the needs of the litigants, bench and bar of this state at this time. It is my opinion that they provide flexibility and the opportunity for the exercise of discretion by a trial judge in case management. I believe there is the potential for considerable savings in costs to litigants by the use of the Court Rules Committee proposals. On the other hand, my impression is that the Supreme Court Advisory Committee recommendations are too rigid, and do not provide litigants, lawyers and trial judges with the flexibility that they need in the management of dockets.

Additionally, I have had the opportunity to review the letter to you dated December 8, 1995, which came from the current executive committee of the Texas Association of Defense Counsel. As I am sure you are aware, I am a former President of TADC. I join in and concur with the thoughts and analyses contained in that letter.

I sincerely appreciate the Court inviting and encouraging the bar at large to comment on these far-reaching proposals. If I may be of any service or assistance to you or any other members of the Court, I would be most happy to oblige if same is within my capabilities.

Sincerely yours,

Howard Waldrop

Howard Waldrop

HHW:lt

cc: Justice Raul A. Gonzalez
Justice Nathan L. Hecht
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker
Justice Greg Abbott

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WRITER'S DIRECT DIAL NUMBER:

January 9, 1996

Justice Nathan Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Re: Competing Proposals for Revisions to the Discovery Rules

Dear Justice Hecht:

This letter is in response to your article in the January, 1996 Texas Bar Journal requesting comment on the proposals for revision to the Texas discovery rules. First, I volunteer to serve on whatever committee may be appointed by the court to review the competing proposals. You and the other members of the Court may feel that enough committees have already been involved, but it is my belief that not many Texas litigators are fully aware of the work of the CRC and SCAC. I know many knowledgeable, experienced, and well-intentioned Texas lawyers worked on the two proposals, but I believe broader input will reveal a general consensus that the suggested cures are worse than the supposed disease. A few observations:

Where's the Fire?

I first heard of the SCAC proposal at a Travis County Bar luncheon a few months ago, at which a member of the SCAC reviewed in detail the SCAC's proposal. At the luncheon, there were approximately 50 Travis County litigators. It was a diverse group of plaintiffs' personal injury lawyers, personal injury defense lawyers, commercial litigators, government lawyers, big-firm lawyers and small-firm lawyers.

I certainly cannot claim to have taken a scientific survey, but I did stay for the questions and protests after the speaker had finished her prepared remarks. Across the board, the lawyers wanted to know, "Where's the fire?" I went to one discovery hearing in 1995. From my unscientific polling of colleagues in and out of Austin, my experience is not unusual. There are already plenty of disincentives to prevent lawyers from engaging in satellite discovery litigation, not the least of which are: (1) trial judges who will not put up with it; and (2) clients who will not pay for it.

Perhaps I am just fortunate to practice in a firm where Rambo behavior is not tolerated, and in a city where the members of the Bar generally respect each other, but it seems like the Bar has largely won the war against "Rambo" tactics. As O. C. Hamilton and Shelby Sharpe point out in their Bar Journal article, the SCAC proposal will no doubt lead to much more extensive satellite litigation than happens under the current system. If the litigators in this state, generally speaking, are working out their discovery disputes by agreement, and are only going to the courthouse if there is genuine disagreement over an important, substantive issue of law, why should we radically overhaul the present system? There are already rules and cases interpreting those rules sufficient to deal with what I believe to be a very small number of abusers of the system.

Clients and Lawyers, not the Rules, Should Allocate Finite Resources.

The two proposals, but particularly the SCAC proposal, usurp to themselves many of the decisions I like to make as an advocate and allocator of my client's resources. It is most glaring in the area of arbitrary limits on discovery in general and on the length of depositions in particular. I have deposed (and, alright, I admit it, I have hired) experienced and savvy expert witnesses who can spend six or eight or ten hours being deposed and not actually tell me anything. Some people have to be worn down before you can get any answers out of them. If my client and I decide that it is the best allocation of my time and the client's resources to spend three days deposing an expert in a

multi-million dollar piece of commercial litigation, that should be our choice, not the rules' choice.[1]

I understand the purpose of both proposals is to force lawyers to be more efficient and thus save the clients money. I have news for the authors of these proposals: if I do not have a good reason to take a deposition that lasts more than a few hours, which reasons I have explained to the client in advance of the deposition, I am probably not going to get paid for all of that time. As recent surveys of general counsel contained in the Texas Lawyer, the ABA Journal and other publications reflect, clients large and small have already put the brakes on long-winded lawyers. Third-party, professional scrutiny of lawyers' bills, alternative billing arrangements and aggressive use of ADR have all become the norm. In this environment, on those rare occasions when a lawyer and a client decide a particular witness needs to be deposed for many hours, or even several days, subject to the limitations on discovery abuse that are already in the rules, that choice should be respected.

<u>The Proposals Discriminate Against Clients with the Least Resources.</u>

While the stated purpose of these changes is to decrease the cost of litigation, I believe that either of these proposals, but particularly the SCAC proposal, would not only increase the cost of litigation because of all of the satellite matters they will create, but will also inure greatly to the advantage of the more "well-heeled" litigant. For example, I have some clients who can afford for me to spend days, often with another lawyer and/or a paralegal, reviewing documents and preparing a detailed outline of questions for a particular deposition. Obviously, when a client can afford this work, that makes the deposition more efficient in terms of time.

---

[1] I understand that these proposals contain an "escape clause." First, it is usually going to be to someone's advantage to resist using the "agreement" component of the escape clause. Being forced to use the "court order" component of the escape clause is, by any definition, satellite litigation. Moreover, it just does not seem fair to make my client and I go to court just to exercise the right to make our own decisions about advocacy and the allocation of finite resources.

I have other clients, however, who have what are to them significant matters (though they may be doomed to insignificance under the SCAC's arbitrary guidelines) who cannot afford for me to do much more than send a notice and subpoena duces tecum and show up for the deposition. It may take me three or four hours just to get the documents that are produced organized and identified and begin figuring out the right questions to ask. When the rules, rather than the clients and the lawyers, start allocating the resources and dictating the advocacy, those best able to afford all of the lawyering that goes on "outside the rules" will benefit.

The Proposals Will Result in More Trials and Less Settlements.

Discovery works. We know this because almost all cases are settled. However, they usually do not settle until the other side has been convinced, through the discovery process, that facts, theories and arguments exist that justify a compromise. To arbitrarily limit this process I think will clearly lead to less settlements and more trials, not a worthy goal of a "reform" process that is seeking to reduce the cost of litigation. Like everyone who litigates in Texas now, I spend much more time in mediation than I do in trial. Most of the mediations I attend result in settlement. In those that do not, most of the time the mediator's "post-mortem" to the lawyers includes the advice: "You guys need to do some more discovery before this thing is going to settle." The discovery process (which, yes, sometimes includes lengthy depositions), and the strengths and weaknesses it exposes on both sides, is the process that gets cases settled.

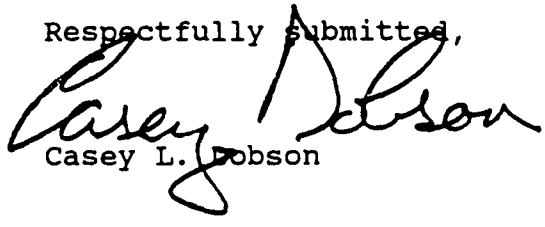
Aren't We Inviting the "Return of Rambo"?

Finally, in referring back to what I perceive to be the Bar's victory over "Rambo" litigation tactics in the 1980s, are these rules really going to encourage the type of behavior from litigators that we want to encourage? It seems obvious to me that putting an arbitrary limit on the number of months of discovery, arbitrary limits on the number of hours of deposition testimony and otherwise treating litigators, and by extension, their clients, as children, who must have their finite time and resources allocated for them, is only going to lead us back towards the type of behavior that at least, in my experience, is very rarely seen these days. (It is not difficult to imagine stressed-out lawyers, bumping up against arbitrary deadlines, arguing with one another about how long bathroom breaks took, etc.) If a lawyer only has nine months to conduct all of the

discovery he needs for his case, how accommodating is he going to be, indeed, how accommodating can he be without subjecting himself to a later claim for malpractice, when his opponent needs an extra thirty days to respond to some discovery, or to reschedule a deposition for a family commitment? With all of the attention that the Bar has paid, and rightly so, in the last few years to lawyers' stress and resultant depression and substance abuse, and its effect on service to clients, is making us count each other's numbers of hours of depositions really what we want to do? Are more numerous and specific deadlines really going to keep the courts out of discovery hearings? Are these proposals really in the best interest of our clients?

Finally, I am writing this letter in my individual capacity, and I am not purporting to state the views of my firm or any other member of my firm.

Respectfully submitted,



Casey L. Dobson

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cc: All Scott, Douglass, Luton & McConnico Attorneys

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February 22, 1996

Mr. Luther H. Soules III
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100 West Houston Street #1500
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General Comments

Dear Luke:

Enclosed are copies of nine letters regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

3RD00036

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GERALD W. BENSON

February 13, 1996

Hon. Nathan Hecht
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

I urge you to reject the changes in the civil discovery rules proposed by the Supreme Court Advisory Committee and to adopt those proposed by the Court Rules Committee of the State Bar of Texas which I believe to be fair and equitable to both plaintiff and defense bar.

Yours very truly,

Gerald W. Benson

GWB/sh

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February 15, 1996

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

Dear Justice Hecht:

As a practicing trial lawyer in San Antonio, I have followed with great interest the civil discovery rules proposed by the Supreme Court Advisory Committee and by the Court Rules Committee of the State Bar of Texas. While I have some problems and difficulties with both rule proposals, I acknowledge that some discovery rule changes are probably necessary and needed. I write this letter though to strongly urge you to adopt the proposed discovery rules of the Court Rules Committee of the State Bar of Texas, and reject the rules proposed by the Supreme Court Advisory Committee.

I have also reviewed a December 8 letter authorized and written by the Texas Association of Defense Counsel, and my views track those of that association.

There will no doubt be interesting developments, altercations, and discussions and disagreements concerning any new proposed civil discovery rules, and the practical implementation of the rule will be an evolutionary process. Nevertheless, I believe that the discovery rules proposed by the Court Rules Committee of the State Bar of Texas are more workable and more fair and will present the greatest opportunity for equity and justice to be done in civil litigation in this State. Once again, I urge you and the rest of the members of this fine Court to adopt the discovery rules proposed by the Court Rules Committee of the State Bar of Texas.

Thank you very much for your consideration and I compliment both of the committees for all their hard work, as well as the Texas Supreme Court for its willingness to undertake and tackle such an arduous, and arguably unpleasant task of amending discovery rules. Trial lawyers as a whole are very reluctant to change our ways, but I believe we have all shown a willingness to bend and accommodate when justice so requires.

Sincerely,

STEVENS & WEISS, P.C.

Don E. Weiss

Don E. Weiss

3RD00038

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February 19, 1996

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

Dear Justice Hecht:

It is my understanding that the Supreme Court is in the process of reviewing and adopting new rules regarding civil discovery. I would urge the Court to adopt the proposal that has been prepared by the Court Rules Committee, rather than the proposals by the Supreme Court Advisory Committee.

It is my understanding that the Texas Association of Defense Counsel has previously sent a letter outlining its position that the proposal made by the Supreme Court Advisory Committee unfairly favors plaintiffs to the detriment of defendants. I agree with that analysis, and would ask the Court to pay particular attention to that issue in its discussions and deliberations.

Sincerely,

Roy L. Stacy

RLS:kem

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February 15, 1996

Hon. Nathan L. Hecht
Justice
Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

RE: Civil Discovery Rules

Dear Justice Hecht:

I urge you to reject the changes in the civil discovery rules proposed by the Supreme Court Advisory Committee and, rather, to adopt those proposed the State Bar Court Rules Committee.

Thank you very much.

Very truly yours,

Randal Mathis

RM/jfw

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AUSTIN
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February 13, 1996

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

Re: Civil discovery rules as proposed by the Supreme Court Advisory Committee and adoption of rules proposed by the Court Rules Committee of the State Bar of Texas

Dear Nathan:

At its meeting in Austin on November 3, 1995, the Board of Directors of this Association (consisting of over 2,300 lawyers who practice primarily on the defense side of the docket in this State) unanimously passed a resolution urging the Texas Supreme Court to reject the changes in the civil discovery rules proposed by the Supreme Court Advisory Committee and to adopt those proposed by the Court Rules Committee of the State Bar of Texas.

We have studied the proposals of both committees, and we commend the leadership and members of both committees on their diligence and hard work. However, after carefully considering both proposals, we believe that some of the rules proposed by the Supreme Court Advisory Committee unfairly favor plaintiffs to the detriment of defendants, whereas the proposals of the Court Rules Committee of the State Bar are fair and equitable to both sides of the docket.

The approach of the Court Rules Committee was to design rule changes which would fit the majority of cases and allow the exchange of basic information in a less cumbersome and costly manner than now occurs in some cases. The Court Rules Committee philosophy calls for a discovery plan for each case so that discovery can be focused on the claims and defenses actually existing in that particular case. Similar plans are now utilized in certain state and federal district courts. The utilization of a discovery plan tailored to a particular case, according to lawyers who have practiced in such courts, results in a reduction in costs, orderly planning, preparation and scheduling of a trial date, and an overall increase in efficiency in the administration of civil justice.

The approach taken by the Supreme Court Advisory Committee proposals, on the other hand, is to fashion a set of rules for all cases, even though discovery abuse is really a problem only in a relatively small percentage of cases. We believe that an effort to pass rules applicable to one hundred percent of the cases in order to solve a problem in only a small percentage of the cases is misguided, and will actually impose a greater cost burden on litigants than occurs under the existing rules.

Without doubt, many members of this Association do not and will not like certain aspects of even the preferable Court Rules Committee approach. For example, many of our members oppose any time limitation whatsoever on oral depositions, but others feel that because abuse does exist, reasonable time limitations on individual oral depositions are appropriate. In any event, we believe that the Court Rules Committee approach regarding the length of time of oral depositions is more workable than that proposed by the Supreme Court Advisory Committee.

There are concrete and specific examples of how the approach of the Supreme Court Advisory Committee favors plaintiffs. In the remainder of this letter, we will list a few of the more significant ones.

First, Rule 1-1 of the SCAC proposed rules limits discovery to six hours per party if the plaintiff's pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, pre-judgment interest and attorneys fees. Moreover, each party is limited to 15 interrogatories. The trap for an unsuspecting defendant lies in the following sentence: "No amendment seeking relief other than monetary recovery or bringing the amount of recovery above $50,000 shall be allowed within 30 days prior to trial." In other words, an attorney representing multiple seriously injured plaintiffs or wrongful death beneficiaries can sue for $50,000, limit the defense to six hours of depositions and 15 interrogatories, and conduct discovery up until 30 days before trial. Just over 30 days before trial, the plaintiff can amend and sue for $50 million. Rule 1 provides that when this occurs, "discovery shall be re-opened and completed within the limitations provided in Section 2 or 3 of this rule, and any person previously deposed may be re-deposed." Some courts, of course, may be disposed only to grant a 30-day continuance, or other very short period, in which to allow the defendant to prepare a complex case for trial, resulting in blatant gamesmanship and unfairness in favor of the plaintiff, since the amount sought in the plaintiff's pleadings is solely within plaintiff's control.

Second, if the suit is for more than $50,000 and the parties do not agree and the court does not order a discovery control plan pursuant to Rule 1-2, the case is governed by Rule 1-3 dealing with "all other suits". The discovery period is limited to 9 months or until 30 days before trial, whichever is shorter, absent an agreement of the parties. (The parties cannot even agree to a discovery period of over 12 months, if the suit is under Rule 1-3). During the discovery period, each "side" shall have no more than 50 hours to examine and cross-examine in oral depositions opposing parties and experts designated by opposing parties and persons who are subject to the opposing party's control. In cases involving multiple defendants, which are becoming increasingly more common, dividing 50 hours among 20 or 30 or 100 defendants is, quite simply, unfair and unworkable. Again, the naming of defendants is within the control of the plaintiff's attorney, and this provision can result in unfairness in favor of the plaintiff.

Third, plaintiffs in many instances have several years in which to develop a case before it is filed. This can include interviewing witnesses, examining products, hiring expert witnesses and consultants, and gathering other facts in evidence. Therefore, the plaintiff is often very far "ahead" of the defendant in trial preparation before the suit is even filed, especially in the case in which the defendant may not even know about the accident or other events involved in the case. Under the SCAC proposal, the defendant would then have only 9 months to prepare for trial if a court refuses to order a discovery plan. This problem may be aggravated by S. B. 28 which significantly amended Chapter 33 of the Civil Practice & Remedies Code. Specifically, Section 33.004(d) provides, in pertinent part:

> "A third-party claim by a defendant under this section may be filed, even though the claimant's action against the responsible third party would be barred by limitations, if the third-party claim is filed on or before thirty days after the date the defendant's answer is required to be filed."

This provision may actually encourage plaintiffs' attorneys in some cases to wait until limitations are about to expire before filing suit, and the SCAC proposed nine-month discovery window is blatantly unfair to defendants.

Fourth, the procedures for designating expert witnesses set forth in Rule 10 significantly favor the plaintiff. Rule 10-2b provides that experts testifying for a party who seeks affirmative relief must be designated before the earlier of 75 days before the end of the discovery period or 75 days before trial. The plaintiff would then be required, pursuant to Rule 10-3a(4), to give two suggested dates for deposition within the next 30 days. However, the defendant must then designate experts the earlier of 45 days before the end of the discovery period or 45 days before trial, meaning that the defendant may be in a position of

having to designate experts on the same day the defendant first learns of the plaintiff's expert's opinion. Gamesmanship will almost dictate that a plaintiff's attorney is going to give as the two suggested dates the 29th and 30th day following designation in order to give the defendant less time to prepare a designation of the defense experts.

Under the SCAC proposal, I anticipate the parties would agree to a discovery control plan or would approach the court about obtaining a discovery control plan. I feel that is the best way to handle large cases. The approach of the Court Rules Committee recognizes this probability by making the discovery control plan available in any case, even if one side or the other will not agree to it or the court will not order it.

While I believe there are many other problems with the approach of the Supreme Court Advisory Committee, I am well aware that other groups, including the State Bar Committee on Court Rules, have provided significant input to the Supreme Court on these matters. Therefore, this letter is not intended to be a totally exhaustive analysis of the SCAC proposals.

I earnestly urge the Court to adopt the discovery rules proposed by the State Bar Committee on Court Rules. That committee is representative of the lawyers who practice in the courts of this state, and the members of that committee have diligently addressed the difficult problems of discovery in a fair and even-handed way. I understand that the rules passed by the Court Rules Committee, which is composed of lawyers on both sides of the docket were, for the most part, enacted unanimously, whereas that is <u>not</u> the case with respect to the proposals of the Supreme Court Advisory Committee.

Additionally, appropriate changes must be made in all of the rule proposals to allow counsel to protect his or her client/witness during deposition from inappropriate and unfair questions, impossible hypotheticals that are confusing should not be allowed. "What if" questions should not be allowed. "If you assume" questions should not be allowed. There should be a right of a lawyer to protect his client and/or witness and/or the record from clearly abusive, misleading and haranguing inquiries.

Yours very truly,

Frank

Frank Finn

FF:tw

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February 13, 1996

Justice Nathan L. Hecht
Supreme Court Bldg.
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I am a member of both the Court Rules Committee of the State Bar of Texas and of the Board of Directors of the Texas Association of Defense Counsel. Both of these groups have concerns about proposals to reform the discovery process in civil litigation in Texas. I share those concerns. The comments made by me in this letter reflect my personal thoughts and concerns as a citizen and attorney in Texas.

At our meeting in Austin on November 3, 1995, the Board of Directors of the Texas Association of Defense Counsel (consisting of over 2,300 lawyers who practice primarily on the defense side of the docket in this State) unanimously passed a resolution urging the Texas Supreme Court to reject the changes in the civil discovery rules proposed by the Supreme Court Advisory Committee and to adopt those proposed by the Court Rules Committee of the State Bar of Texas. At our meeting in Austin on January 27, 1996, the Board of Directors of the Texas Association Defense Counsel again took some time to discuss these matters. It is my understanding that the concerns of the group were conveyed to you in a letter sent by our group's leaders.

I have attempted to learn about the proposals of both committees, and I commend the leadership and members of both committees on their diligence and hard work. However, after carefully considering both proposals, I believe that some of the rules proposed by the Supreme Court Advisory Committee unfairly favor plaintiffs to the detriment of defendants, whereas the proposals of the Court Rules Committee of the State Bar are fair and equitable to both sides of the docket.

The approach of the Court Rules Committee has been to design rule changes which would fit the majority of cases and allow the exchange of basic information in a less cumbersome and costly manner than now occurs in some cases. The Court Rules Committee, as one of the committees of the State Bar of Texas, has tried to do its best job for all Texans, mindful that the discovery rules will apply to all civil cases. The members of the Court Rules Committee have

represented all segments and sectors of the Bar, and these committee members have been pretty much in accord in supporting the proposals put forward by the Committee. The Court Rules Committee philosophy calls for a discovery plan for each case so that discovery can be focused on the claims and defenses actually existing in that particular case. Similar plans are now utilized in certain state and federal district courts. The utilization of a discovery plan tailored to a particular case, according to lawyers who have practiced in such courts, results in a reduction in costs, orderly planning, preparation and scheduling of a trial date, and an overall increase in efficiency in the administration of civil justice.

The approach taken by the Supreme Court Advisory Committee proposals, on the other hand, is to fashion a set of rules for all cases, even though discovery abuse is really a problem only in a relatively small percentage of cases. It appears to me that an effort to pass rules applicable to one hundred percent of the cases in order to solve a problem in only a small percentage of the cases may be misguided, and may actually impose a greater cost burden on litigants than occurs under the existing rules.

I believe that the Court Rules Committee approach regarding the length of time of oral depositions is more workable than that proposed by the Supreme Court Advisory Committee.

There are concrete and specific examples of how the approach of the Supreme Court Advisory Committee favors plaintiffs. The remainder of this letter lists a few of the more significant ones.

First, Rule 1-1 of the SCAC proposed rules limits discovery to six hours per party if the plaintiffs pleadings affirmatively seek only monetary recovery of $50,000 or less, excluding costs, prejudgment interest and attorneys fees. Moreover, each party is limited to 15 interrogatories. The trap for an unsuspecting defendant lies in the following sentence: "No amendment seeking relief other than monetary recovery or bringing the amount of recovery above $50,000 shall be allowed within 30 days prior to trial." In other words, an attorney representing multiple seriously injured plaintiffs or wrongful death beneficiaries can sue for $50,000, limit the defense to six hours of depositions and 15 interrogatories, and conduct discovery up until 30 days before trial. Just over 30 days before trial, the plaintiff can amend and sue for $50 million. Rule 1 provides that when this occurs, "discovery shall be re-opened and completed within the limitations provided in Section 2 or 3 of this rule, and any person previously deposed may be re-deposed." Some courts, of course, may be disposed only to grant a 30-day continuance, or some other very short period, in which to allow the defendant to prepare a complex case for trial, resulting in blatant gamesmanship and unfairness in favor of the plaintiff, since the amount sought in the plaintiffs pleadings is solely within plaintiffs control.

Second, if the suit is for more than $50,000 and the parties do not agree and the court does not order a discovery control plan pursuant to Rule 1-2, the case is governed by Rule 1-3 dealing with "all other suits." The discovery period is limited to 9 months or until 30 days before trial, whichever is shorter, absent an agreement of the parties. (The parties cannot even agree to a discovery period of over 12 months, if the suit is under Rule 1-3 .) During the discovery period, each "side" shall have no more than 50 hours to examine and cross-examine in oral depositions opposing parties and experts designated by opposing parties and persons who are subject to the opposing party's control. In cases involving multiple defendants, which are becoming increasingly more common, dividing 50 hours among 20 or 30 or 100 defendants is, quite simply, unfair and unworkable. Again, the naming of defendants is within the control of the plaintiffs attorney, and this provision can result in unfairness in favor of the plaintiff.

Third, plaintiffs in many instances have had a long period of time in which to develop a case before it is filed. This can include interviewing witnesses, examining products, hiring expert witnesses and consultants, and gathering other facts in evidence. Therefore, the plaintiff is often very far "ahead" of the defendant in trial preparation before the suit is even filed, especially in the case in which the defendant may not even know about the accident or other events involved in the case. Under the SCAC proposal, the defendant would then have only 9 months to prepare for trial 1. This problem may be aggravated by S.B. 28 which significantly amended Chapter 33 of the Civil Practice & Remedies Code. Specifically, Section 33.004(d) provides, in pertinent part:

"A third-party claim by a defendant under this section may be filed, even though the claimant's action against the responsible third party would be barred by limitations, if the third-party claim is filed on or before thirty days after the date the defendant's answer is required to be filed."

This provision may actually encourage plaintiffs' attorneys in some cases to wait until limitations are about to expire before filing suit, and the SCAC proposed nine-month discovery window is blatantly unfair to defendants. Under the proposal of the Court Rules Committee the trial court could fashion a discovery plan giving consideration to the amount of time actually needed by all parties in each individual case.

Fourth, the procedures for designating expert witnesses set forth in Rule 10 significantly favor the plaintiff. Rule 10-2b provides that experts testifying for a party who seeks affirmative relief must be designated before the earlier of 75 days before the end of the discovery period or 75 days before trial. The plaintiff would then be required, pursuant to Rule 10-3a(4), to give two suggested dates for deposition within the next 30 days. However, the defendant must then designate experts the earlier of 45 days before the end of the discovery period or 45 days before

trial, meaning that the defendant may be in a position of having to designate experts on the same day the defendant first learns of the plaintiffs expert's opinion. Gamesmanship will almost dictate that a plaintiff's attorney is going to give as the two suggested dates the 29th and 30th day following designation in order to give the defendant less time to prepare a designation of the defense experts.

Under the SCAC proposal it is likely the parties would agree to a discovery control plan or would approach the court about obtaining a discovery control plan. That is the best way to handle large cases. The approach of the Court Rules Committee recognizes this probability by making the discovery control plan available in any case, even if one side or the other will not agree to it or the court will not order it.

While there may be other problems with the approach of the Supreme Court Advisory Committee, I am aware that other groups, including the State Bar Committee on Court Rules, have provided significant input to the Supreme Court on these matter. Therefore, this letter is not intended to be a totally exhaustive analysis of the SCAC proposals.

I respectfully urge the Court to adopt the discovery rules proposed by the State Bar Committee on Court Rules. That committee is representative of the lawyers who practice in the courts of this state, and the members of that committee have diligently addressed the difficult problems of discovery in a fair and even-handed way. The rules passed by the Court Rules Committee, which is composed of lawyers on both sides of the docket were, for the most part, enacted unanimously, whereas apparently that is not the case with respect to the proposals of the Supreme Court Advisory Committee.

Best regards,

Ernest Reynolds III

ERIII:rlf

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February 13, 1996

The Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Pursuant to the articles in the *Texas Bar Journal* of January 1996 concerning the possible amendments to our discovery rules, I wanted to set out my thoughts. They are as follows:

1. I am troubled about the proposals for such limited discovery in light of the fact counsel for plaintiffs often have their cases ready to proceed to trial upon the filing of same. In particular, personal injury cases are often based upon earlier cases handled by national counsel or members of such groups as the Association of Trial Lawyers of America. As you know, they pre-package many cases with depositions and expert reports and other such matters to make the cases almost generic so that counsel for a plaintiff has very little work to do before the case is ready for trial. By restricting discovery, this puts defense counsel at a terrible disadvantage in that he or she often has to commit the resources to extensive discovery.

2. I am troubled about a limitation on the number of depositions to be taken. I can imagine a situation where the lawyers are required to select five people from whom depositions will be taken. Then, at the time of trial, it is individual number eight, nine or some other number on the list of potential witnesses whose deposition has not been taken who provides damaging testimony at the time of trial. In a situation such as this, I can easily see an attorney being sued by his client for not taking the deposition of witness number eight, nine, etc. instead of the other five individuals chosen for depositions by the attorney.

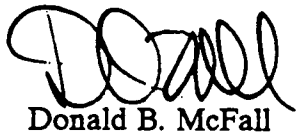
3. Pursuant to the rules in place as of this date, a court can restrict discovery in several ways. For instance, I have had judges in Houston restrict the length of time for a deposition from some particular individual. Also, as you are well aware, a judge can restrict the scope of document production.

I can sympathize with the cries to restrict discovery, but I think it is important for cases to be well-developed so that the parties know exactly where they stand when and if they proceed to trial. It can be very expensive, but that is often a function of the way lawyers handle matters not necessarily in formal discovery but in an office practice. If parties to lawsuits actually shopped for a good attorney at a reasonable rate, I think a lot of the problems the courts see now would either disappear or be of far less significance.

In any event, I am troubled by efforts to not only restrict access to the courthouse but also limit discovery. I am convinced that it is only through adequate and complete discovery that so many of our cases are settled well before trial.

I hope things are going well for you, and I appreciate any consideration that you can give my comments.

Very truly yours,



Donald B. McFall

DBM:kmc
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February 20, 1996

Supreme Court of Texas
Justice Nathan Hecht
P.O. Box 12248
Austin, TX 78711

RE: New Discovery Rules
January, 1996 Texas Bar Journal Article

Dear Justice Hecht:

I have practiced law for over ten years and I firmly believe that the civil discovery rules need a major overhaul. During the last four years I have concentrated in commercial collections therefore I have been insulated from the nasty discovery battles I have been reading about and hearing about from my colleagues. However, recently I have had a few general litigation matters in which discovery has gotten out of hand.

In particular one area I believe needs to be reformed is the procedure for deposition notices. It is common practice to include a duces tecum with the notice asking for all documents relevant to the case that were probably already requested through a request for production of documents. In a recent case, the opposing attorney insisted that my client haul all of the documents (seven boxes) to his deposition even though they had been previously supplied. In my opinion, the initial production of the documents should be sufficient.

Also, the civil rules of procedure are silent as to when objections to specific requests for documents must be made. Suppose the deposition is scheduled for forty days after receipt of the notice. If I wait until the deposition is taken to lodge my objections, are the objections waived because they were not made within thirty days? This is a common problem because depositions are often rescheduled long after the original notice.

To solve the above problem I took the time (and my client had to pay additional attorney's fees) to file my objections in written form and set them for a hearing prior to the deposition. I believe that his was all a ridiculous waste of time. I do not think that the duces tecum procedure should be allowed at all. If an attorney wants to see documents for a deposition he can ask for them prior to the deposition by requests for production of documents.

Another abusive tactic I have seen is for the attorney to ask for all the documents he wants for the entire case only by a notice duces tecum one hour before the deposition. Of course, if there are a lot of documents, then my client and I have to wait while the attorney reads all of the documents. Once again, the solution is to allow only requests for production of documents before the deposition. I would dissolve the notice duces tecum practice.

In a recent deposition of a Plaintiff I represented in a simple $12,500.00 suit the defendant's attorney spent five hours asking about friend, neighbors and relatives of my client as well as the sports he played in high school. The deposition lasted over three days. I am amazed the defendant did not complain since it was paying by the hour. All depositions should be limited to two days except for extraordinary circumstances.

The kind of behavior of attorneys I have described above is the reason I believe that the public has a low opinion of lawyers. Unless the discovery rules are drastically changed to force lawyers to get to the point, the public's hatred of lawyers will only grow. Rule One of the Texas Rules of Civil Procedure states in relevant part that the rules should be given liberal construction to attain adjudication of litigant's rights with as great expedition and dispatch and the least expense as may be practicable. In practice this rule is ignored by both attorneys and judges.

Sincerely,

David Naworski

David Naworski

DN/vc

2-16-96
4543.001
cc: LHS
hhd

THE SUPREME COURT OF TEXAS

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February 9, 1996

HHD
SCAC Agenda
✓ SubC
Staff
SBOT
Flx

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

General Comments

Dear Luke:

Enclosed are copies of letters from Kristi I. McCasland and Phillip N. Cockrell regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

PATTON,
HALTOM,
ROBERTS,
McWILLIAMS
& GREER

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KRISTI I. McCASLAND

RALPH K. BURGESS

JOHANNA H. SALTER (1960-1993)

STEVEN W. CAPLE

KEITH A. SCOTT

JENNIFER HALTOM DOAN

DARBY V. DOAN

January 30, 1996

Chief Justice Thomas R. Phillips
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Rule Changes

Dear Justice Phillips:

I am writing to you in response to several articles and letters I have read recently regarding proposed changes to the Texas Rules of Civil Procedure. After studying the proposals (and interpretations of those proposals), I would urge the Texas Supreme Court to reject the changes in the civil discovery rules proposed by the Supreme Court Advisory Committee and to adopt those proposed by the Court Rules Committee of the State Bar of Texas.

After studying both proposals, I want to commend the leadership of members of the various study groups on their diligent work. However, it is my opinion that the rules proposed by the Court Rules Committee of the State Bar best fit the real needs of litigants, rather than implementing rigid limitations in discovery, which can have the unintended effect of impeding trial preparation. Our experience with the Civil Justice Expense and Delay Reduction Plan implemented by the federal courts in the Eastern District of Texas has shown that guidelines which are too rigid can bring about "mixed results" that can actually hinder the development of a case in an expeditious manner. In fact, very strict discovery limits and can actually increase the cost of trial preparation if any party chooses not to cooperate within the spirit of those guidelines. Leaving some flexibility with the trial court to examine and develope a discovery procedure is imperative if justice is going to be served in the more complicated cases.

The utilization of a discovery plan tailored to a particular case, by the court, with the input of lawyers who have practiced in the particular court involved, results in a reduction in cost, orderly planning, preparation and scheduling of a trial date, and an overall increase in efficiency in the administration of justice in the civil courts.

Thank you for the opportunity to provide these comments. We really do appreciate your efforts to improve the administration of our court system.

Very truly yours,

Phillip N. Cockrell

PNC/ja
cc: Justice Raul A. Gonzalez
Justice Nathan L. Hecht
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker
Justice Greg Abbott

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Texas Board of Legal Specialization

KRISTI I. McCASLAND

RALPH K. BURGESS

JOHANNA H. SALTER (1960-1993)

STEVEN W. CAPLE

KEITH A. SCOTT

February 5, 1996

Chief Justice Thomas R. Phillips
Supreme Court Building
P.O. Box 12248
Austin, TX 78711

Dear Chief Justice Phillips:

This letter is written in response to the Court's invitation to the Bar at large to comment upon the proposals of both the Supreme Court Advisory Committee and the Court Rules Committee of the State Bar of Texas regarding the rules revisions proposals advanced by each. I have read both proposals in the January issue of the *Texas Bar Journal*, and found these articles to be most enlightening. I think both groups worked diligently on these rules revisions proposals, and know that we all share a desire to make litigation more affordable for litigants in the state of Texas.

After having reviewed these proposals, however, it is my opinion that the rules proposed by the Court Rules Committee of the State Bar best fit the needs of the litigants, bench and bar of this State. They provide greater flexibility and the opportunity for the exercise of discretion by a trial judge in case management. The Court Rules Committee proposals also appear to provide the potential for considerable savings in costs to litigants.

I was not favorably impressed with the "Advisory Committee Recommendations" at this juncture. They appear to be extremely rigid and do not provide litigants, lawyers and trial judges with the flexibility they need in the management of their dockets. Accordingly, I would like to voice support for the passage of the rules and revisions proposals advanced by the Court Rules Committee of the State Bar of Texas.

I very much appreciate the Court's invitation for comment on these far-reaching proposals.

Sincerely,

Kristi I. McCasland

KIM/cm
cc: Justice Raul A. Gonzalez
Justice Nathan L. Hecht
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker
Justice Greg Abbott

02-14-96
4543 001
CC: LHS
Vamf

THE SUPREME COURT OF TEXAS

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February 13, 1996

HHD,
Staff
General Comments

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Jack Boyd, Jr., William Keys, and J. David Crisp regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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February 5, 1996

Chief Justice Thomas R. Phillips
Texas Supreme Court Building
P.O. Box 12248
Austin, TX 78711

General Comments

Dear Chief Justice Phillips:

I have been following, with great interest, the work of the Supreme Court Advisory Committee and the Court Rules Committee of the State Bar of Texas. I have also reviewed the articles in the January 1996 Texas Bar Journal analyzing the rules revision proposals advanced by both committees. While I agree that some rules revisions may be appropriate, the Supreme Court Advisory Committee seems to have gone far afield and is proposing changes that are not needed nor necessary in the practice of civil law in Northeast Texas.

Of the two proposals for change prepared by these committees, I am more impressed with the work done by the Court Rules Committee of the State Bar. At least those proposals appear to provide more flexibility and the opportunity for the exercise of discretion by the trial judge in case management. After all, it is the judges before whom cases are to be tried that have the best feel and grasp for the revisions that are necessary to management of the dockets of their courts.

I have had an opportunity to review the letter forwarded to your office by the Executive Committee of the Texas Association of Defense Counsel. I feel that that letter fairly points out the shortcomings of the proposals drafted by the Supreme Court Advisory Committee. I join many others in requesting the Supreme Court adopt those discovery rules proposed by the State Bar Committee on Court Rules, and send the proposal advanced by the Supreme Court Advisory Committee back with a hearty "thanks but no thanks" response.

I appreciated your visit to Texarkana and your invitation for members of the Texarkana Bar to comment on the proposals advanced by these two advisory committees. In the future, I would also appreciate the opportunity of either serving on or recommending attorneys and judges

in Northeast Texas to serve on these types of committees. It is my impression that the lawyers and judges of Northeast Texas do not get adequate representation on these statewide committees. Kindest regards.

Sincerely yours,

ORIGINAL SIGNED BY
J. DAVID CRISP

J. David Crisp

JDC:siw

cc: Justice Raul A. Gonzales
Justice Nathan L. Hecht
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker
Justice Greg Abbott

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General Comments

February 9, 1996

Chief Justice Thomas R. Phillips
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Mr. Chief Justice:

In its letter of December 8, 1995, addressed to you, the Texas Association of Defense Counsel, Inc. has commented upon certain proposed changes in the civil discovery rules proposed by the Supreme Court Advisory Committee on the one hand and by the Court Rules Committee of the State Bar of Texas on the other.

Because little would be gained by a restating of the Association's letter, please permit me to say that I concur in the views therein expressed, and I would urge the Court to adopt those changes proposed by the Court Rules Committee of the State Bar of Texas.

Yours very truly,

William H. Keys

WHK:nac

cc: Justice Raul Gonzales
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

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

Justice Greg Abbott
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Justice John Cornyn
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February 7, 1996

Chief Justice Thomas R. Phillips
Texas Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

General Comments

Dear Chief Justice Phillips:

I am a practicing lawyer in Texarkana, Texas. My firm routinely handles personal injury trial matters in the northeastern part of Texas (as far west as Dallas and as far south as Nacogdoches). I had the pleasure of attending the Texarkana Bar Association meeting on January 25, 1996, and hearing you speak. Your presentation regarding the rules revision proposals was extremely informative, and I extend my thanks to you for taking time out of your busy schedule to make your presentation in Texarkana.

Like my fellow Northeast Texas lawyers, I am very interested and concerned with the work of the Supreme Court Advisory Committee and the Court Rules Committee of the State Bar of Texas. I have been following the work of each of those committees with great interest. I have also reviewed the articles in the January, 1996 Texas Bar Journal analyzing the rules revision proposals advanced by both committees. While I agree that some rules revisions may be appropriate, the Supreme Court Advisory Committee seems to have gone far afield and is proposing changes that are not needed nor necessary in the practice of civil law in Northeast Texas.

Of the two proposals for change prepared by these committees, I am more impressed with the work done by the Court Rules Committee of the State Bar. At least those proposals appear to provide more flexibility and the opportunity for the exercise of discretion by the trial judge in case management. After all, it is the judges before whom cases are to be tried that have the best feel and grasp for the revisions that are necessary to management of the dockets of their courts.

I have had an opportunity to review the letter forwarded to your office by the Executive Committee of the Texas Association of Defense Counsel. I feel that that

letter fairly points out the shortcomings of the proposals drafted by the Supreme Court Advisory Committee. I join many others in requesting that the Supreme Court adopt those discovery rules proposed by the State Bar Committee on Court Rules, and send the proposal advanced by the Supreme Court Advisory Committee back with a hearth "thanks but no thanks" response.

Again, I enjoyed meeting you during your visit to Texarkana. If I can be of service by either serving on or recommending attorneys and/or judges to serve on advisory committees in the future, please do not hesitate to phone or write.

Sincerely yours,

Jack N. Boyd, Jr.

JNB/hkh
cc: Justice Raul A. Gonzales
Justice Nathan L. Hecht
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker
Justice Greg Abbott

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cc: LHS
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HHP
SCAC Appeals
Subc
8BOT 8th06

April 5, 1996

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

General Comments

Dear Luke:

Enclosed is a copy of a letter from Melvin Wilcox regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

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March 6, 1996

Chief Justice Thomas R. Phillips
Supreme Court Bldg.
P. O. Box 12248
Austin, TX 78711

Dear Justice Phillips:

Being primarily engaged in a defense practice in a moderate East Texas community, I have had experience with both the Expense and Delay Reduction Plan as adopted by the Eastern District of Texas, as well as the State Rules of Discovery and Procedure as they currently exist. I find that in cases in the Federal Courts where the plan is complied with on both sides, it does reduce expense of litigation and provides basic information for narrowing issues. However, I am concerned, as are other members of the Texas Association of Defense Counsel, that the changes being considered and proposed by the Supreme Court Advisory Committee unfairly favor plaintiffs to the detriment of defendants and facilitate loopholes for the further abuse of discovery and the judicial system.

I very much support the comments and position of the Texas Association of Defense Counsel as presented to you by members of our organization.

If I can provide any further information or assist the court about these very important changes, I will be more than happy to do so.

Respectfully yours,

SMEAD, ANDERSON, WILCOX & DUNN

Melvin Wilcox

Melvin R. Wilcox, III

MISC.MW\PHILLIPS.L01\LM

02-26-96
4543.001
cc: LHS
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February 22, 1996

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General Comments & P.D.R. 10

RE: Discovery Rules

Dear Luke:

Enclosed please find copies of letters I recently received from Terry Jacobson, James Browning, Jr. and Casey Dobson regarding new discovery rules.

Sincerely,

Carl [signature]

O. C. Hamilton, Jr.

OCH/sam

Enclosures

3RD00067

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REPLY TO:
NORTH DALLAS ☐
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January 16, 1996

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P.D.R. 10

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Re: Proposed revisions to discovery rules

Gentlemen:

I have read both of your articles in the January '96 issue of *The Texas Bar Journal* concerning the proposed revisions to the TRCP's discovery rules. One issue that jumped out at me, and does not appear to be considered by either the CRC or the SCAC, is the question of experts not employed by either of the parties.

As I am sure you know, it is common in every suit involving personal injury for the medical providers to be designated as experts by one or both sides. However, the parties do not necessarily (or even usually) employ those individuals to act as expert witnesses. Rather, they must be designated as experts due to the nature of the testimony they would be expected to give.

As I read Mr. Susman's description of SCAC's proposed revision concerning experts, a party who does not employ an expert, but designates that individual as an expert because of his specialized training, experience, etc., will nonetheless be required to -

> ". . . provide not only a brief summary of the expert's opinions and the basis thereof, but all documents that the expert was provided, or that he or she reviewed or prepared, his or her current resume and bibliography, and two dates within the next 30 days when he or she can be deposed."

It appears that the proposed Rule revision assumes that all experts designated by a party will be employed by the party and, therefore, will be under the party's control. That assumption is incorrect. The proposed Rule revision as described will likely place a party in the position of either (a) having to employ that witness (and thereby destroy what independent status the witness possessed) or (b) utilize subpoenas to force busy medical providers to conform to the shortened discovery schedule and thereby alienate or antagonize key witnesses.

The problem of the expert witness designated, but not hired, by a party is not a new one. The current rules do not require a written report unless ordered by the Court, and those circumstances can be discussed at the hearing seeking such an order. A rule that automatically requires such reports, resumes, bibliographies, etc. from all expert witnesses, without requiring any court order and without distinguishing between employed experts and those not employed, will create a great burden on parties.

Moreover, the burden will be imposed in those cases that are the most unable to carry it - the "smaller" personal injury cases in which the extent of the damages (or the amount of hospital liens, subrogation interests, etc.) prohibit the expense of employing expert witnesses. I fear that such a revision to the discovery rules might well, although inadvertently, deny access to the justice system for many.

Sincerely,

James P. Browning, Jr.

Dawson, Sodd, Moe, Jacobson & Beard, P.C.

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January 3, 1996

O.C. Hamilton, Jr.
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818-820 Pecan Ave./P.O. Box 3725
McAllen, Texas 78502

General Comments

Re: New Discovery Rules

Dear Mr. Hamilton:

I read with interest the reports by the State Bar Discovery Subcommittee, and the discovery subcommittee for the Supreme Court Advisory Committee. You will recall that you and I spoke several years ago regarding my providing you with the Discovery Task Force's work product. After clearing it with David Keltner, the Chair of the Discovery Task Force, I believe I sent you what we had done up to the time you asked.

I have been following how the proposed changes in discovery rules have evolved over time. In your comments on the discovery rule changes proposed by the SCAC, you make several very important points, which I agree with totally.

One of the problems the Discovery Task Force noticed was that where trial courts were given discretion, individual judges exercised their discretion very differently. In some parts of the state, discretion was typically exercised in favor of the plaintiff, while in other parts of the state the reverse was true. Thus, the problem was not so much with the rules themselves, but with the lack of uniform application of the rules wherever discretion was involved. A second, related, problem was that wherever a rule gave discretion to a court to order a specific act, the litigants were <u>likely</u> to ask the court to exercise its discretion. A prime example of this involves sanctions. Once it became fashionable to award sanctions, every attorney in every lawsuit who had a discovery dispute asked for sanctions, especially including death penalty sanctions. I think trial judges got tired of seeing every discovery dispute become a basis for sanctions -- the request for the information became secondary. And yet, this phenomena was very predictable because once judges <u>could</u> order serious sanctions, lawyers always asked the judges to do so. Thus, our approach was to <u>reduce</u> the amount of discretion given to trial judges, and thereby reduce the variation in rulings and amount of trial court intervention. Giving judges more discretion on important issues (deposition limits and discovery periods) is not going to reduce judicial involvement in discovery disputes and produce predictable and consistent rulings. In

my opinion, it will do the opposite.

The idea of a "discovery period" is problematical. In many courts, a party can get a trial within 60 or 75 days of requesting it (i.e., here in Navarro County). In other courts (i.e., Dallas County), the case will be set for trial multiple times before it ever has a chance of actually going to trial. Thus, in many counties the "discovery period" will be an unnecessary restriction; while in other counties it will be a tactical weapon. Because the second section of SCAC Rule 1 is based on agreement, all a party has to do to fall under §3 is decline to agree. I agree with you that it would be very problematical for a defendant in a multi-part case to properly defend a toxic tort case under §3. And yet, the rule, as drafted, provides a plaintiff with a definite tactical advantage. He can do substantial pre-suit discovery, decline to agree to anything once suit is filed, force the suit under category 3, fight hard for nine months until discovery is closed and set the case for trial. In a plaintiff-oriented county, a defendant would be daft to rely on the judge to exercise his discretion to help the defendant.

I further agree with your observation that limitations on deposition time are problematical. In my experience, the need for a limitation is the exception, than the rule. Thus, the limitation ought to be something a party seeks from the trial judge, rather than an automatic imposition upon the ability of the litigant to prepare his case for trial in a meaningful way.

At any rate, I enjoyed reviewing your committee's work product and your comments regarding the SCAC's proposed rules. The SCAC rules need to be thoroughly scrutinized. I look forward to seeing what happens.

If I can be of assistance, please let me know.

Very truly yours,

Terry Jacobson

TJ:nw

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TEXAS BOARD OF LEGAL SPECIALIZATION

January 10, 1996

General Comments

TO: Members of the Travis County Bar Association Civil Litigation Section

Dear Colleague:

I am sure many of you have read, either in the January, 1996 Texas Bar Journal or elsewhere, competing proposals for radical revision of the discovery rules. I disagree strongly with portions of both proposals, particularly the proposal put forth by the Supreme Court Advisory Committee. My basic disagreement with these proposals is that I believe clients and lawyers, rather than the rules, should decide how to allocate finite resources in discovery. Per his invitation to do so in the January bar journal, I have sent the enclosed comments to Justice Hecht.

I am sending this letter and a copy of the enclosed letter to Justice Hecht to several dozen members of the Travis County Bar Association Civil Litigation Section. My purpose is not to get everyone to agree with me, but rather to raise the profile of these proposals. Whether you agree with me or not, we should all be concerned about the wholesale restructuring of how we conduct discovery, and we should all take the time to make our views known to the court.

Sincerely yours,

Casey L. Dobson

Casey L. Dobson

CD:lmh
Enclosure

102393

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WRITER'S DIRECT DIAL NUMBER

January 9, 1996

Justice Nathan Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Re: Competing Proposals for Revisions to the Discovery Rules

Dear Justice Hecht:

This letter is in response to your article in the January, 1996 Texas Bar Journal requesting comment on the proposals for revision to the Texas discovery rules. First, I volunteer to serve on whatever committee may be appointed by the court to review the competing proposals. You and the other members of the Court may feel that enough committees have already been involved, but it is my belief that not many Texas litigators are fully aware of the work of the CRC and SCAC. I know many knowledgeable, experienced, and well-intentioned Texas lawyers worked on the two proposals, but I believe broader input will reveal a general consensus that the suggested cures are worse than the supposed disease. A few observations:

Where's the Fire?

I first heard of the SCAC proposal at a Travis County Bar luncheon a few months ago, at which a member of the SCAC reviewed in detail the SCAC's proposal. At the luncheon, there were approximately 50 Travis County litigators. It was a diverse group of plaintiffs' personal injury lawyers, personal injury defense lawyers, commercial litigators, government lawyers, big-firm lawyers and small-firm lawyers.

I certainly cannot claim to have taken a scientific survey, but I did stay for the questions and protests after the speaker had finished her prepared remarks. Across the board, the lawyers wanted to know, "Where's the fire?" I went to one discovery hearing in 1995. From my unscientific polling of colleagues in and out of Austin, my experience is not unusual. There are already plenty of disincentives to prevent lawyers from engaging in satellite discovery litigation, not the least of which are: (1) trial judges who will not put up with it; and (2) clients who will not pay for it.

Perhaps I am just fortunate to practice in a firm where Rambo behavior is not tolerated, and in a city where the members of the Bar generally respect each other, but it seems like the Bar has largely won the war against "Rambo" tactics. As O. C. Hamilton and Shelby Sharpe point out in their Bar Journal article, the SCAC proposal will no doubt lead to much more extensive satellite litigation than happens under the current system. If the litigators in this state, generally speaking, are working out their discovery disputes by agreement, and are only going to the courthouse if there is genuine disagreement over an important, substantive issue of law, why should we radically overhaul the present system? There are already rules and cases interpreting those rules sufficient to deal with what I believe to be a very small number of abusers of the system.

Clients and Lawyers, not the Rules, Should Allocate Finite Resources.

The two proposals, but particularly the SCAC proposal, usurp to themselves many of the decisions I like to make as an advocate and allocator of my client's resources. It is most glaring in the area of arbitrary limits on discovery in general and on the length of depositions in particular. I have deposed (and, alright, I admit it, I have hired) experienced and savvy expert witnesses who can spend six or eight or ten hours being deposed and not actually tell me anything. Some people have to be worn down before you can get any answers out of them. If my client and I decide that it is the best allocation of my time and the client's resources to spend three days deposing an expert in a

multi-million dollar piece of commercial litigation, that should be our choice, not the rules' choice.[1]

I understand the purpose of both proposals is to force lawyers to be more efficient and thus save the clients money. I have news for the authors of these proposals: if I do not have a good reason to take a deposition that lasts more than a few hours, which reasons I have explained to the client in advance of the deposition, I am probably not going to get paid for all of that time. As recent surveys of general counsel contained in the Texas Lawyer, the ABA Journal and other publications reflect, clients large and small have already put the brakes on long-winded lawyers. Third-party, professional scrutiny of lawyers' bills, alternative billing arrangements and aggressive use of ADR have all become the norm. In this environment, on those rare occasions when a lawyer and a client decide a particular witness needs to be deposed for many hours, or even several days, subject to the limitations on discovery abuse that are already in the rules, that choice should be respected.

<u>The Proposals Discriminate Against Clients with the Least Resources.</u>

While the stated purpose of these changes is to decrease the cost of litigation, I believe that either of these proposals, but particularly the SCAC proposal, would not only increase the cost of litigation because of all of the satellite matters they will create, but will also inure greatly to the advantage of the more "well-heeled" litigant. For example, I have some clients who can afford for me to spend days, often with another lawyer and/or a paralegal, reviewing documents and preparing a detailed outline of questions for a particular deposition. Obviously, when a client can afford this work, that makes the deposition more efficient in terms of time.

---

[1] I understand that these proposals contain an "escape clause." First, it is usually going to be to someone's advantage to resist using the "agreement" component of the escape clause. Being forced to use the "court order" component of the escape clause is, by any definition, satellite litigation. Moreover, it just does not seem fair to make my client and I go to court just to exercise the right to make our own decisions about advocacy and the allocation of finite resources.

I have other clients, however, who have what are to them significant matters (though they may be doomed to insignificance under the SCAC's arbitrary guidelines) who cannot afford for me to do much more than send a notice and subpoena duces tecum and show up for the deposition. It may take me three or four hours just to get the documents that are produced organized and identified and begin figuring out the right questions to ask. When the rules, rather than the clients and the lawyers, start allocating the resources and dictating the advocacy, those best able to afford all of the lawyering that goes on "outside the rules" will benefit.

The Proposals Will Result in More Trials and Less Settlements.

Discovery works. We know this because almost all cases are settled. However, they usually do not settle until the other side has been convinced, through the discovery process, that facts, theories and arguments exist that justify a compromise. To arbitrarily limit this process I think will clearly lead to less settlements and more trials, not a worthy goal of a "reform" process that is seeking to reduce the cost of litigation. Like everyone who litigates in Texas now, I spend much more time in mediation than I do in trial. Most of the mediations I attend result in settlement. In those that do not, most of the time the mediator's "post-mortem" to the lawyers includes the advice: "You guys need to do some more discovery before this thing is going to settle." The discovery process (which, yes, sometimes includes lengthy depositions), and the strengths and weaknesses it exposes on both sides, is the process that gets cases settled.

Aren't We Inviting the "Return of Rambo"?

Finally, in referring back to what I perceive to be the Bar's victory over "Rambo" litigation tactics in the 1980s, are these rules really going to encourage the type of behavior from litigators that we want to encourage? It seems obvious to me that putting an arbitrary limit on the number of months of discovery, arbitrary limits on the number of hours of deposition testimony and otherwise treating litigators, and by extension, their clients, as children, who must have their finite time and resources allocated for them, is only going to lead us back towards the type of behavior that at least, in my experience, is very rarely seen these days. (It is not difficult to imagine stressed-out lawyers, bumping up against arbitrary deadlines, arguing with one another about how long bathroom breaks took, etc.) If a lawyer only has nine months to conduct all of the

discovery he needs for his case, how accommodating is he going to be, indeed, how accommodating can he be without subjecting himself to a later claim for malpractice, when his opponent needs an extra thirty days to respond to some discovery, or to reschedule a deposition for a family commitment? With all of the attention that the Bar has paid, and rightly so, in the last few years to lawyers' stress and resultant depression and substance abuse, and its effect on service to clients, is making us count each other's numbers of hours of depositions really what we want to do? Are more numerous and specific deadlines really going to keep the courts out of discovery hearings? Are these proposals really in the best interest of our clients?

Finally, I am writing this letter in my individual capacity, and I am not purporting to state the views of my firm or any other member of my firm.

Respectfully submitted,

Casey L. Dobson

CLD:lmh
cc: All Scott, Douglass, Luton & McConnico Attorneys

01-11-96
45473 001
CF: LHS
hhd
Vamf

THE SUPREME COURT OF TEXAS

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January 16, 1996

HHD
Sec agenda
Subc
Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

General Comments and
P.D.R 3, 4, 5, 9, 10, 12 & 13

Dear Luke:

Enclosed is a copy of a letter from Judge J. C. Zbranek regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

LIBERTY COUNTY

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FAX 336-4640

J.C. Zbranek
JUDGE 75th JUDICIAL DISTRICT
POST OFFICE BOX 10148
LIBERTY, TEXAS 77575

January 10, 1996

Prof. Alex Wilson Albright
Univ. of Texas School of Law
727 E. 26th St.
Austin, TX 78705

Hon. Nathan L. Hecht
Supreme Court of Texas
Box 12248
Austin, TX 78711

Re: Proposed discovery rules

Dear Mrs. Albright & Judge Hecht:

I have reviewed the proposed discovery rules and wish to submit my comments. The proposed rules are an improvement over what we have, however, they will not solve 75% of the problems we have with discovery. The present discovery rules are a major deterrent to expediting a fair and just resolution of disputes among the citizens at a reasonable cost. Proof of this is (a) the volume of appellate court writings on discovery compared with the volume of writings on substantive matters since 1982, (b) the widespread criticism of civil litigation in the press and among the public in that the public, more and more, considers the civil litigation process as unfair, (c) the practice of many attorneys in successfully abusing discovery and (d) the fact that the present discovery rules are used as much (or more) to exclude relevant evidence than to gain knowledge of it.

The salutary purpose of the discovery rules was to avoid "trial by ambush". Our rules have not served that purpose. Those lawyers (and their present counterparts) who were getting ambushed before 1982 are still getting ambushed, only now it's the discovery rules that is ambushing them. Further, the rules have not served their laudatory purpose because they totally ignore the practical consideration of how trials are prepared. The present rules (and all of their "30 days before trial" mandates) have forced diligent attorneys to prepare twice for trial in cases that are tried and at least once for those that settle on the eve of trial. The fact that in most cases the lawyers don't know six weeks before trial if the case will settle is ignored. Yet, both sides have to gear up,

make full scale preparations, check all discovery to see if supplementing of information is in order, etc. This is very costly and needlessly time consuming! Then, if one party learns that the other can't get certain vital evidence in due to an oversight in discovery responses after the "30 days before" have elapsed, it will force a trial when otherwise settlement would have resulted. If it settles then one round of the intense trial preparation was unnecessary. Even without all this effort, the lawyers on both sides knew what the relevant evidence was and how the case should be evaluated. Before 1982, we made intense trial preparations only once (unless the case for some reason wasn't reached) and the results were much better than after 1982 when many meritorious cases have gone down the drain because of a faux pas in discovery. Lady Justice has been abused much more after 1982 than she was before we had the rules. We have become slaves to form over substance.

The result has been a "black eye" for the legal profession. Why do we have all the mediators now? I seldom heard of one before 1982. It's because people who are involved in litigation are getting tired of the unnecessary escalating costs. What should be a $10,000 case in terms of fees per side now runs several times that amount. We lawyers better realize that litigants are not going to put up with these totally unnecessary and expensive burdens forever and when the public is sufficiently aroused, the legislature will take back the rule making power. I know that many lawyers are concerned. They don't like to do work needlessly and have to charge for it. Lawyers can stay busy enough without being forced to spend most of their lawyering time on useless or, at best, insignificant matters of form.

So, I've said that to say this: the very best thing we can do is go back to square one. Several years ago I discussed these matters with Judge Phillips. He told me that he also was worried, and added, "Everything we've done (on discovery) during the '80's was wrong." Truer words were never spoken! My first and most earnest recommendation is that we scrap everything and reenact what we had in 1980.

However, because I realize that much work has been done by the committee on improving the discovery rules, I will comment on the proposals. My first overall observation is that we still

have too many "30 days before" rules. However, I think, with some refinement the major obstacles can be softened or eliminated, provided we keep in mind that the object is justice at a reasonable cost and not avoiding "trial by ambush." Most lawyers were not ambushed prior to 1982.

Here are my comments:

Rule 1 and 2 are good.

Rule 3.1. Eliminate interrogatories as a permissible form of discovery. I will explain later.

Rule 3.2(d) Trial witnesses. Eliminate this requirement. Keeping this requirement will not solve the double preparation problem. It will add something that is not now required. Please don't add any requirements. True improvement will result only if we eliminate requirements.

Rule 4. Eliminate paragraph 2.c(2)(4) and (6). These will eliminate much useless effort. What if an attorney decides two weeks before trial that certain information could best be presented to the jury by making an exhibit of it? So we keep it out and perhaps miss an opportunity to shorten a trial. The contention interrogatories are a real problem. The lawyers know what the claims are! These type requirements only serve as a vehicle to exclude competent, helpful evidence. Objections to pleading is an adequate remedy long available. Eliminate contention interrogatories. Anyway, whatever happened to advocacy?

Rule 5 will be acceptable if we eliminate interrogatories.

Rule 6 is fine.

Rule 7 and 8 are good.

Rule 9 is the best part. This, together with the elimination of interrogatories, will be all anyone, in good faith, needs. It requires the divulgence of persons with relevant knowledge and experts. This rule together with depositions, requests for production of documents, etc. will be all the

discovery rules one needs to keep from being ambushed on the substantive issues in the case!

Rule 10. Expert Witnesses. The rule could be improved by eliminating 3.a(1) and (2). This information can be obtained at deposition and will be duplicated when depositions are taken. Any lawyer who says that this information is necessary to prepare for depositions should check in his/her license. In any event Rule 10.5 permits the production of a report from the expert covering the same matters, so if a lawyer really needs prior information, he can get a report before taking the deposition.

Rule 12. Interrogatories to Parties. Eliminate in its entirety! If we don't get rid of interrogatories all our efforts are in vain! This causes by far the most problems for trial judges and litigators. We tried cases well before we had interrogatories and everything has gone down hill after they became available. Under proposed Rule 9 a party can get a list of people with relevant knowledge and the experts together with the other information Rule 9 permits. That's all one needs that can be the subject of a <u>legitimate</u> interrogatory.

Rule 13. Requests for Admissions. Limit it to 30, except when used to ascertain the authenticity of documents, when it should be unlimited. I have had two cases where over 500 requests for admission were filed! If we eliminate interrogatories and don't limit requests for admission, Rambo lawyers will begin using requests to harass the opponent.

The rest of the proposes rules are acceptable.

Let's bear in mind that in criminal cases there is very limited discovery and depositions have to be authorized by the court yet, we send people to the penitentiary and the gallows. Before 1982 we could try civil cases without interrogatories and did so without being "ambushed". How did we ever get started down the trail we are on? I know that the intention was good, but look what happened to lawyers and litigants! If we eliminate interrogatories it will improve the situation 75%. The rest can be handled. If we don't eliminate interrogatories, then simply adopt your proposed Rule 6 and eliminate "contention" interrogatories. Also if you won't eliminate interrogatories under proposed Rule 12,

then limit them to no more than 5 with the provision that in extraordinary cases the trial judge could permit more.

With kindest regards, I am

Sincerely,

Zeke

J. C. Zbranek, Judge
75th District Court

JCZ:bas

1. See the attached excerpt from Glendon "A Nation Under Lawyers", Farrar, Straus and Giroux, 1994.

2. A discovery system that can be used to exclude relevant evidence has to be suspect for this reason alone.

edgeable."[51] Subsequent judicial decisions relaxed the traditional ban on solicitation. Within a decade, many of the nation's largest law firms decided that a little self-promotion might not be such a bad thing after all. Still looking down their noses at TV ads and lawyers who flock to the scene of mass disasters, many firms engaged public relations agencies to promote their images. A growing number hired full-time, in-house marketing directors.

Litigators in elite law firms, moreover, are routinely resorting to tactics that would have scandalized John W. Davis.[52] All lawyers know that often the best thing a litigator can do for a client is to discourage the bringing of a lawsuit or to arrange its early settlement. No one has ever put it better than Abraham Lincoln:

> Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.[53]

Contemporary lawyers, to the contrary, are apt to see negotiation and settlement, not as peacemaking activity, but as war by other means, an effort to gain victory by intimidating, outspending, or otherwise grinding down one's opponent. Big-firm litigators are sought out as often for their ingenuity in wearing out their adversaries through expensive delaying tactics as for their courtroom skills. Indeed, many an associate who eagerly joined a litigation department has never been in court.

That state of affairs was brought about in part by the realization many years ago that certain procedural reforms designed to promote settlement and streamline trials could be deployed to harass opponents. That abuse was not foreseen by those who designed pretrial "discovery" rules permitting each party in a lawsuit to pose written questions to the other (interrogatories), to inspect documents in the other's possession, and to take formal statements under oath (depositions) from

parties and potential witnesses. The basic idea that all parties would benefit from advance disclosure of testimony was a sound one. But attorneys representing economically powerful clients now regularly use these devices to outwait and outspend their opponents as well as to obtain pertinent information. A financially weaker party can often be brought to his knees under barrages of interrogatories spewed out by word processors, lengthy and intrusive depositions, and voluminous demands for production of documents.

The Diaghilev of discovery seems to have been the late Bruce Bromley, a leading partner at Cravath, Swaine & Moore. Bromley once boasted to an audience of Stanford law students, "I was born, I think, to be a protractor. . . . I could take the simplest antitrust case and protract for the defense almost to infinity. . . . [One case] lasted 14 years. . . . Despite 50,000 pages of testimony, there really wasn't any dispute about the facts. . . . We won that case, and, as you know, my firm's meter was running all the time—every month for 14 years."[54] Mr. Bromley's grateful partners endowed a chair in his memory at the Harvard Law School, from which Arthur Miller, the Bruce Bromley Professor, has declaimed against an out-of-control discovery system:

> This pre-trial structure permits artful attorneys to hide the ball and keep alive hopeless claims, as well as defenses, for a much longer time than [formerly]. In many ways, contemporary federal litigation is analogous to the dance marathon contests of yesteryear. The object of the exercise is to . . . hang on to one's client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion.[55]

The discovery system has proved difficult to reform, not for want of constructive ideas, but because plaintiffs' and defendants' lawyers have joined forces to resist measures designed to limit abuses.

In recent years, American advocates have begun to take on

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an eerie resemblance to their counterparts of late Roman times. That "splendid and popular class," according to Gibbon, "are described for the most part as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment; from whence, after a tedious series of years, they were at length dismissed, when their patience and fortune were almost exhausted."[56] One busy practitioner told me that he has seen contemporary versions of those Roman rascals appraise one-shot clients and remark, "There's more meat left on that turkey."

Just as clients' increased bargaining power and firms' furious competition for business wreaked havoc with counselors' ideals, the same developments plus the litigation explosion seem to have left advocates' ideals in a shambles as well. The political and financial scandals involving lawyers in the 1970s and 1980s led to much outcry and hand-wringing about the decline of legal ethics. "How in God's name could so many lawyers get involved in something like this?" asked John Dean, voicing the question on many minds when the Watergate saga unfolded. And as the events leading up to the Lincoln Savings & Loan debacle came to light, Judge Stanley Sporkin asked where the attorneys had been: "Why didn't any of them speak up or disassociate themselves from the[se] transactions?"[57]

Still, if one's benchmark for corporate firms is the palmy days at the turn of the century when lawyers were using every tactic in the book (and many that were not) to help clients bust unions, consolidate monopolies, drive competitors out of business, and obtain favorable treatment from judges and legislators, it would be hard to demonstrate a marked ethical decline. Many among the founders of today's grand Wall Street firms were no strangers to the kind of behavior that again became rampant in the 1980s. Men whose portraits now adorn the walls of paneled law libraries were often up to their sideburns in Tammany Hall–style corruption. Many collaborated with and covered up dealings of railroad builders, oil pioneers, and utility magnates that included bribery and violence.[58]

If, on the other hand, we take as our base for comparison

03-27-96
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~~CC~~ LHS
NHD
Vamf

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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March 26, 1996

FJHD -
SCAC Agenda
✓ Discovery Subc
Staff
Subc
fyi

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Proposed Discovery Rule 1

Dear Luke:

Enclosed is a copy of a letter from Ben Rowe, the director of risk management for Minyard Food Stores, regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

March 12, 1996

Chief Justice Thomas R. Phillips
Supreme Court Building
P.O. box 12248
Austin, TX 78711

Dear Justice Phillips: Re: Court Rules

We in retail face the public head on. Our civil suites cover a wide range of subjects from slip falls, crime related issues, prescription errors, false arrest, fraud and you name it. What is wrong or right walks through our doors.

The laws have made us the enforcer on beer, alcohol, tobacco, harassment, A.D.A., EEOC, OSHA, F.D.A., and again you name it.

The plaintiffs in each case can delay their intentions to where the files can get misplaced, disoriented, or lost. Each person over a respective department has about twenty hats to wear and the last one is being legislative smart.

A plaintiff attorney establishing his case in service for two years can document days, times, and statements. He can even provide pictures.

The defense is totally unaware of his or her intentions and is busy wearing the twenty hats plus the phone.

Surprise!!!, two days before two years are up, you receive notification an attorney has been selected and wants your reply to his demands in 10 days!

This is not fair, it's not justice. I feel a six month delay is a maximum period that should be allowed for plaintiff attorneys to be chosen and a letter of intent be sent to defense.

This time frame (6 months), would allow the defense time to take current pictures, interview "fresh" witnesses, and to prepare all company records for themselves as well as the plaintiffs.

The end result would be a higher degree of accuracy by both parties. After the letter of intent (before the six month period expires), the plaintiff attorney would have 18 months in which to file his formal complaint. Failure to meet the six month deadline by plaintiff or plaintiff attorney would disqualify the suite, no exceptions. Failure to formalize the letter of intent 18 months later would also disqualify.

Thank you

Ben D. Rowe
Minyard Food Store Inc.
Director Risk Management

3RD00088

BR:sc

03-11-96
4543.001
cc: LHS
[redacted]
Vamf

THE SUPREME COURT OF TEXAS

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March 8, 1996

HHD
Sarah Orsinger
Sub C
[redacted]
[redacted]
Luke

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

P.D.R. 1

Enclosed is a copy of a letter from Brenda Hight regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

CANTEY & HANGER, L.L.P.
ATTORNEYS AT LAW

BRENDA N. HIGHT
BOARD CERTIFIED – CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
DIRECT DIAL 214/978-4120

March 3, 1996

Justice Nathan Hecht
Supreme Court Building
P.O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

As a lawyer defending physicians and hospitals since 1985 and before that in commercial litigation, I have been deeply involved in handling discovery and trial preparation. I have been watching and reviewing the development of new rules over the years and would like to express my opinion to you on a personal level with regard to the Supreme Court Advisory Committee rules changes and those proposed by the Court Rules Committee of the State Bar of Texas.

As a defense lawyer, I am cognizant for the need for some changes in the rules because of the small amount of abuse that does exist. In the analysis of the two proposed rules, however, I find that the Supreme Court Advisory Committee rules, (hereinafter SCAC) have some specific aspects that could work to deprive the defendant of a fair evaluation and preparation of the liability and damages facts. Specifically, Rule 1-1 through Rule 1-3 can set up a defendant for an inability to fairly evaluate the case pretrial. The State Bar Committee on court rules does not have that bias for the plaintiffs.

I request that the Court seriously consider rejecting the Supreme Court Advisory Committee Rules and adopt those rules passed by the Court Rules Committee.

Very Truly Yours,

Brenda Neel Hight

BNH/jas

3RD00090

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04-10-96
4543-001
cc: LHS
NHd
Varf

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

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CHARLES E. FROST, JR.
SHAREHOLDER

April 5, 1996

HHD, SCR, Stabb, Sober, Jhey

P.D.R. 1

Justice Nathan Hecht
Texas Supreme Court
P. O Box 12248
Austin, TX 78711

Re: The Proposed New Texas Rules

Dear Justice Hecht:

As I prepare this letter, I have just finished two depositions of two of the three plaintiffs in an estate case. The plaintiffs, all of whom are adults in their 40s, are accusing their deceased father of fraud and conversion in connection with his handling of their mother's estate 27 years ago. Originally they were also accusing their father's widow, his second wife of 22 years, of conspiring with their father. In this case, I and the widow's personal lawyer deposed the plaintiffs' son for approximately 9 hours. Sometime after that, the plaintiffs concluded that there was no evidence to hold the widow in the case, and dismissed her. Today, I spent approximately 3 hours deposing each of the two plaintiffs' daughters. Because they had not been involved at all in their uncle's, father's and brother's construction business and because they had dismissed the claims against the Defendant's widow, it was not necessary to depose them any longer than that; however, if they had not released the widow from the case, or if they had been involved any more in their father's business, a longer deposition would have been necessary. I add this account of this case to my previous letters because it is one more reason why the new proposed rules need to be give parties the flexibility to decide how much of the total 50 hours of deposition time a particular party will devote to the depositions of any witness.

P.D.R. 1

This also is true with respect to expert witnesses, which as I recall are included within the 50 hours. I have deposed expert witnesses, as I am certain this Court and the Committee have, who could be deposed in 3 hours, but I also have found it necessary on many occasions to depose expert witnesses for 5 or even 10 hours.

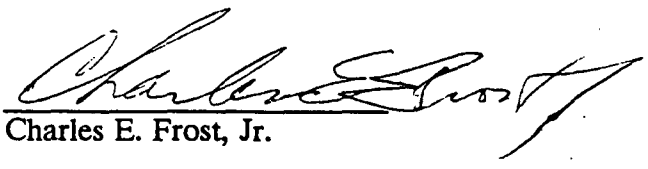
Another issue that it would be most helpful for the new rules to deal with is the practice of many lawyers of interrupting a deposition while a question is pending and taking their client(s) out in the hallway to coach them. It has always been my understanding that that practice is improper, but there is a paucity of caselaw concerning the matter. Certainly a party could not do that during trial, and yet lawyers do it during depositions as though they have the right to do so. It would be quite helpful for the new rules to make clear that such a practice is not permitted.

3RD00091

I appreciate your consideration of the foregoing.

Very truly yours,

CHAMBERLAIN, HRDLICKA, WHITE,
WILLIAMS & MARTIN, P.C.

By: 
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CEF/tjh:3466:01
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cc: Mr. Luther Soules
Soules & Wallace
15th Floor, 100 W. Houston Street
San Antonio, Texas 78205-1457

Mr. Stephen D. Susman
Susman Godfrey L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 70002-5096

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THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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HAP
Sate Jobe
✓ Agenda
SBOT Staff

May 9, 1996

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

P.D.R. 1 · $10

Dear Luke:

Enclosed is a copy of a letter from Randall Owens regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

BUCK, KEENAN & OWENS, L.L.P.
ATTORNEYS
5100 NATIONSBANK CENTER
700 LOUISIANA
HOUSTON, TEXAS 77002
(713) 225-4500

TELECOPIER (713) 225-3719

May 3, 1996

Justice Nathan L. Hecht
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I am a general civil litigator in Houston. Although the bulk of my docket is defense work, I am not a member of any special interest association. I am writing to provide my comments on some of the proposed changes to our state's civil discovery rules.

As I understand the Supreme Court Advisory Committee ("SCAC") proposed rule for expert designations, a defendant will not always have an opportunity to discover the opinions of plaintiff's experts prior to the date that the defendant is required to designate experts. This would occur if the plaintiff's lawyer does not make his experts available for deposition until the day that the defendant's designations are due. This rule stands out for me because even now litigants routinely have to revise docket control orders to allow defendants to discover plaintiff expert opinions prior to designating their own experts. In the wake of Daubert, it is becoming more and more important for litigants to discover the specific issues and opinions in controversy so that a truly qualified rebuttal expert can be located. The SCAC proposed rule therefore would unfairly place defendants (and their attorneys) in harms way should their uninformed expert designation miss the mark.

P.D.R. 10

In addition, the SCAC proposed limitation on deposition time seems to be an unnecessary constraint on both sides in multi-party lawsuits, especially if the plaintiffs are claiming multiple and alternative theories of liability against the various defendants. In suits for more than $50,000, when the parties do not agree and the court does not order a discovery control plan, each "side" only has 50 hours to examine and cross-examine opposing parties, their experts and persons who are subject to the opposing party's control. In complex cases, this limitation is unfair to all parties.

P.D.R. 1

P.D.R.1

The nine month discovery period applicable to "trial 1" is also problematic. I now handle several cases in which the plaintiff investigated and prepared the case for over a year before my clients knew that there was even a problem. In one case, it took nine months (and two motions to compel) to get the plaintiff to answer interrogatories, which was required prior to beginning depositions. It would be much more reasonable to schedule trials and discovery deadlines based upon the time actually needed for the case.

I know that under the SCAC plan most parties would agree to a discovery plan or approach the Court about getting one. However, if the system has to be changed, it should provide protection to litigants when the opposing party will not agree to a plan or the Court will not order it.

I understand that other groups, including the State Bar Committee on Court Rules, have provided you with input on discovery rules revision. I request that you give consideration to the recommendations of these other groups to ensure that all litigants in Texas have a level playing field.

Very truly yours,

Randy Owens

Randall C. Owens

RCO:db

04-23-96
4543.001
cc: nhd Sanf

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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April 22, 1996

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Kenneth Wright regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

LAW OFFICES OF
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DALLAS, TEXAS 75205
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April 12, 19962

Honorable Nathan L. Hecht, Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: New discovery rules

Dear Justice Hecht:

Aside from the recent Texas Bar Journal article, I also attended a seminar here, locally, which was entitled "Scrutinizing the New Rules". At this time, I would like to take the opportunity to provide input as to one extant Rule of Civil Procedure which I believe impinges upon the attorney's work product and mental processes. Specifically, I refer to Rule 166 of the Texas Rules of Civil Procedure. Indeed, proposed Rule 4 of the Texas Civil Rules of Discovery contains provision 2.c(4) which in paraphrase form suggests that trial exhibits are discoverable, even if made or prepared in anticipation of litigation or for trial, if their disclosure is ordered pursuant to Rule 166.

Let me share with you my philosophical dispute as a litigator. I clearly do not oppose sharing my "game plan" regarding my case-in-chief whether that be as plaintiff, with the burden of proof, or defendant, who has alleged an affirmative defense. However, I strongly disagree with having to apprise my opposing counsel as to what errors or omissions exist in his or her "game plan". I truly believe that trial exhibits that pertain to impeachment for cross-examination purposes should not be the subject of disclosure. By advising my opposing counsel as to the deficiencies in his or her proof, in all likelihood, all I am doing is allowing the "other side" to cure such deficiencies. This rule does not reward the vigilant but rather merely provides a "safety net" for the ill-prepared. I strongly urge the Texas Supreme Court and its adjunct committee to seriously consider revamping Rule 166 to require the disclosure of only those trial exhibits that pertain to the respective parties' case-in-chief. I have discussed this issue with several trial attorneys who share this view.

Thank you for your consideration.

Very truly yours,

ROGERS & WRIGHT, P.C.

Kenneth A. Wright

3RD00097

cc: Mr. Richard G. Rogers

10-25-95
4543.001
cc: LHS
hhd
Vamf

THE SUPREME COURT OF TEXAS

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October 24, 1995

HHP, SCAC Subc, Agenda, SCOT Staff

P.D.R. 11

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Bridget Robinson regarding the proposed discovery rules.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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Dorcas Ann Green
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Bridget R. Robinson*
Mark C. Goulet
Robert Russo
Sandra D. Carpenter
Jacqueline F. Lain
John T. Fessenden
Paige C. Kyle
Susan B. Graham
Nona C. Matthews

October 20, 1995

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Re: Proposed changes to the Discovery Rules

Dear Justice Hecht and Members of the Advisory Committee:

I write regarding the proposed changes to the discovery rules. Specifically, I am concerned about attorneys refusing to supply discovery, not only by objecting to requests, but by affirmatively claiming no documents satisfy a particular request.

My experience has been that attorneys on both sides of the bar either object or claim no documents are responsive when the attorney is trying to hide inculpatory documents. In a case where an attorney claims no documents are responsive and thus a motion to compel is not appropriate, the attorney requesting discovery only discovers documents are being hidden if the documents are discovered through another source or some witness mentions the hidden documents during his or her deposition.

In cases in which attorneys suppress inculpatory information, the proposed rule that would prohibit the admission of documents not timely disclosed during discovery is ineffective. Indeed, the proposed rule is a bonus for the attorney who has successfully hidden the documents that would prove his opponent's case.

In addition to the proposed rule, I believe the committee should propose a rule to deal with the document hiding scenario. I suggest a mandatory instruction to the jury that the culpable party claimed documents did not exist that would establish certain facts pled by the opposing party, when in fact such documents did exist and were suppressed. Therefore, the jury may distrust the suppressing party's testimony in other areas or reject

it altogether. The instruction is simply a variation of the usual credibility instruction, which allows the jury to be instructed regarding a matter that directly affects credibility but about which the jury probably would not otherwise know.

Additionally, I think the Committee should consider a rule that provides for self-authentication of documents produced by the opposing party during discovery. The documents produced during discovery are often records of a business affiliated with the opposing party and it is difficult to obtain an affidavit from the custodian of records.

I am sure these discovery concerns are areas of which the Committee is aware. If I may be of assistance to the Committee as it continues its important work, please do not hesitate to call.

Very truly yours,

Bridget Robinson

BRR/eb

10-19-95
4543.001
cc: LHS
h.hrd

Robert D Topping **Texaco**
Senior Attorney
Legal Department

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October 13, 1995

HHD
Steve Aycock
Susan
Scott Stabb
D. Hecht

Supreme Court of Texas
Rules Advisory Committee
c/o Luther H. Soules, III
Soules & Wallace
100 W. Houston St., Suite 1500
San Antonio, TX 78205-2230

RE: Proposed changes to the Texas Rules of Discovery

Proposed Discovery Rules 12 & 15

Gentlemen:

For the last fourteen years, my practice has been centered on business litigation. I have represented on an equal basis, plaintiffs and defendants, in numerous business controversies.

I am writing this letter to express my views with respect to the proposed changes to our rules of discovery. A considerable part of my practice has always been in federal court, so I am generally familiar with the concepts being proposed. I am in favor of the proposals with respect to initial disclosure requirements and discovery periods. I would favor limiting interrogatories to two sets of 30 for any size or type case. In the event more interrogatories would be required or more than two sets would be necessary, leave of court should be required. I favor the concept of specific rules on conduct during a deposition, as well as rules on specific objections, the rules on amendment of pleadings, and discovery supplementation.

PDR 12

However, I am strongly opposed to the proposed rules with respect to time limitations on individual depositions. Virtually every complicated business case that I have been involved with has involved hundreds, if not thousands of documents. I can only think of an insignificant few number of cases where I could have completed depositions of fact witnesses in complicated business cases in three hours.

PDR 15

I believe that limiting depositions to three hours for fact witnesses and six hours for expert witnesses in a business case would severely prejudice a lawyer's ability to prosecute or defend such a case. I would strongly urge you to follow the federal rules in this instance and limit the number of depositions to no more than 10, but allow the attorneys latitude in the number of hours that may be utilized to take a deposition. I believe that limiting depositions by the number of hours would allow unethical attorneys to prompt and instruct witnesses to obstruct or delay the process. This type of limitation could only result in creating problems, not in solving them. An hour limitation on depositions only provides ammunition for unethical attorneys to obstruct the truth gathering process.

Thank you for your consideration of my comments.

Very truly yours,

Robert D. Topping

RDT:mj
88J0301S.LTR

03-25-96
4543.001
cc [redacted]
WHd
Vam

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
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CHARLES E. FROST, JR.
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WATS
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March 21, 1996

WHD
Same Agenda
Steps

Mr. Stephen D. Susman
Susman Godfrey L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096

Re: *Your Letter of March 19, 1996*

Dear Steve:

Your letter of March 19, 1996 was much appreciated.

Unfortunately, I apparently did not do a very capable job of relating what transpired. The 12 hours we spent deposing the first witness were quite necessary, inasmuch as there were a multitude of issues and the first witness did have much to say about them. He, however, also stated that we had to also ask his business "partner", the second witness, the same questions. It therefore was necessary to depose the second witness, and given the multitude of fact issues and legal issues, took 8-9 hours for me and co-defendant's counsel to delve through all the facts.

P.D.R. 15

Although theoretically opposing lawyers do not have the right to cut off counsel during depositions, it in fact is done or threatened frequently. In this case, however, there was not even any mention of it or complaint about the length of the deposition by plaintiffs' counsel because the questions were clearly relevant and went to the multitude of fact and legal issues presented by the plaintiffs' petition. Although that is not "proof" beyond a reasonable doubt, neither is it a fact to be completely ignored. In summary, two longer depositions were required to ferret the truth. This is further supported by the fact that the case thereafter settled for a relatively reasonable sum, indicating that we had flushed out the real facts and had caused plaintiffs and their counsel to rethink the perceived strength of their case.

P.D.R. 12

My comment with respect to "the second set of interrogatories" went to the proposed rule that would eliminate all but the first set of interrogatories. In light of the fact that State Court pleadings are notice pleadings, and the kind of detail one frequently sees in

Federal Court complaints is seldom provided in state court petitions, a second set of interrogatories is quite desirable and calculated to lead to the ultimate rendition of justice. The same is true with respect to interrogatories by plaintiffs to defendants, inasmuch as all that a plaintiff receives from a defendant is a general denial and some affirmative defenses about which the plaintiff may know little or nothing.

Once again, thanks for your thoughtful response to my February 12 letter.

Very truly yours,

CHAMBERLAIN, HRDLICKA, WHITE,
WILLIAMS & MARTIN, P.C.

By: _____
Charles E. Frost, Jr.

CEF247:40/tjh
01-700006:3/21/96

cc: The Honorable Nathan L. Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

Mr. Luther H. Soules III
Soules & Wallace
100 West Houston, Suite 1500
San Antonio, Texas 78206

4543.001
cc: LHS
lhd

THE SUPREME COURT OF TEXAS

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February 14, 1996

HHD
Sofia Aguado
Lisa
Abbot Stapp

P.D.R. 1, 10, 12 & 15

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from James Haltom and Charles Frost, Jr. regarding the proposed discovery rules.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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CHARLES E. FROST, JR.
SHAREHOLDER

February 12, 1996

Justice Nathan Hecht
Texas Supreme Court
P. O Box 12248
Austin, TX 78711

Re: The Proposed New Texas Rules

Dear Justice Hecht:

I would like to urge the Court to consider modifying slightly the proposed rule that would, with respect to most civil litigation, permit only one 8-hour deposition of the opposing party. The desired modification arises from the problem that presents itself when there are multiple plaintiffs or multiple defendants, and each of those multiple parties has a key part of the story to tell. For example, in a case that I recently handled for one of the two defendants, both the plaintiff corporation and its two principals sued my corporate client, (the franchisor), and another franchisee on a variety of commercial tort and contract claims. I deposed the president for approximately 8 hours, and the other defendant deposed him for another 4 hours. We also deposed the other principal for approximately 8-9 hours. At no point did the plaintiff's attorney, a partner at one of the major Fort Worth law firms, suggest that the length of the depositions was inappropriate or that it was inappropriate to depose both of his individual clients. Furthermore, the first individual Plaintiff time and again told us to ask his colleague (the other Plaintiff) the questions we posed to him. After those depositions and the deposition of one of our client's officers, the case settled for a modest sum (leading me to believe that the depositions resulted in ferreting out the poor quality of the plaintiff's claims, thereby leading to a substantially just outcome (the settlement).)

PDR 15

As noted above, the first principal whom we deposed in the above-described case on numerous occasions pointed to matters that we would need to find out from his colleague. If we had not been able to spend adequate time deposing both of them, we would have been left in the position of running somewhat blind at trial (and likewise indirectly in the mediated settlement conference (conducted by Louis Weber in Dallas). I, therefore, would urge your committee to modify the rule concerning the single 8-hour

deposition to provide that the 8-hour deposition limitation would be with respect to each named party.

A second problem of time for depositions concerns expert witnesses. I have seldom seen a financial/accounting expert witness who could be questioned effectively in a four-hour deposition. This is especially true if the opposing party is playing hide-the-ball games -- as occurs frequently in commercial litigation.

I am also concerned about eliminating the second set of interrogatories. The value of that second set is, if the opposing party (whether it be plaintiff or defendant) substantially amends the pleadings, the second set of interrogatories provides an opportunity to learn about those amendments without necessarily pursuing a second deposition. Likewise, contention interrogatories, if properly used, provide a helpful basis for developing a better feel for what the opposing party's contentions really are, particularly if one is facing a corporation. Thus, I would respectfully ask that you reconsider those parts of the proposed rules.

P.D.R. 12

Very truly yours,

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN, P.C.

By: Charles E. Frost, Jr.

CEF247:25/tjh
01-250011:2/12/96

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HALTOM,
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& GREER

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STEVEN W. CAPLE

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JENNIFER HALTOM DOAN

DARBY V. DOAN

February 12, 1996

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

RE: Discovery Rules Revisions

Dear Justice Hecht:

This is written in response to articles in the Texas Bar Journal and in response to an invitation issued by Chief Justice Phillips who spoke at the January meeting of the Texarkana Bar Association.

The recommendations of the State Bar Committee on court rules and the recommendations of the Supreme Court Advisory Committee have been watched with great interest by all attorneys who make their living in the courtroom. I have practiced law for 35 years and have an active trial practice representing both plaintiffs and defendants. I have read the proposals made by the various committees and have had the opportunity to discuss them with other lawyers who have an active trial docket.

P.D.R.1

I have also had the experience of working with the Civil Justice Expense and Delay Reduction Plan implemented by the federal courts in the Eastern District of Texas. I know first-hand the effect of judicially imposed rigid guidelines can do to the orderly practice of law. Specifically, a plaintiff who has prepared his case and has done sufficient investigation can be ready for trial when the case is filed; however, a defendant unaware of months of pre-filing planning by plaintiff may well be placed at a terrific disadvantage on a "rocket docket" or fast-track litigation.

Specifically, I am totally opposed to the civil discovery rules proposed by the Supreme Court Advisory Committee. For someone maintaining six to ten files a year and trying three or four cases a year, they might be workable; to everyone else, I would suggest they are inviting disaster.

To build into the rules, a specific time-line for which discovery must be undertaken and concluded is asking for the trial court to be considering on a case-by-case basis requests for extensions of time which will result in additional costs to litigants and not less. To build into the rules a limitation of time the witness can be disposed is also devising a plan in which the trial court will be asked, from time to time, for those same extensions of time. Obviously, one would think that six hours of testimony time would be sufficient for most witnesses; however, why invite this intrusion into a system which has worked for years when the time might well have been expressed as three hours or two hours or some other arbitrarily defined time?

PDR.15 I fully concur that lawyers should not voice objections at depositions other than for simple responses as to relevance, materiality or privilege.

PDR.10 To require expert reports and to give available dates of testimony certainly seems to be reasonable.

I have read the proposals made by the Court Rules Committee of the State Bar of Texas and feel that they are much better than those proposed by the Supreme Court Advisory Committee; however, I would encourage all members of the Court not to adopt a "package," but to look at each one of the individual proposals and see if it not only "speeds up trials," but also is designed to insure the delivery of a justice system that is not paranoid of speed of trial or a case disposal record.

Leaving flexibility with the trial court to examine and develop a discovery procedure which is right, fair and just to the particular cause it is considering is imperative if justice going to be served in the more complicated cases which are being filed with more and more frequency throughout the state. With the frequency of class actions, mass tort litigation and super-multi party litigation it is obvious that the matters I have raised in this response to you are dealt with on a daily basis in the current system. There surely are instances where I have witnessed an abuse of the discovery process; however, I truly think that suggestions raised by the Supreme Court Advisory Committee would put in print abuses of that same discovery system.

Thank you for the opportunity to provide these comments. I know that the court will give proper ear to the bar before changes are made which not merely place perimeters around discovery, but may well turn discovery into an exhausting endeavor to those attorneys whose dockets are truly busy.

Sincerely yours,

James N. Haltom

cc: Justice Raul A. Gonzalez
Justice Nathan L. Hecht
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker
Justice Greg Abbott

02-28-96
4543.801
(LHS)
hnd
Vault

THE SUPREME COURT OF TEXAS

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February 27, 1996

HHP
Oldham Soules
SBOT Staff

Proposed
Discovery Rule 10

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Oldham & Associates and Thomas Gendry regarding the proposed discovery rules and from Robert Cain regarding the Court's breifing practices.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

GENDRY & SPRAGUE, P.C.

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CABLE SA LAW

February 22, 1996

PDR 10

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

RE: Rules of Civil Practice--Proposed Changes

Dear Justice Hecht:

I am a practicing attorney in Texas primarily handling defense of personal injury litigation, particularly medical malpractice cases. I am writing to offer my comments concerning proposed changes to the Rules of Civil Practice. I speak from the standpoint of one who defends medical malpractice litigants. It goes without saying that medical malpractice cases can become quite complex because of the medical issues involved and differences in medical opinion about medical issues critical to each case. In considering proposed changes to the Rules of Civil Procedure, I ask that the Supreme Court consider, generally, that health care defendants must have available to them reasonable means to conduct discovery of a plaintiff's contentions and identification of plaintiff's position, followed by reasonable opportunity for defendant to develop a response. It is critical in medical malpractice cases for a defendant to have access to medical provider records disclosing medical history, diagnoses and treatment; opportunity to depose non-party medical providers with relevant information; and, to take plaintiff's experts' depositions after determining plaintiff's position on medical issues and how the standard of care was breached. Essentially, determining plaintiff's position can only be determined upon taking plaintiff's designated expert witnesses' depositions. The Supreme Court's proposed Rule 10-2b and Rule 10-3a(4) potentially disallows defendant from discovering plaintiff's position concerning medical issues and breach of standard of care. Sometimes a defense expert must be found after finding out plaintiff's experts' opinions. As proposed, Rules 10-2b and Rule 10-3a(4) require the designation of defense medical experts before ever discovering plaintiff's position. It has been my experience that a defendant needs at least 30 to 45 days in which to respond to plaintiff's position by designation of defense experts who are able and qualified to speak on the subject matter. A deposition of plaintiff's expert must be

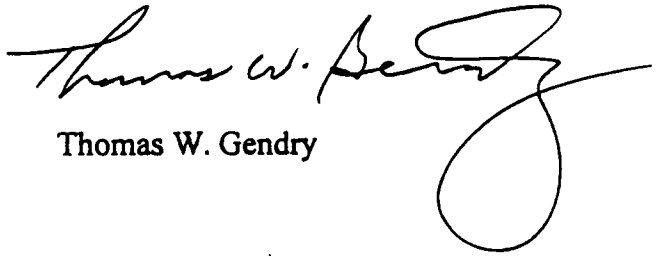
* BOARD CERTIFIED CIVIL TRIAL LAW
† BOARD CERTIFIED PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

transcribed and referred to a defense expert for review and response. As proposed, the subject rules allow plaintiff to designate two alternative dates for taking plaintiff's experts' depositions, while at the same time requiring defendant to designate experts at about the same time that plaintiff's experts are giving their depositions. In my opinion, any rule proposed should incorporate a time lag sufficiently lengthy between the taking of plaintiff's experts depositions and defendant's designation of experts. This requirement would add no extra cost to the discovery process.

The above can be incorporated in a discovery control plan. A discovery control plan can be made mandatory upon the option of either party.

Thank you for your consideration of the contents of this letter.

Yours very truly,



Thomas W. Gendry

misc\justices

12-06-95
4543.001
cc: CHS
hhd
vamf

MICHOL MARY O'CONNOR
JUSTICE
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002
(713) 655-2716

TRCP 1

December 4, 1995

HAD. See agenda Scott
Rule 1- ✓
Staff.

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

Hon. Sam Houston Clinton
Texas Court of Criminal Appeals
Supreme Court Building
P.O. Box 12308
Austin, Texas 78711

Re: Amendment to the TRCPs & TRAPs

Dear Justices Hecht and Clinton,

I propose a change to the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure that I believe will help computer research when the new rules are adopted. This proposal was made to the Appellate Section of the State Bar at our board meeting on November 30, and the section voted unanimously in favor of making the recommendation to you.

Presently, when a person attempts to locate cases that cite a specific rule, say 45, the computer inquiry must be something like this:

OP(rule or Tex.R.Civ.P. +1 45)

That is, the search must be for the word "rule" or "Tex.R.Civ.P." within one word of the number 45.

There are problems with this kind of search. Some computer programs do not recognize "Tex.R.Civ.P." as a single word, and those programs will attempt to search separately for "Tex." and "R." and "Civ" and "P.," which will not work. In those programs, the search will only find cases that use the word "rule" within one word of "45." Another problem is that this kind of search will turn up every case involving the word "rule" within one word of the number "45." If you have ever performed this kind of search, you know that it turns up every administrative rule, every automobile club rule, etc., that involves "rule"

and "45." In other words, it is not an efficient way of searching for cases that cite a certain rule of procedure.

With the adoption of new rules, you could make it easier to search for cases that cite specific rules, and at the same time, make it easier to search for cases that cite the newly revised rules.

My suggestion is to replace the word "rule" in the title of the rule with the abbreviation of the name of the rules. For example, instead of calling Rule 45 "Rule 45" or referring to it as "Tex.R.Civ.P. 45," name the rule "TRCP 45" (no periods). Instead of calling Rule 52 "Rule 52" or referring to it as "Tex.R.App.P. 52," name it "TRAP 52." Instead of "Rule 101" or "Tex.Civ.R.Evid. 101" use "TRCvE 101." The "TRCvE" would distinguish the civil rules of evidence from the criminal rules of evidence, which could be cited as "TRCrE 101."

The search for cases citing the new rules would be:

OP(TRCP +1 45)

That is, the person making a computer search for cases citing TRCP 45 could search for the word "TRCP" within one word of the number "45." This kind of search will be an efficient way of searching for the new rules, and will turn up the rules of procedure, not administrative rules.

We would appreciate if the Supreme Court and the Court of Criminal Appeals would consider this proposal. If you have any questions, please do not hesitate to call me.

Yours truly,

Michol M. O'Connor

cc: Hon. Thomas R. Phillips
Hon. Raul Gonzalez
Hon. Jack Hightower
Hon. John Cornyn
Hon. Craig Enoch
Hon. Rose Spector
Hon. Priscilla R. Owen
Hon. James A. Baker
Hon. Greg Abbott
Mr. Lee Parsley, Staff Attorney

Mr. Luke Soules
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San Antonio, TX 78205-1457

Mr. Richard Orsinger
Suite 1616, Tower Life Bldg.,
San Antonio, TX 78205

Mr. Kevin Dubose
Chair, Appellate Section
Holman & Hogan
440 Louisiana, Suite 1410
Houston, TX 77002

JUDGE TOM LAWRENCE
JUSTICE OF THE PEACE
HARRIS COUNTY
PRECINCT FOUR, POSITION TWO

121 WEST MAIN STREET
HUMBLE, TEXAS 77338-4306

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HXD, TRCP 3a
Scope Agenda
Sept
SBOT Stobb
Hecht -

February 7, 1997

Hon. Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

At our January meeting, the Justices of the Peace in Harris County voted to seek legislative authority to adopt local rules. Our bill, a proposed version of which is enclosed, would amend Sec. 75.404 of the Government Code which is a statute pertaining to the Harris County Justice Courts.

We respect the Supreme Court's pre-eminent authority to promulgate rules of civil procedure so we want to avoid a situation where the legislature grants us local rule making authority, but the Supreme Court has no mechanism for us to seek approval of local rules for civil procedure. Rule 3a allows all Texas courts trying civil cases, except justices of the peace, to submit local rules for approval by the Supreme Court. Notwithstanding our anticipated authority to adopt local rules, we believe the Supreme Court should approve all local civil procedural rules, but justices of the peace are unable to seek local rule approval under Rule 3a as currently worded.

We request that the Supreme Court allow the Harris County justices of the peace to seek Supreme Court approval for local rules. This could be accomplished by either amending Rule 3a to add Harris County Justice Courts or to add a Rule 3b which would pertain only to Harris County Justice Courts.

Proposal 1:

Rule 3a. Local Rules

Each administrative judicial region, district court, county court, county court at law, probate court, and the Harris County justice courts, may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(2) no time period provided by these rules may be altered by local rules;

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

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

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

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

Proposal 2:

Rule 3b. Local Rules for the Harris County Justice Courts

The Harris County justice courts may make and amend local rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules;

(2) no time period provided by these rules may be altered by local rules;

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

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

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

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

Thank you for your consideration.

Sincerely yours,

Tom Lawrence

Tom Lawrence
Judge

TL:mt

cc: Justice Nathan Hecht
Mr. Luther Soules ✓

HB _____

A BILL TO BE ENTITLED

AN ACT

relating to the appointment of former judges, the ability of the Justices of the Peace in Harris County to adopt local rules, and the filing of criminal cases in Harris County.

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

SECTION 1. Section 75.404 of the Government Code is amended as follows:

Sec. 75.404. **Presiding Judge for Harris County Justice Courts**

(a) The justices of the peace in Harris County may select from among themselves a presiding judge.

(b) The presiding judge shall be selected during the month preceding the term the judge is to serve by a two-thirds vote of the judges. The presiding judge serves a term of one year unless by a vote of two-thirds of the judges the selection is canceled and another judge is selected to serve the unexpired term. Each judge shall enter on the minutes of the court an order reciting the selection of the presiding judge.

(c) A copresiding judge may be selected in the same manner as the presiding judge. The copresiding judge serves when the presiding judge is absent or disabled for any reason and has the same duties as the presiding judge.

(d) The presiding judge shall preside at any session of the judges.

(e) If a justice of the peace in Harris County is absent or for any reason unable to preside, the presiding judge may appoint a former justice of the peace or a former county court, statutory county court, or district court judge

who served as a judge in this state and who consents to the appointment as a special judge to preside for the justice of the peace. The presiding judge may designate the duration of the appointment, not to exceed 50 days, and may revoke an appointment at any time. The ~~qualifications,~~ duties, and powers of a special judge are the same as for the regular justice of the peace.

(f) The commissioners court may compensate the special judge.

(g) The justices of the peace in Harris County may adopt local rules not inconsistent with the Code of Criminal Procedure and the Texas Rules of Civil Procedure, for practice and procedure in the justice courts of Harris County, and may adopt local rules for practice and procedure in the small claims courts of Harris County. A local rule may be adopted by a three-fourths vote of the justices of the peace. Each justice of the peace shall enter the rules on the minutes of the court. The justices of the peace shall supply copies of the rules to any interested person.

(h) Notwithstanding other provisions relating to venue, an offense under statutes, rules or regulations of a state agency, officer, board, commission, or department with statewide jurisdiction, or a county agency, officer, board, commission, or department may be prosecuted in a justice court in any precinct in Harris County.

(Tex.Crim.App.1991). Absent an abuse of discretion, we will not disturb the trial court's findings on appeal. *Id.* Although the misplaced capias was not in the record, "[t]he trial court was given the opportunity to determine whether the [capias] was supported by [probable cause], and appellant's rights were protected." *Garrett*, 791 S.W.2d at 141. The trial court did not abuse its discretion in denying appellant's motion to suppress. We deny appellant's sole point of error, and affirm the judgment of the court below.

Lisa Ann PEACOCK, formerly known as Lisa Ann Wardlaw, Relator,

v.

The Honorable Don HUMBLE, Visiting Judge of the Travis County District Court, Respondent.

No. 03-96-00479-CV.

Court of Appeals of Texas, Austin.

Nov. 6, 1996.

In original proceeding, relator sought writ of mandamus to correct ruling that her appeal of associate judgment's report to referring district court regarding motion to modify conservatorship of child was untimely. The Court of Appeals held that Code Construction Act's method for computing time applied to statutory three-day filing period for appealing associate judge's report to referring district court.

Motion for leave to file petition for writ of mandamus denied.

Time ⇐10(9)

Code Construction Act's method for computing time applied, rather than method contained in rule, under which Saturdays, Sundays, and legal holidays are not counted in periods of five days or less, to statutory three-day filing period for appealing associate judge's report to referring district court, and therefore appeal of temporary orders on motion to modify conservatorship, timely filed under rule but not Act, was not timely. V.T.C.A., Family Code § 201.015(a); V.T.C.A., Government Code § 311.014; Vernon's Ann.Texas Rules Civ.Proc., Rule 4.

Daniel J. Lawton, The Lawton Law Firm, Austin, for Relator.

Sidney Childress (Leslie Andrew Wardlaw), Austin, for Respondent.

Before POWERS, ABOUSSIE and JONES, JJ.

ORDER

PER CURIAM.

Relator, Lisa Peacock, seeks a writ of mandamus to correct the respondent's ruling that her appeal of an associate judge's report to the respondent, the referring district court, was untimely. *See* Tex. Fam.Code Ann. § 201.015 (West 1996). The respondent determined that Peacock failed to comply with a local rule requiring her to request the referring district court to review de novo the associate judge's report no later than the third day after the associate judge gave notice to the parties of the substance of the report. At issue is what computation method a referring district court should employ when applying the three-day time limit.

Concluding that under the present circumstances the referring district court did not err in applying the three-day time limit, we will deny leave to file a petition for a writ of mandamus.[1] We write, however, to point out an inconsistency between a provision of the

1. We assume without deciding that this report by an associate judge is "appealable" to the referring district court pursuant to Texas Family Code, section 201.015. Neither party suggested a report on temporary orders is not subject to review and the district court held a hearing only to decide if the request was timely. Whether a party is entitled to de novo review by the district court of temporary matters is not before us and we offer no opinion on that question.

Code Construction Act and a Rule of Civil Procedure.

The associate judge recommended temporary orders on a motion to modify conservatorship of a child. On Thursday, July 11, 1996, the parties received notice of the substance of the associate judge's report. Tex. Fam.Code Ann. § 201.011(c) (West 1996). Peacock filed a written notice, seeking the referring court's review of the associate judge's report, with the district clerk on Tuesday, July 16, 1996. Tex. Fam.Code Ann. § 201.015(a), (b) (West 1996). The real party in interest, Andrew Wardlaw, objected that Peacock's request was not timely filed pursuant to the three-day time limit of Travis County Local Rule 6.10.[2] Consequently, Wardlaw asserted, Peacock was not entitled to have the district court conduct a de novo hearing on temporary issues. The referring court, following a hearing on Wardlaw's objections, agreed with Wardlaw, found that Peacock's written notice was untimely, and ruled that she was not entitled to a review of the associate judge's report.

The Texas Family Code provides that, after a hearing, an associate judge shall provide the parties participating in the hearing notice of the substance of the associate judge's report. Tex. Fam.Code Ann. § 201.011(b) (West 1996). Notice of the substance of an associate judge's report may be given by the associate judge to the parties in open court by an oral statement. Tex. Fam. Code Ann. § 201.011(c) (West 1996). A party may appeal an associate judge's report by filing a written notice of appeal to the referring district court not later than the third day after the date the party receives notice of the substance of the associate judge's report as provided by Section 201.011. Tex. Fam.Code Ann. § 201.015(a) (West 1996). Thus, Local Rule 6.10 corresponds to the statutory section 201.015(a), both providing for a three-day time limit for seeking review of the associate judge's report by the referring district court. The issue is how to calculate the three-day limit.

Peacock contends that, since the Travis County Local Rules do not provide a method for computing time, the trial court should have applied Texas Rule of Civil Procedure 4 when computing the three-day time limit. Specifically, Peacock contends that under Rule 4, "Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less...." Tex.R.Civ.P. 4. Consequently, Peacock asserts, her notice of appeal filed with the district clerk on Tuesday, July 16, 1996, the third day under Rule 4, was timely.

The Code Construction Act provides a statutory method for computing time periods. *See* Tex. Gov't Code Ann. § 311.014 (West 1988). The legislature enacted the Code Construction Act which, while not exclusive, is meant to describe and clarify situations when construing codes. Tex. Gov't Code Ann. § 311.003 (West 1988). The Code Construction Act provides that

> (a) [i]n computing a period of days, the first day is excluded and the last day is included.
>
> (b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

Tex. Gov't Code Ann. § 311.014 (West 1988). Unlike Rule 4, the Code Construction Act has no special provision for calculating time periods of five days or less involving weekends or legal holidays. The Code Construction Act and Rule 4, therefore, are not consistent in the manner in which they address Saturdays, Sundays, and legal holidays when computing time periods of five days or less.

When a rule of procedure conflicts with a statute, the rule yields to the legislative enactment. *Kirkpatrick v. Hurst*, 484 S.W.2d 587, 589 (Tex.1972); *Purolator Armored, Inc. v. Railroad Comm'n of Texas*, 662 S.W.2d

2. Travis County Local Rule 6.10 provides,

> Any person is entitled to a de novo hearing before a judge if, not later than the third day after the associate judge gives notice of his or her findings, conclusions, and recommendations, the person files with the District Clerk a written request for a de novo hearing.
>
> The right to a de novo hearing exists even if within said three-day period a judge has signed an order approving the findings and recommendations of the associate judge.

3RD0121.2

700, 703 n. 4 (Tex.App.—Austin 1983, no writ) (citing *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex.1971)). The Texas Constitution vests in the supreme court the power to establish rules of procedure "not inconsistent with the law of the state." Tex. Const. art. V, § 25. Rule 4 was established pursuant to this power. Until 1990, the Code Construction Act and Rule 4 were consistent regarding the computation of all time periods.[3] In 1990, however, the supreme court amended Rule 4 providing for the exclusion of weekends and legal holidays when computing time periods of five days or less. As a result, since 1990, the Code Construction Act and Rule 4 have addressed the computation of time periods of five days or less differently when a weekend or legal holiday falls within the time period. Because the three-day filing period in the present case is statutory, the Code Construction Act's method for computing time applies rather than the method contained in Rule 4. *See Cohen v. State*, 858 S.W.2d 51, 52 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (statutory deadline for certain objections to be filed).

The record shows that the third day of the time limit to file a request for a hearing before the referring district court, if appropriate, fell on a Sunday. Thus, under the Code Construction Act, Peacock's notice was due to be filed on or before Monday, July 15, 1996. Therefore, Peacock's written notice, which was not filed with the referring district court until Tuesday, July 16, 1996, was untimely. Tex. Fam.Code Ann. § 201.015(a) (West 1996).

Mandamus is an extraordinary remedy, and it will lie only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy at law. *Walker v. Packer*, 827 S.W.2d 833, 841 (Tex.1992) (orig. proceeding). We conclude that the respondent did not abuse its discretion or violate any duty imposed by law. Accordingly, we overrule Peacock's motion for leave to file her petition for writ of mandamus.

It is so ordered this 6th day of November 1996.

3. We think it highly desirable to maintain consistency between the statute and the rule.

KEY NUMBER SYSTEM

ISHIN SPEED SPORT, INC., Appellant,

v.

Johnny RUTHERFORD and Johnny Rutherford, Inc., Appellees.

No. 2-95-169-CV.

Court of Appeals of Texas, Fort Worth.

Nov. 7, 1996.

Professional race car driver and his corporation sued racetrack for breach of contract under which driver was to set up, develop, promote, and operate automobile driving school. The 342nd District Court, Tarrant County, Bob McGrath, J., entered judgment for driver and corporation. Racetrack appealed. The Court of Appeals, Holman, J., held that: (1) parties' dealings supported finding of implied contract to pay driver a set fee plus commissions; (2) trial court was within its discretion in refusing to submit explanatory jury instruction regarding reasonably definite and certain requirement for enforceable agreement; and (3) evidence supported award of lost profits.

Affirmed.

1. Appeal and Error ⇐930(3)

In determining "no evidence" point, Court of Appeals is to consider only the evidence and inferences that tend to support finding and disregard all evidence and inferences to the contrary.

2. Appeal and Error ⇐1001(3)

On "no evidence" review, if there is more than scintilla of evidence to support

3RD0121.3

8/21/96
4543.001
cc: LHS
orig: hhd

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

August 20, 1996

NHD, SCAC agenda v Soule SP01 Staff Tim

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Tim Curry regarding Texas Rule of Civil Procedure 17.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

TARRANT COUNTY

OFFICE OF THE
CRIMINAL DISTRICT ATTORNEY

TIM CURRY
CRIMINAL DISTRICT ATTORNEY
817/884-1400

JUSTICE CENTER
401 W. BELKNAP
FORT WORTH, TX 76196-0201

August 12, 1996

Honorable Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Amendment of Tex. R. Civ. P. 17

Dear Justice Hecht:

In my capacity as Assistant District Attorney, I represent the Tarrant County District Clerk's office. That office has been greatly affected by a recent opinion of the Attorney General, Op. Tex. Att'y Gen. No. DM-382 (1996), which interprets Tex. R. Civ. P. 17 (hereinafter "Rule 17"). The purpose of this letter is to inform you, as the rules liaison to the Supreme Court, of the need to amend Rule 17, which prohibits the district clerk's office from collecting service fees of the sheriff and constable in advance of service.

Rule 17 provides:

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

Tex. R. Civ. P. 17. Despite this rule, the district clerk's office has traditionally collected service fees at the time of the request for service since Tex. Const. art. III, § 52 and art. XI, § 3 prohibit the extension of credit by a county.

On October 10, 1994, my office requested an Attorney General's opinion on the following questions regarding Rule 17:

1. Can the district clerk's office require an advance deposit of fees for service by a sheriff or constable?

2. If the district clerk's office cannot require such an advance deposit, can it

head or at (817) 884-1233. Thank you for the opportunity to present this proposed rule change to you.

Sincerely,

TIM CURRY
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

Dana M. Womack

DANA M. WOMACK
Assistant District Attorney

DMW/gbb

Enclosures

cc: Mr. Thomas A. Wilder
Tarrant County District Clerk

Mr. Patrick S. Dohoney
Assistant District Attorney

K:\CIVIL\DANA\DISTCLRK\HECHT.LTR

TO: THE HONORABLE DAN MORALES
ATTORNEY GENERAL OF THE STATE OF TEXAS

BRIEF IN SUPPORT OF REQUEST FOR OPINION

RE: AUTHORITY OF DISTRICT CLERK TO REQUIRE ADVANCE DEPOSIT FOR SERVICE FEES, AND RELATED QUESTIONS

FROM: TIM CURRY
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

ARGUMENT AND AUTHORITIES

A. A clerk is a ministerial officer who can only perform acts authorized or required of him by law.

A civil suit in the district or county court is commenced by a petition filed in the office of the clerk. Tex. R. Civ. P. 22. When a petition is filed with the clerk, he must indorse thereon the file number, the day on which it was filed, the time of filing, and his signature. Tex. R. Civ. P. 24.

The powers and duties of court clerks are purely ministerial. Benge v. Foster, 47 S.W.2d 862 (Tex. Civ. App. - Amarillo 1932, writ ref'd). As a public officer, the clerk has no authority to perform acts not authorized or required of him by law. Duncan v. State, 67 S.W. 903 (Tex. Civ. App. 1902, no writ). The Attorney General has held that this ministerial duty requires a clerk to file pleadings even though the signature of the attorney does not appear on them. Op. Tex. Att'y Gen. No. JM-727 (1987). In addition, a clerk must file returns of process served by "disinterested persons" authorized to serve process. Op. Tex. Att'y Gen. No. H-1222 (1978).

In Op. Tex. Att'y Gen. No. H-1155 (1978), the Attorney General addressed whether or not a court clerk may refuse to accept for filing pleadings that did not contain a certificate of service. He concluded:

> When the Supreme Court has meant for the clerk of a court to exercise discretion with respect to documents offered for filing, it has plainly said so. See V.T.R.C.P., rules 388, 389, 389a, 480 [now repealed]. In our opinion the duty of the clerk of a

costs." However, these rules do not address the authority of the clerk to require an advance deposit for service fees of a constable or sheriff.

This question was addressed in Op. Tex. Att'y Gen. No. H-756 (1975). In that opinion, the Attorney General was asked, "May County and District Clerks assess and collect service fees at the time of filing of suits or instruments which require service?" Op. No. H-756 at p. 3196. The opinion concluded, "Since a sheriff is not entitled to a fee for service of process or some other instrument unless such service is successful, we believe it clear that such fees may not be taxed as costs until the service is completed." Op. No. H-756 at p. 3197. However, the integrity of this conclusion is doubtful in light of a later opinion, which concluded that commissioners courts may set reasonable fees for services performed by sheriffs and constables in unsuccessful attempts to serve civil process. Op. Tex. Att'y Gen. No. JM-1046 (1989).

C. While Tex. R. Civ. P. 17 provides that service fees cannot be demanded by the serving officer prior to execution, it does not state whether or not the clerk can require a deposit for the fees.

While Tex. R. Civ. P. 142 (which allows collection by a clerk for services rendered before issuing process) provides for the advance collection of some fees by the clerk, there is no similar provision for a clerk to collect sheriff and constable service fees in advance. Rather, Tex. R. Civ. P. 17 requires service before payment. It states:

> The clerk issuing the process shall indorse thereon the words "pauper oath filed," and sign his name officially below them; and the officer in whose hands such process is placed for service shall serve the same.

There is no rational distinction for requiring advance payment of fees for out-of-county versus in-county cases.

D. Since Tex. R. Civ. P. 17 requires a county officer to execute process prior to collection of fees, it is an unlawful extension of credit in violation of Tex. Const. art. III, § 52 and Tex. Const. art. XI, § 3.

Several sections of the Texas Constitution prohibit a county[4] from lending its credit or granting public money or any thing of value to an individual, association or corporation. Article III, section 52, states:

> [T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

Tex. Const. art. III, § 52. See also Tex. Const. art. III, § 50.

In addition, Article XI, section 3 states:

> No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

Tex. Const. art. XI, § 3.

---

[4] The fees collected by sheriffs and constables are turned over to the county. 35 D. Brooks, County and Special District Law § 20.40 (Texas Practice 1989). Service fees are set by the commissioners court. § 118.131, Loc. Gov't Code.

services of a county constable or sheriff prior to a deposit for fees violates the constitutional prohibition against the extension of the credit of a county.

CONCLUSION

A district clerk is a ministerial officer who has no authority to perform acts not authorized or required of him by law. While the law provides that a clerk can require fees for services rendered before issuing any process, Tex. R. Civ. P. 17 states that an officer receiving process to be executed cannot receive his fee for service in advance. Therefore, Tex. R. Civ. P. 17 amounts to an extension of the credit of the county in violation of Tex. Const. art. III, § 52 and Tex. Const. art. XI, § 3.

WHEREFORE, this office requests your opinion on the above-referenced questions relating to the advance collection of service fees by a district clerk.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

DANA M. WOMACK
Assistant District Attorney
State Bar No. 21873900
401 West Belknap
Fort Worth, Texas 76196-0201
(817) 884-1233

dw:100694dw01.op

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 4, 1996

The Honorable Tim Curry
Criminal District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

Opinion No. DM-382

Re: Whether a district clerk may require an advance deposit of fees for service of process by a sheriff or constable; whether deferred collection of the fee for service of civil process by a sheriff or constable constitutes a loan of credit under article III, section 52, or article XI, section 3, of the Texas Constitution (RQ-757)

Dear Mr. Curry:

You have asked us whether a district clerk may require an advance deposit of fees for service of process by a sheriff or constable in a civil case. You note that Texas Rule of Civil Procedure 17 provides that the serving officer generally may not demand payment of the fee for service of process in a civil case, "but his fee shall be taxed and collected as other costs." You also note that Texas Rule of Civil Procedure 126 provides an exception to rule 17 when process is issued in a case pending in a county other than the county in which the sheriff or constable is to serve process. In that situation, the service fee must be paid in advance or a pauper oath must be on file in the case. Tex. R. Civ. P. 126. We do not consider that exceptional situation in this opinion.

Taxation of costs is "[t]he process of ascertaining and charging up the amount of costs and fees in an action to which a party is legally entitled, or which are legally chargeable." BLACK'S LAW DICTIONARY 1460 (6th ed. 1990). Rule 17 therefore requires that the service fee be ascertained and charged as a cost of court, not collected in advance. *See Rodeheaver v. Alridge*, 601 S.W.2d 51, 54 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.) ("there is no statutory authorization for the constable to require an advance deposit of fees for service of citation").

In addition, rule 17 requires that the fee be "collected as other costs." Texas Rule of Civil Procedure 149 provides for collection of costs by execution as follows:

> When costs have been adjudged against a party and are not paid, the clerk or justice of the court in which the suit was determined may issue execution, accompanied by an itemized bill of costs, against such party to be levied and collected as in other cases; and said officer, on demand of any party to whom any such costs are due,

the extension of credit to the party requesting service. While we agree that taxation and delayed compulsory collection of the fee for service of process amount to an extension of credit, we disagree with your assumption that a county necessarily "lend[s]" or "loan[s] its credit" whenever it extends credit to a vendee. It is our opinion that the Texas courts would hold that the mere fact that a county has sold goods or services for deferred payment does not mean that the county has "loan[ed] its credit" within the meaning of article XI, section 3, and that the authorization of such a practice by the Texas Supreme Court pursuant to legislative authority does not mean that the legislature has authorized a "county . . . to lend its credit . . . in aid of, or to any individual, association or corporation" within the meaning of article III, section 52. In short, we believe that a sale of goods or services for deferred payment is not a "loan of credit" as that phrase and similar phrases are intended in the constitution. We conclude that taxation and delayed compulsory collection of the fee for service of process is a mere extension of credit and so does not implicate the constitutional prohibitions against lending credit.

To explain our reasons for reaching this conclusion, it is appropriate first to consider other constitutional provisions that are complementary to section 52 of article III and section 3 of article XI. One provision, section 50 of article III, in the following language prohibits the State itself from lending its credit:

> The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

In a 1960 report to the legislature, the Texas Legislative Council explained that this section has substantially the same historical background as article III, section 49, which prohibits, with a few exceptions, the creation of State debt,[1] and that this section

---

[1]Section 49(a) provides:

> No debt shall be created by or on behalf of the State, except:
>
> (1) to supply casual deficiencies of revenue, not exceed in the aggregate at any one time two hundred thousand dollars;
>
> (2) to repel invasion, suppress insurrection, or defend the State in war,
>
> (3) as otherwise authorized by this constitution; or
>
> (4) as authorized by Subsections (b) through (f) of this section.

The framers borrowed section 49 verbatim from the Pennsylvania Constitution, except for the amount of the debt limitation (which was one million dollars in the Pennsylvania Constitution). Tex. Const. art. III, § 49 interpretive commentary.

McCarty does not establish a precedent that a mere extension of credit by the State is a loan of the State's credit. The *McCarty* court was not asked and did not consider this issue. "A decision is not authority upon a question not raised and considered in the case, although it may be involved in the facts." *United States v. Miller*, 208 U.S. 32 (1908). "[S]tare decisis [is] limited to questions raised and decided on full consideration." *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 298 (Tex. Civ. App.--Dallas, 1979), *rev'd on other grounds*, 601 S.W.2d 931 (Tex. 1980), *cert. denied*, 449 U.S. 1015 (1980). We therefore are not bound by an unstated assumption in that case.

Furthermore, having researched our prior opinions, we have found none that analyze the question of whether a credit sale of goods or services by the State or a political subdivision constitutes a loan of the credit of the State or its political subdivision. As the court did in *McCarty*, this office in prior opinions has assumed that such an extension of credit is a loan of the government's credit, but none of the opinions indicate that this office actually considered whether the assumption was correct. *See* Attorney General Opinions JM-1229 (1990), JM-749 (1987), JM-533 (1986), MW-461 (1982), No. 2996 (1937). We therefore must consider your question as one of first impression.

To ascertain the meaning of the constitutional prohibitions against giving, lending, or pledging credit, it is appropriate to consider "the history of the times" in which they were adopted, "the evils intended to be remedied, and the good to be accomplished." *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1012 (Tex. 1934). In a nineteenth century case, *City of Cleburne v. Gulf, C. & S.F. Ry.*, 1 S.W. 342 (1886), the Texas Supreme Court explained the historical background of section 3 of article XI as follows:

> Section 3 of article 11 of the constitution prohibits municipal corporations from making appropriations or donations or loans of its credit to private corporations. The object of this provision was to deprive municipalities of the power possessed by them under the constitution of 1869, in the exercise of which many counties and towns in the state assumed burdens not yet discharged, in anticipation of benefits never realized. The increase in population and values expected from railway connection in many instances never came; and the tax, not lightened from these sources, depressed values, prevented immigration, and became a curse to the localities which had invited it as a blessing. In localities in which the delusion had not been dissipated by experience, the people were still stimulated by false hopes and fraudulent assurances to make extravagant donations to coveted railroads. While the power lasted, corporate greed found local pride and ambition an open way to municipal revenues. The scheme was generally consummated by a contract, by which the railway company bound itself to construct its line through a county, or in a given distance of a town, in consideration of so many thousand dollars of negotiable bonds of the county or town. This section deprived municipalities of the power to

> manner be given or loaned to or in aid of any individual, association or corporation." A second type, almost as fashionable as the first, is a clause--referred to herein as the stock clause--which prohibits the state and political subdivisions from becoming stockholders in any corporation. These two provisions were a direct response to two common methods of providing public financial assistance to railroads. One method was public guaranty of railroad bonds, which in some instances took the form of an exchange of railroad bonds for governmental obligations, the latter then being sold on the market by the private corporation. In reality, the railroad was the principal debtor and the more attractive public credit was made available only to assist it in raising the necessary capital. As a variant of this procedure, there were instances of the donation of county and municipal bonds to railroad corporations. The credit clause was designed to eliminate these forms of financial aid to private enterprise. However, in the case of the political subdivisions, the other method--stock subscriptions--was by far the most common form of financial assistance. Typically railroad stock was exchanged for public bonds, the latter, of course, being duly sold by the corporation on the market. Even though the public stock subscriptions were almost universally financed by borrowing, the legislatures and courts of the time drew a clear distinction between an exchange of bonds for bonds, prohibited by the credit clause, and an exchange of public bonds for railroad stock, which was viewed as a form of joint venture in the business of railroading not prohibited by the credit clause. This distinction made necessary the stock clause as an additional constitutional safeguard against public financial assistance to the railroads.
>
> The credit and stock clauses, however, did not erect any barrier against loans or donations financed out of current taxation, or against gifts of land. A number of states, therefore, adopted additional prohibitions barring this type of aid, even though it did not occur in significant proportions. This third type of clause, somewhat less common than the credit and stock clauses, varies in wording from jurisdiction to jurisdiction. Pennsylvania's is typical in commanding the legislature not to authorize any political subdivision "to obtain or appropriate money for ... any corporation, association ... or individual."

David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 278-79 (1963) (footnotes

belief that history has proved to be frequently unwarranted. *Id.* The court concluded that the credit clause was intended to prohibit only the "delusion of suretyship" and therefore does not prohibit the undertaking of primary obligations:

> The ultimate cry of the surety is: I would not have become surety if I had known or believed that I should have to pay the debt. This is as true of states as of individuals. It was to remove this delusion of suretyship with its snare of temptation that this section of the Constitution was adopted. It withheld from the constituted authorities of the state *all power or function of suretyship.* It forbade the incurring of obligations by the indirect method of secondary liability. This is the field and the full scope of this section. It does not purport to deal with the creation of a primary indebtedness for any purpose whatever. That question was left to be dealt with in other sections. . . .
>
> We hold therefore, that the prohibition of section 1, art. 7, has no reference to the creation of a primary indebtedness.

Id.

Applying this understanding of the credit clause to the proposed state bond issue under the veterans bonus act, the court found no merit to the argument that the bond issue would be an unconstitutional loan of credit:

> It is urged that when the state borrows money upon its bonds for the purpose of paying the same to the beneficiaries of the act, it loans its credit to such beneficiary, because without the credit of the state the beneficiary could not obtain the money at all. The argument is not sound. The beneficiary is not a debtor all. He sustains no relation of liability to the bondholder either primary or secondary. The state recognizes the beneficiary as in the nature of a creditor to whom the state proposes to pay its recognized obligation. The state becomes debtor to the bondholder under a primary liability and not a secondary one. Neither legislator nor voter is beguiled by any delusion that the bonds will be paid by some one else as a primary debtor.

Id. at 533.

A broader construction of the credit clause--that "lending of credit" also occurs when the government incurs primary indebtedness--is found in several other cases.[5] For

[5]Decisions concluding that "loan of credit" or a similar phrase includes an assumption of primary liability as well as an assumption of secondary liability include the following: *Veterans' Welfare Board v. Jordan*, 208 P. 284 (Cal. 1922); *New York v. Westchester County National Bank*, 132 N.E. 241, 245 (N.Y. 1921) (issuance of state bonds and gift of proceeds to railroad corporation would be unconstitutional gift

debt for the benefit of private enterprises." *Id.* at 218. Thus, the court held, the investment of existing funds of the state in bonds, notes, and stock of private corporations did not violate the credit clause, "for no new State debts are created by such action." *Id.*

Another case applying the rule that a lending of credit requires the assumption of some kind of financial liability by the government is the Florida Supreme Court decision of *Nohrr v. Brevard County Educational Facilities Authority*, 247 So. 2d 304, 309 (1971). There the court upheld, against a credit-clause challenge, a state law "authoriz[ing] a board of county commissioners to establish a county educational facilities authority to issue revenue bonds for financing the construction of facilities for private higher educational institutions in the county," *id.* at 307. Having noted the statutory provision stating that the bonds "shall not be deemed to constitute a debt or liability of the state or of any such county, but Shall be payable solely from the funds herein provided therefor from revenues," *id.* at 307-08, the court applied the same rule as did the Idaho court in *Engelking*:

> The word 'credit,' as used in [the credit clause of Florida's constitution], implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.
>
> In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody. Neither the full faith and credit nor the taxing power of the State of Florida or of any political subdivision thereof is pledged to the payment of the principal of, or the interest on, these revenue bonds. The purchasers of the revenue bonds may not look to any legal or moral obligation on the part of the state, county, or authority to pay any portion of the bonds.

Id. at 309.

We have found no precedent for the construction of a credit clause as meaning that a state or a political subdivision lends its credit when it merely extends credit to another.[7]

---

[7]We did, however, find one case that discusses the possibility that a sale on credit in certain circumstances might constitute a prohibited loan of credit. That case, *Washington ex rel. O'Connell v. Public Utility District No. 1*, 469 P.2d 922 (Wash. App. 1970), *rev'd on other grounds*, 484 P.2d 393 (Wash. 1971), discussed the following passage from *Washington Natural Gas Co. v. Public Utility District No. 1*, 459 P.2d 633 (Wash. 1969) (en banc): "The municipality, we think, may, consistent with efficient management, sell and deliver electrical energy to its citizens and customers on short term credit as long as this procedure does not allow the customer to convert this concession into a profitable hypothecation of credit with third persons." *Id.* at 639, *quoted in Washington ex rel. O'Connell*, 469 P.2d at 927. The court explained its understanding that "[a] 'profitable hypothecation of credit' connotes to us the concept of a risk-taking use of another's good name. If a concession can be converted into a profitable hypothecation of credit, it would seem to follow that an unprofitable hypothecation of that credit might also result from the concession granted." 469 P.2d at 927-28. You do not suggest any circumstances that

accumulated charges is just such an extension of the state's credit which is constitutionally proscribed." Attorney General Opinion MW-461 (1982) at 3.

In Attorney General Opinion JM-533, this office was asked whether a county clerk may maintain credit accounts for fees due. The attorney general noted that the phrases "lend its credit," as found in article III, section 52; "loan its credit," as found in article XI, section 3; and "lending of the credit," as found in article III, section 50, "appear to have the same meaning." Attorney General Opinion JM-533 (1986) at 3. The attorney general then quoted the following passage from page 225 of George D. Braden's *The Constitution of the State of Texas: An Annotated and Comparative Analysis* (1977):

> Section 50 states that the legislature may not "give" the credit of the state to anybody, "lend" the credit of the state to anybody, or "pledge" the credit of the state for anybody. . . . This is an involved and somewhat imprecise way of saying that the state may not aid anybody by lending him money; by providing him land, goods, or services on credit; or by guaranteeing payment to a third party who aids anybody by lending him money or providing him land, goods, or services on credit.

Id. at 2 (emphasis added). This office also cited an 1889 Texas Supreme Court case, *City of Cleburne v. Brown*, 11 S.W. 404, as holding that a city would "loan its credit" in violation of article XI, section 3, by accepting a proposed corporation's bonds in payment for its transfer of its waterworks to the corporation. The attorney general concluded:

> In the light of the City of Cleburne holding, we believe the proscriptions of article III, section 52, and article XI, section 3, mean that county officers are not authorized -- and cannot be authorized -- to deliver county services to individuals, associations or corporations on credit unless some other provision of the constitution authorizes it [sic] to do so.

Attorney General Opinion JM-533 (1986) at 3. We note that the emphasized language quoted above from *The Constitution of the State of Texas* cites no authority and that we find no other case citing *City of Cleburne* as authority for the rule stated as the holding of that case in Attorney General Opinion JM-533.[9]

---

[9]The opinion in *City of Cleburne*, we believe, involved more than a mere extension of credit. The controlling fact the court noted in concluding that the transfer of the city's waterworks to a proposed corporation "would have amounted to nothing more than a loan by the city of Cleburne of its credit to the proposed corporation" was that "[t]he agreement entered into does not define the powers, nor state the amount of capital, of the proposed corporation." *City of Cleburne*, 11 S.W. at 405. Thus, the proposed corporation might have been undercapitalized and consequently might have defaulted in payment of its operating costs, leaving the city with the burden of paying off the corporation's creditors.

SUMMARY

A district clerk is not authorized to require an advance deposit of fees for service of citation in a case pending in the county in which the sheriff or constable is to serve process. The requirements in the rules of civil procedure that fees for service of process by a sheriff or constable be taxed as costs and that such costs be collected by execution only after judgment do not constitute a lending of credit or a grant of a thing of value in violation of the Texas Constitution. We disapprove of Attorney General Opinions No. 2996, MW-461, JM-533, JM-749, and JM-1229, and any other prior opinions of this office insofar as they state or imply that a mere credit sale of goods or services by the State or one of its political subdivisions violates the credit clauses of the constitution.

Yours very truly,

Dan Morales

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRLEY
Chair, Opinion Committee

Prepared by James B. Pinson
Assistant Attorney General

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done 9/4/96

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August 27, 1996

xc Terrian Tratte
Judge Gilbert Hinojosa
Judge Noah Kennedy
Chas Sullivan

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Phillips:

The Court Rules Committee has recently completed its work on a proposed amendment to Rule 18a, Recusal or Disqualification of Judges, and I am enclosing herewith the Court Rules Committee's proposal for the Supreme Court's consideration.

By copy of this letter, I am sending a copy of this to Luke Soules, Chairman of the Supreme Court Advisory Committee.

The court's consideration of this proposed amendment would be appreciated.

Sincerely,

By: O. C. Hamilton, Jr.

OCH/sam
Enclosure

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

STATE BAR OF TEXAS
COURT RULES COMMITTEE
REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing rule:

RULE 18a. RECUSAL OR DISQUALIFICATION OF JUDGES

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

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

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

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

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

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

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

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

II. Exact wording of proposed Rule:

RULE 18a. RECUSAL OF JUDGES

(a) ~~At least ten days~~ Upon discovery of grounds for recusal, as soon as practicable, before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the Court of Appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should ~~not sit in the case~~ be recused. ~~The grounds may include any disability of the judge to sit in the case.~~ The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

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

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

(d) If the judge declines to recuse himself or herself, ~~he~~ the clerk with whom the motion is filed shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, ~~an order of referral~~, the motion and all opposing and concurring statements. Once the motion has been filed, the judge has no authority to rule on the procedural or substantive merits of the motion except to recuse or not to recuse. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall initially determine whether the motion is procedurally proper and whether the movant has set forth a prima facie showing of good cause to recuse. If the motion is procedurally proper and a prima facie showing of good cause has been found, the presiding judge of the administrative judicial district shall immediately set a hearing before himself or herself or some other judge designated by him or her, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require. If the motion is not procedurally proper or if the movant has not set forth a prima facie showing of good cause, the presiding judge of the administrative judicial district may deny the motion to recuse without a hearing.

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

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

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

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

III. Purpose of the Proposed Change:

(a) to make the process more efficient by allowing the presiding judge of the administrative judicial district to summarily dispose of frivolous motions

(b) to make the system more impartial and reduce the perception of possible impropriety

12/4/96
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cc: HS
orig: hhd

MEMORANDUM

HHD, Scope Agenda Subcommittee Staff ✓ J. Kelly

TRCP 21 173 177b 181 329b

TO: Members of the Court Rules Committee

FROM: Patrick Hazel, Subcommittee Chair

DATE: December 3, 1996

SUBJECT: Rules 21, 173, 177b, 181, and 329b.

Three members (named below) of the Subcommittee on "Hearings on Appointment of Guardian ad Litem, Motion for New Trial/Appealabliity, and Three Day Notice of Motions" met by telephone conference on December 2, 1996.

A version making certain amendments to the above rules was first circulated for discussion. The results of our discussion are noted following each of the amendments.

In summary we recommend passage of the recommended amendments to Rules 21, 173, 177b, and 181. We do not recommend passage of the amendments to Rule 329b. This needs a lot more discussion and, perhaps, some sort of research to determine whether a large problem exists and, if so, what the best way to resolve it might be.

Subcommittee members who discussed the proposals:

J. Patrick Hazel

Janet Spielvogel

Bill Cox

THANKS

CONSIDERATIONS FOR AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE

RULE 21. FILING AND SERVING PLEADINGS AND MOTIONS

(paragraph 1 - no changes)

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days, not including the date of service, Saturdays, Sundays, and legal holidays, before the ~~time~~ date specified for the hearing unless otherwise provided by these rules or shortened by the court.

(paragraphs 3, 4, and 5 - no changes)

COMMENT: This provision really is not new. It simply incorporates what is already provided in Rule 4. Its inclusion is for the purpose of clarity. The only change is the deletion of "time" and substitution of "date." Again, the purpose is clarity. Service made on Monday would preclude any hearing before Friday; service on Tuesday would preclude any hearing before Monday; service on Wednesday would preclude any hearing before Tuesday; service on Thursday would preclude any hearing before Wednesday; and service on Friday would preclude any hearing before Thursday. These assume no legal holiday on any of the interim days.

her son's questions regarding his family background is enough to establish a genuine issue of material fact, thereby precluding summary judgment. *See Nixon*, 690 S.W.2d at 548–49.

The ruling on the summary judgment was improper because the child was not represented in the prior suit as a party or by counsel, and because Purcell did not meet his burden of establishing that the child did not have separate interests in bringing his own action to establish paternity. Because we will reverse the ruling of the trial court under the two sub-points already addressed, there is no need for us to consider Bellinger's constitutional arguments.

The judgment of the trial court is reversed and the case is remanded for further proceedings.

TRCP 21a.

GRACO ROBOTICS, INC., Appellant,

v.

OAKLAWN BANK, Appellee.

No. 06-94-00120-CV.

Court of Appeals of Texas, Texarkana.

Submitted Aug. 29, 1995.

Decided Dec. 28, 1995.

Rehearing Overruled Feb. 20, 1996.

Equipment supplier brought action against bank for breach of escrow agreement executed to ensure supplier's payment for construction work at army depot, breach of fiduciary duty, fraud, negligence, negligent misrepresentation, and conversion. The Fifth Judicial District Court, Bowie County, Jack Carter, J., rendered take-nothing judgment. Supplier appealed, and bank assigned cross-points. The Court of Appeals, Cornelius, C.J., held that: (1) supplier was entitled to judgment for damages resulting from bank's breach of escrow agreement by failing to preserve funds until payment obligation arose, despite jury's finding that conditions precedent for bank's obligation to perform had not occurred; (2) trial court did not abuse its discretion in declining to allow bank to withdraw deemed admissions regarding escrow agreement; (3) supplier had not waived bank's deemed admissions; (4) supplier did not pursue inconsistent remedy by obtaining judgment in Michigan suit brought against contractor and guarantor, even though both suits dealt with funds from construction project; and (5) bank was entitled to set-off based upon amount that supplier had recovered on Michigan judgment against contractor.

Reversed and judgment rendered.

1. Assignments ⇐22

Litigant may assign his claim or interest in pending action. V.T.C.A., Property Code § 12.014.

2. Assignments ⇐120

Although assignor may not maintain in his own right a claim he assigned after suit is brought on it, assignee may maintain suit in assignor's name, and assignee is not even a necessary party.

3. Assignments ⇐120

Statute providing that assignment may be made and that record of it may be filed with papers of case does not change general rule that assignee may maintain suit in assignor's name and that assignee is not even a necessary party. V.T.C.A., Property Code § 12.014.

4. Assignments ⇐117

Even if plaintiff had assigned all its rights and interest in cause of action to third party after suit was filed, dismissal of action was not required.

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5. Deposits and Escrows ⇐24.1

Beneficiary of escrow agreement was entitled to judgment for damages resulting from bank's breach of agreement by failing to preserve funds until payment obligation arose, even though, in addition to finding that

bank breached agreement, jury also found that conditions precedent to bank's obligation to perform had not occurred; conditions in question referred to bank's payment obligation, not to its obligation to preserve escrow funds.

6. Trial ⇐358

In reviewing jury findings for conflict, threshold question is whether findings concern same material fact.

7. Trial ⇐358

Court may not strike down jury answer on ground of conflict if there is any reasonable basis on which apparently conflicting answers can be reconciled.

8. Trial ⇐358

Court must reconcile apparent conflicts in jury's findings if reasonably possible in light of pleadings and evidence, manner of submission, and other findings considered as whole.

9. Trial ⇐358

When issues admit of more than one reasonable interpretation, that interpretation which avoids conflict in jury's answers is generally adopted.

10. Deposits and Escrows ⇐16

"Conditions precedent" under escrow agreement were not conditions precedent to any liability of bank under agreement, but were merely conditions for payment, since bank had other contractual duties under agreement, notably preserving the escrow funds, that is, not paying them out until authorized by agreement.

See publication Words and Phrases for other judicial constructions and definitions.

11. Contracts ⇐221(2)

True "conditions precedent" are conditions that must occur in order for contract itself to come into effect or for obligation to arise.

12. Contracts ⇐318, 321(1)

When party materially breaches contract, nonbreacher may treat contract as ended and cease performance, and nonbreacher may then sue for benefit of bargain.

13. Contracts ⇐321(1)

When party to contract fails to perform his obligation, he may not thereafter enforce remaining terms of contract.

14. Contracts ⇐279(1)

When one of parties to contract refuses to perform duties and obligations required of him, other party need not perform useless act of tendering performance.

15. Deposits and Escrows ⇐24.1

When bank, which was escrow agent under agreement executed to ensure equipment supplier's payment for construction work at army depot, let contractor have first monies paid for supplier's work, supplier was entitled to treat escrow agreement at an end and sue for breach.

16. Contracts ⇐278(1), 279(1)

Repudiation or breach by one party entitles the other to damages without performing or tendering performance of acts that would otherwise have been conditions precedent.

17. Contracts ⇐173

Mutual conditions will be considered dependent rather than independent unless contrary intention clearly applies.

18. Contracts ⇐154

Language of contract will be given reasonable construction, if possible, rather than unreasonable construction.

19. Contracts ⇐154

When contract is susceptible to more than one construction, court will adopt the one that is rational, reasonable, and probable, and that will result in contract that prudent parties would naturally adopt.

20. Deposits and Escrows ⇐11

Purpose of escrow arrangement is to preserve funds so they will be available for disbursement when payment is authorized.

21. Deposits and Escrows ⇐13, 24.1

Under escrow agreement executed to ensure equipment supplier's payment from contractor for construction work at army depot, bank had no duty to pay out funds until supplier met conditions; however, as soon as

it signed escrow contract, bank had duty to preserve funds and hold them until payment to vendors was authorized, and supplier was entitled to treat contract as ended and sue for benefit of bargain when bank reached contract by not performing its duties.

22. Pretrial Procedure ⇐483

Requested admissions are deemed admitted unless, within 30 days after service of request, party to whom request is directed serves written answer or objection. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

23. Pretrial Procedure ⇐486

Court may permit withdrawal of deemed admissions on showing of good cause if it finds that party relying on deemed admissions will not be unduly prejudiced and that presentation of merits of action will be subserved thereby. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

24. Pretrial Procedure ⇐486

Trial court has broad discretion in deciding whether to allow withdrawal of deemed admissions. Vernon's Ann.Texas Rules Civ. Proc., Rule 169, subd. 1.

25. Appeal and Error ⇐961

Trial court's ruling on whether to allow withdrawal of deemed admissions will be set aside only if there is clear abuse of discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

26. Appeal and Error ⇐946

Court abuses its discretion when it acts without reference to guiding rules or principles or acts arbitrarily or unreasonably.

27. Pretrial Procedure ⇐486

Trial court did not abuse its discretion in finding that equipment supplier would be unduly prejudiced by bank's withdrawal of its deemed admissions regarding existence of escrow agreement and bank's status as escrow agent for supplier, and, thus, trial court properly declined to allow withdrawal, where supplier would have to go back and try to develop evidence some five years after the fact upon withdrawal. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

28. Pretrial Procedure ⇐483

Equipment supplier did not waive bank's deemed admissions regarding authenticity of escrow agreement and genuineness of signatures when bank officer testified during equipment supplier's cross examination, without objection by supplier, that he did not know whose signature was on document, since that statement was not explicit denial that signature belonged to officer, and, thus, it did not put supplier on notice that bank was controverting authenticity of document. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

29. Pretrial Procedure ⇐483

Equipment supplier did not waive bank's deemed admission that bank acted as escrow agent for supplier by introducing copy of escrow agreement identifying entity entitled to bank payment with name applicable to both supplier and its parent corporation; other miscellaneous suggestions about usage of that name were not clear enough to constitute waiver, since they simply might be casual usages by parties familiar with both entities. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

30. Pretrial Procedure ⇐483

Equipment supplier did not waive bank's deemed admissions regarding escrow agreement with supplier by not objecting to evidence that showed that contracting party paid money to bank pursuant to assignment and not escrow agreement; merely because contracting party might have been operating pursuant to assignment did not mean that bank was not bound by escrow agreement once it received the money. Vernon's Ann.Texas Rules Civ.Proc., Rule 169, subd. 1.

31. Election of Remedies ⇐1, 14

"Election of remedies" is active choosing between inconsistent but coexistent modes of procedure and relief allowed by law on same set of facts; when party chooses to exercise one of them, it abandons right to exercise the other and is precluded from resorting to it.

See publication Words and Phrases for other judicial constructions and definitions.

32. Election of Remedies ⇐3(4)

Election of remedies bar does not apply to assertion of distinct causes of action against different persons arising out independent transactions which such persons.

33. Election of Remedies ⇐3(4)

Equipment supplier which was currently suing bank for breach of escrow of agreement had not elected to pursue inconsistent remedy by obtaining judgment in suit against contractor, even though both contract between contractor and supplier and escrow agreement between bank and supplier dealt with funds from construction project; at most, separate suits meant that if supplier had collected contract damages from contractor it might have difficulty proving contract damages with bank.

34. Damages ⇐15

Plaintiff may obtain only one recovery for same injury.

35. Damages ⇐63

Equipment supplier's receipt of mortgage following judgment against contractor and guarantor did not provide basis for credit to escrow agent on judgment recovered by supplier against escrow agent, where owner of real estate subject to mortgage was not able to deed land to supplier in lieu of foreclosure because of preexisting encumbrances, and, thus, supplier had recovered only a mortgage of indefinite value.

36. Damages ⇐63

Escrow agent was entitled to set-off on equipment supplier's judgment against it based on supplier's collection of $19,500 on its judgment against contractor, since supplier could receive only one recovery for its injury, and its breach of contract suit against contractor dealt with same funds as escrow suit.

37. Damages ⇐63

Mortgage lien that equipment supplier received following judgment against contractor and guarantor could not be used as basis to set off judgment against escrow agent in separate suit, where there was no indication that law of Michigan, under which judgment against contractor and guarantor was entered, would consider that lien would satisfy judgment, and there was no evidence that supplier accepted that lien in satisfaction of debt.

38. Judgment ⇐890

Levy on land is not a satisfaction of judgment; judgment debtor, notwithstanding levy, holds title and possession and is in enjoyment of land's profits.

39. Execution ⇐145

Title to land does not pass by levy.

40. Judgment ⇐890

Judgment is not satisfied until sale of land, despite earlier levy on land.

41. Judgment ⇐875

Generally, judgment for payment of money can be satisfied only in money, unless judgment's owner accepts some other thing of value, such as mortgage on debtor's property.

42. Judgment ⇐883(1)

Procedural law of Texas as forum state controlled when plaintiff wished to use lien arising out of Michigan judgment as set-off against Texas judgment.

43. Evidence ⇐80(1)

Without proof that Michigan law differed from Texas law in regard to whether lien satisfies judgment, Texas court would presume that Michigan law was the same as Texas law.

44. Interest ⇐39(2.6), 60

Prevailing plaintiff may recover prejudgment interest compounded daily, based on 365–day year, on damages that have accrued by time of judgment. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

45. Interest ⇐31, 39(2.30)

General rule that prejudgment interest accrues at prevailing rate that exists on date that judgment is rendered applies to actions for breach of contract where amount of damages is not ascertainable from contract's face. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

46. Interest ⇐39(2.30)

Damages accrue from date of injury to date of judgment, for purposes of equitable prejudgment interest in action for breach of contract when amount of damages is not ascertainable from contract's face. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

47. Interest ⇐31, 39(2.10)

Trial court has no discretion about decision to award prejudgment interest or rate of prejudgment interest. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

48. Interest ⇐39(2.20), 60

Equipment supplier was entitled to prejudgment interest from escrow agent compounded daily from time that damages accrued to date of judgment, where damages could not be determined from escrow agreement's face, but, rather, jury had to use evidence about how much money contracting party paid to escrow agent and how much supplier invoiced the escrow agent. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

49. Appeal and Error ⇐1178(1)

Ordinarily, when Court of Appeals cannot tell when damages accrued, Court remands cause to trial for determination of that question.

50. Appeal and Error ⇐1178(1)

Remand was not required for determination of when damages accrued to beneficiary of escrow agreement, where beneficiary only sought interest from date that contractor gave escrow agent authorization to release $550,000 to beneficiary, beneficiary had been injured by that date as matter of law, and, although it was probable that injury occurred before that date, beneficiary did not seek prejudgment interest from date of actual injury. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

51. Interest ⇐39(2.6)

Equitable exception to prejudgment interest scheme is not needed based on party's failure to vigorously pursue its claim since, if party unnecessarily delays resolution of case, other party has several methods to force case to trial, such as objecting to granting of continuances, objecting to passing of case, and moving for special trial setting. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

52. Interest ⇐39(2.6)

Pecuniary and nonpecuniary damages subject to prejudgment interest do not include attorney fees. Vernon's Ann.Texas Civ.St. art. 5069–1.05, § 2.

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John R. Mercy, Atchley, Russell, Waldrop, Texarkana, for appellee.

Before CORNELIUS, C.J., and BLEIL and GRANT, JJ.

OPINION

CORNELIUS, Chief Justice.

GRI sued Oaklawn for breach of an escrow agreement executed to ensure GRI's payment for construction work at Red River Army Depot. GRI alleged that the bank breached the escrow agreement, breached its fiduciary duty, and committed fraud, negligence, negligent misrepresentation, and conversion. The jurors found that the bank breached the contract and committed some of the torts. Because the jurors also found that conditions precedent to the bank's performance had not occurred, and because they found no tort damages, the trial court rendered a take-nothing judgment.

GRI appeals, alleging that the trial court erred: in rendering a take-nothing judgment on the breach of contract claim based on the jurors' findings that the bank breached the contract, but that the conditions precedent had failed to occur; in rendering a take-nothing judgment on the tort issues because GRI proved tort damages as a matter of law and because the jurors' finding of no tort damages was against the great weight and preponderance of the evidence; by instructing a verdict against GRI on its conversion claim; and in admitting in evidence deposition testimony taken in another lawsuit.

Oaklawn Bank has assigned cross-points, alleging that the court erred: in denying its motion to withdraw deemed admissions; in finding that the deemed admissions established the existence of a valid escrow agreement because evidence controverting the admissions was introduced without objection at trial; in not granting the bank a judgment because GRI elected to pursue an inconsistent remedy by obtaining a judgment on the same claim in Michigan; and by failing to give the bank a $419,000.00 credit on any judgment in this case because GRI had previously received that sum in satisfaction of its damages.

We reverse the judgment and render judgment for GRI.

The U.S. Army contracted with Mahon, Inc. of Saginaw, Michigan to build a $2.6 million vehicle paint booth and curing oven at Red River Army Depot near Texarkana. John Frimberger was Mahon's principle owner. Walter House, Red River project engineer, designed the project and administered the contract. The project was to have a manual conveyor line, Line A, and a robotic conveyor line, Line B. Throughout 1985 and 1986, Mahon worked with Graco, Inc., of Minneapolis, Minnesota, and Graco Robotics, Inc., a subsidiary owned eighty percent by Graco, Inc. GRI, having never worked with Mahon, requested that an escrow agreement be executed making the bank the escrow agent to receive and pay out the payments to be earned. GRI submitted a draft of the escrow agreement to Mahon, which passed it on to the bank. The bank says it made significant changes in the draft agreement, compiled a Schedule A that listed all the vendors that would be subject to the agreement, and then sought approval from all the vendors. This draft agreement was signed September 25, 1985, by bank officer Gary McCauley and by Frimberger. The bank argues that the escrow agreement never took effect because not all of the vendors approved it. Because of deemed admissions, however, the court found that the escrow agreement became effective on July 26, 1985.

Mahon assigned all its contract payments to the bank. The escrow agreement set this procedure for release of funds: Red River would send contract payments to the bank. Vendors would present to Mahon invoices corresponding to the payments set out in Schedule A. Mahon would present to the bank and the vendors written approval for the payments. The bank was to then pay the vendors and itself by cashier's check as set out in Schedule A. Schedule A listed Graco's payment schedule as follows:

Line A—pumping equipment payable within 30 days after acceptance by Red River Army Depots (sic) Project Engineer.

Line A $120,000.00

Line B—pumping equipment payable within 30 days after acceptance by Red River Army Depots (sic) Project Engineer.

Line B $602,500.00

During the first half of 1986, GRI installed equipment at Red River. Between April and July 1986, GRI invoiced Mahon for $650,250.00, in two installments. The bank never paid GRI because it contended that Red River never accepted the work as required by Schedule A of the escrow agreement. From July 1985 to September 1986, Red River sent contract payments to the bank as escrow agent, and the bank placed them in two accounts in the name of Mahon, Inc. The funds were never escrowed. Instead they were disbursed, some by cashier's check to vendors listed on the bank's list of vendors, and some to other parties not identified as vendors. Some of the funds were transferred directly to Mahon, either to a money market checking account at Oaklawn or to a Mahon account in Michigan. When McCauley, for the bank, received checks from Red River, he simply deposited them in the two accounts in Mahon's name and then disbursed them on instructions from Frimberger or someone else at Mahon. 3RD00149

In September 1986, after GRI had delivered most of the required equipment, it still had not been paid. Graco, Inc.'s chief financial officer, Roger King, went to Texarkana in October to meet with bank officials. He discovered that the bank had already disbursed the contract funds. GRI then removed some computer boards from the equipment at Red River to disable the equipment; in effect, it walked off the job. That

ne month, King and Frimberger met to discuss GRI's return to the project. Mahon paid GRI approximately $100,000.00. King told Mahon to rescind its assignment of funds to the bank and to execute a new assignment for the remaining funds available under the contract, about $200,000.00 in retainage. King prepared and Frimberger signed three letters, dated October 15, 1986. The first directed the bank to pay to GRI all amounts held by the bank under that agreement. The second, which King cosigned, directed the bank to account for Red River money it received pursuant to Mahon's assignment. The third, with an interlineation reflecting Mahon's direct payment of $100,000.00 to GRI, directed the bank to pay $550,250.00 pursuant to GRI's invoices of April 25, 1986 and July 17, 1986. King on October 21, 1986, on Graco, Inc.'s letterhead, mailed these three letters to the bank. In November 1986, the bank placed a hold on Mahon's account and informed GRI it would forward all future deposits to GRI. GRI received no more funds.

In January 1987, GRI sued Mahon and its guarantor, Genevieve Frimberger, in Michigan. The Michigan court gave GRI permission to sue Oaklawn Bank in Texas, and it brought suit in April of 1987, alleging breach of contract and various torts. The case was tried to a jury in late May 1994. At the close of GRI's case in chief, the court granted directed verdicts for the bank on various causes of action, including conversion. GRI requested one jury question, which the court denied, before the court submitted the charge to the jury.[1]

Because of deemed admissions, the court considered the escrow agreement effective as a matter of law. The jurors found that the bank breached the contract, that $550,250.00 would compensate GRI for its contract damages, and that $280,000.00 was a reasonable attorney's fee, but that conditions precedent to the bank's obligation to perform under the escrow agreement failed to occur. The jurors also found for GRI on the questions of breach of fiduciary duty, fraud, negligence, and negligent misrepresentation, but found no damages.

As a threshold matter, we determine if the bank's motion to dismiss should be granted for the reason that after the suit was filed GRI allegedly assigned all of its rights and interests in the cause of action to Graco, Inc. There was testimony that such an assignment had been made, but no assignment was offered in evidence.

[1-4] A litigant may assign his claim or interest in a pending action. TEX.PROP.CODE ANN. § 12.014 (Vernon 1984 & Supp.1996). Although an assignor may not maintain in his own right a claim he assigned after suit is brought on it, the assignee may maintain the suit in the assignor's name, and the assignee is not even a necessary party. *Texas Machinery & Equip. Co. v. Gordon Knox Oil & Exploration Co.*, 442 S.W.2d 315 (Tex.1969); *Ferguson-McKinney Dry Goods Co. v. Garrett*, 252 S.W. 738 (Tex.Comm'n App.1923, judgm't adopted); *see also Bay Ridge Util. Dist. v. 4M Laundry*, 717 S.W.2d 92 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Fort Worth & Denver Ry. Co. v. Ferguson*, 261 S.W.2d 874 (Tex.Civ.App.—Fort Worth 1953, writ dism'd). The rule is not changed by TEX.PROP.CODE ANN. § 12.014. That statute simply provides that an assignment may be made and that a record of it may be filed with the papers of the case. *See Mitchell, Gartner & Thompson v. Young*, 135 S.W.2d 308, 311 (Tex.Civ.App.—Fort Worth 1939, writ ref'd) (relating to predecessor statute). Nor does the holding in *River Consulting, Inc. v. Sullivan*, 848 S.W.2d 165 (Tex.App.—Houston [1st Dist.] 1992, writ denied), conflict with the rule. The rule applied in that case was that after an assignment the assignor may not bring or maintain suit in *its own right*. Moreover, the case of *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470 (Tex.Civ.App.—Texarkana 1978, no writ), involved an assignment *before* suit was brought. Thus, this case is properly maintained, and the motion to dismiss is overruled.

1. At a hearing on GRI's motion for new trial on August 15, 1994, GRI tried unsuccessfully to offer jury questions and instructions. GRI ultimately filed the questions and instructions with the court on October 11, 1994.

[5] The trial court submitted Question No. 1 in which it asked the jurors, "Did Oaklawn Bank fail to comply with the Escrow Agreement of July 26, 1985?" The jurors answered "Yes." The court also submitted Question No. 11, which read:

> Have the conditions precedent to Oaklawn Bank's obligation, if any, to perform under the escrow agreement occurred:
>
> Conditions precedent to an obligation to perform are acts or events that are to occur after the contract is made and that must occur before there is a right to immediate performance and before there can be breach of contractual duty.
>
> The conditions precedent under the escrow agreement are:
>
> a. Proceeds from the contract between Mahon, Inc. and Red River Army Depot must be delivered to Oaklawn Bank before any disbursement of payments;
>
> b. Graco identified in Schedule A of the escrow agreement must present to Mahon, Inc. invoices that correspond to payments as set forth in Schedule A;
>
> c. Mahon, Inc. must present to Oaklawn Bank written approval for payment;
>
> It is your duty to interpret the following language of the agreement:
>
> "... acceptance by Red River Depots (sic) project Engineer."
>
> You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties. Any doubts as to the meaning must be resolved against the party who selected the language
>
> Answer "Yes" or "No"
>
> Answer: NO

GRI contends that the jurors' answer to Question No. 1 entitled it to judgment. It also argues that all the conditions were met as a matter of law, so the answer to Question No. 11 is immaterial. It further argues that the court erred in even submitting, and in then failing to disregard, Question No. 11 because the question misapplies the law of contract, since the bank's prior breach of the escrow agreement excused GRI's lack of compliance. Moreover, it argues the jury findings are in irreconcilable conflict because the breach of contract finding presupposes the satisfaction of any conditions precedent. It also complains because the court erred in overruling its request to include all conditions precedent in Question 1.

[6-9] In reviewing jury findings for conflict, the threshold question is whether the findings concern the same material fact. *Bender v. Southern Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex.1980). A court may not strike down a jury answer on the ground of conflict if there is any reasonable basis on which the apparently conflicting answers can be reconciled. *Id.* The court must reconcile apparent conflicts in a jury's findings if reasonably possible in light of the pleadings and evidence, manner of submission, and other findings considered as a whole. *Id.* Where the issues admit of more than one reasonable interpretation, that which avoids a conflict in the answers is generally adopted. *Id.*

The jurors found that the bank breached the escrow agreement, but also found that the conditions precedent to performance had not occurred. The trial court found no conflict in those answers because, although the bank failed to comply (Question No. 1), it was not obligated to comply (Question No. 11).

[10, 11] A better construction of the escrow agreement, however, is that the "conditions precedent" are not conditions precedent to any liability under the escrow agreement, but are merely conditions for payment.[2] The bank had other contractual duties under the escrow agreement, notably preserving the escrow funds, that is, not paying them out until authorized by the agreement. The jurors may have found that, although GRI had not met the conditions for the bank to pay GRI, the bank failed to comply with its obligation to preserve the funds. The bank, in

2. True conditions precedent are conditions that must occur in order for the contract itself to come into effect or for an obligation to arise.

fact, did not release the funds in accordance with the agreement. It did not pay vendors with cashier's checks and did not require written payment orders from Mahon. At times, it paid funds directly to Mahon.

GRI also argues that the bank's material breach in not disbursing money in accordance with the agreement allowed GRI to consider the contract at an end and, instead of performing under the contract, sue for the benefit of the bargain.

[12–14] When a party materially breaches a contract, the nonbreacher may treat the contract as ended and cease performance. *Morgan v. Singley*, 560 S.W.2d 746, 748 (Tex.Civ.App.—Texarkana 1977, no writ). The nonbreacher may then sue for the benefit of the bargain. *El Paso & S.W. R. Co. v. Finkel & Weikel*, 186 S.W. 922, 940 (Tex.Civ.App.1910, writ ref'd), *appeal dism'd*, 226 U.S. 590, 33 S.Ct. 179, 57 L.Ed. 369 (1913). When a party to the contract fails to perform his obligation, he may not thereafter enforce the remaining terms of the contract. *Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 447 (Tex.App.—Texarkana 1993, writ denied). Where one of the parties refuses to perform the duties and obligations required of him, the other party need not perform the useless act of tendering performance. *Laredo Hides Co. v. H & H Meat Prods. Co.*, 513 S.W.2d 210, 220 (Tex.Civ.App.—Corpus Christi 1974, writ ref'd n.r.e.).

[15] The jurors found that the bank breached the escrow agreement. The bank breached the agreement when it failed to preserve contract moneys for GRI. The breach may have occurred in July 1985, when the bank improperly paid escrow moneys to Mahon. The breach also could have occurred in May 1986, when the bank let Mahon have the first moneys paid for Graco Robotic's work. At this point, GRI was entitled to treat the agreement at an end and sue for breach. *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 247 (Tex.App.—Amarillo 1994, no writ).

[16, 17] The bank claims that GRI's argument confuses the doctrine of excusing performance of mutually dependent covenants, *Morgan v. Singley*, 560 S.W.2d at 749, with the affirmative defense of waiving the performance of conditions precedent, *Ames v. Great Southern Bank*, 672 S.W.2d 447, 449 (Tex.1984). The rule regarding mutual covenants, however, applies with equal force to conditions precedent. A repudiation or breach by one party entitles the other to damages without performing or tendering performance of acts that would otherwise have been conditions precedent. 4 CORBIN ON CONTRACTS § 977 (1951), and cases there cited. And mutual conditions will be considered dependent rather than independent unless the contrary intention clearly appears. *Price v. Appalachian Resources Co.*, 496 S.W.2d 136 (Tex.Civ.App.—Tyler 1973, no writ).

[18, 19] The language of a contract will be given a reasonable construction, if possible, rather than an unreasonable construction. *National Sur. Corp. v. Western Fire & Indem. Co.*, 318 F.2d 379, 386 (5th Cir.1963). Where a contract is susceptible to more than one construction, the court will adopt the one that is rational, reasonable, and probable, and that will result in a contract that prudent parties would naturally adopt. *Id.*

[20, 21] The effect of the trial court's construction of the contract is that the bank had no duty to perform until GRI met the conditions, i.e., that the bank did not even have a duty to preserve the escrowed funds until after GRI met the conditions for payment. But to hold there was no obligation to preserve the funds until payment of the funds was authorized would render the escrow agreement meaningless. The very purpose of an escrow arrangement is to preserve the funds so they will be available for disbursement when payment is authorized. A more reasonable construction of the escrow agreement here is that the bank had no duty to pay out the funds until GRI met the conditions, but that as soon as it signed the escrow contract it had a duty to preserve the funds and hold them until payment to the vendors was authorized. When it breached the contract by not performing its duties, GRI was entitled to treat the contract as ended and to sue for the benefit of the bargain.

The bank argues that to impose a preservation obligation on it in favor of GRI would conflict with *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex.1969), in which the court held that in the absence of a written escrow agreement the escrow agent owes a fiduciary duty of preservation only to the funds' owner, here Mahon, and thus the bank owed no preservation duty to GRI. This case, however, deals not with breach of fiduciary duty but with breach of a written contract, entered into specifically for GRI's benefit.

In summary, although the jurors found that conditions for the bank's obligation to perform had not occurred, those conditions referred to the bank's payment obligation, not to its preservation obligation. As the bank breached the agreement by failing to preserve the funds until the payment obligation arose, GRI was entitled to judgment for damages resulting from the breach.

In other points of error GRI contends that the trial court erred in: refusing to award damages to it for the torts found by the jury to have been committed by the bank, in instructing a verdict against GRI on its conversion cause of action, and in allowing into evidence a deposition that was allegedly hearsay. In view of our disposition of the first point of error and our rendition of judgment for GRI on its breach of contract claim, and because GRI concedes in this appeal that it seeks no additional damages on its tort claims than it sought on its contract claim, these additional points of error are now immaterial and it is not necessary that we rule on them. It is necessary, however, that we rule on the bank's cross-points.

The bank contends in its first cross-point that the trial court erred in denying its motion to withdraw the deemed admissions because the requests for admissions were timely answered. It also contends in its second cross-point that the court erred by finding the deemed admissions established as a matter of law because evidence controverting the admissions was introduced without objection at the trial.

[22, 23] Requested admissions are deemed admitted unless, within thirty days after service of the request, the party to whom the request is directed serves a written answer or objection. TEX.R.CIV.P. 169(1). The court may permit withdrawal of deemed admissions on a showing of good cause *if* it finds that the party relying on the deemed admissions will not be unduly prejudiced *and* that presentation of the merits of the action will be subserved thereby. *Id.*

[24–26] The trial court has broad discretion in deciding whether to allow the withdrawal of deemed admissions. *Employers Ins. of Wausau v. Halton*, 792 S.W.2d 462, 464 (Tex.App.—Dallas 1990, writ denied). Its ruling will be set aside only if there is a clear abuse of discretion. *Crime Control, Inc. v. RMH–Oxford Joint Venture*, 712 S.W.2d 550, 552 (Tex.App.—Houston [14th Dist.] 1986, no writ). A court abuses its discretion when it acts without reference to guiding rules or principles or acts arbitrarily or unreasonably. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986).

[27] GRI mailed to the bank's counsel its requests for admission on December 22, 1987. The bank says it received them on December 28, 1987. The bank contends that it forwarded its response on January 27, 1988, the date shown on the certificate of service. The bank was unable, however, to produce a certified mail receipt to verify mailing. The bank's attorneys testified that their records showed the responses had been mailed. In October 1988, GRI told the bank's counsel it had received no response and considered the matters deemed admitted. The bank's counsel then forwarded a copy of the bank's response to GRI. The bank moved to withdraw the deemed admissions on June 19, 1989. The court finally heard the matter in January 1993.[3] The bank eventually filed the answers with the

3. The bank blames the delay on changes in courts and judges. The suit was filed originally in the 202nd District Court of Bowie County. When Honorable Bill Peek became presiding judge of that court, a conflict arose because he was a member of the firm serving as GRI local counsel. The case was transferred to the 5th District Court.

court on October 11, 1994. At issue are deemed admissions in which the bank admits the existence of an escrow agreement and that it was escrow agent for GRI.

The trial court agreed with the bank's contention that having a jury decide the admitted issues would better serve the interests of justice and that the bank may have shown good cause for withdrawal of the deemed admissions because of the development of new evidence [4] and the certificate of service dated January 7, 1988,[5] but it found that allowing the bank to withdraw the admissions would unduly prejudice GRI because it would have to go back and try to develop the evidence some five years after the fact.

We cannot say that the trial court's finding that GRI would be unduly prejudiced by withdrawing the admissions was an abuse of its discretion.

The bank argues that GRI waived the admissions because it failed to object to testimony contrary to the admissions. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex.1989).

[28] The first fifteen admissions dealt with the authenticity of the escrow agreement and the genuineness of the signatures. During GRI's cross-examinations of McCauley the following exchange occurred:

> Q. Is there a signature on there above the line that says, "Oaklawn Bank?"
>
> A. Yes.
>
> Q. Whose signature is that?
>
> A. I do not know the answer to that question.

Oaklawn argues this evidence puts the authenticity of the document in question and that GRI therefore waived the admission. McCauley's statement is not an explicit denial that the signature is his, and thus it did not put GRI on notice that it was controverting the authenticity of the document. Consequently, GRI cannot be held to have waived the admission that the document was valid.

[29] The bank also argues that GRI waived the admission that "Oaklawn Bank acted as an escrow agent for Graco [Robotics, Inc.]" by introducing a copy of an escrow agreement in which Graco, Inc. was identified as the "Graco" entitled to bank payment.

The bank says that after it received the draft agreement it made substantial changes, and that Mahon approved the changes. The bank's draft of Schedule A listed all the vendors and identified Graco as being in Minneapolis, Minnesota, thereby referring to the Minneapolis-based Graco, Inc. GRI, a Delaware corporation, has offices in Livonia, Michigan. GRI submitted this version of the escrow agreement as a trial exhibit. Neither GRI nor Graco, Inc. signed this version. The bank also argues that even though it admitted acting as an escrow agent, because the admission did not reference the July 26, 1985 escrow agreement that GRI approved, the admission does not tie the specific agreement to GRI.

The bank argues that it is not clear whether it was dealing with Graco, Inc., a pumping equipment maker, or GRI, a robotics equipment maker. It alleges that Graco, Inc. submitted the first draft of the agreement to Mahon. Mahon returned the draft to King at Graco, Inc. with a Schedule A that referenced "pumping equipment" and "robotics equipment." In another version, which "Graco" signed as approved, Schedule A referenced only "pumping equipment," suggesting

4. McCauley at his deposition on April 19 and 20, 1990, told GRI counsel he believed the signature on the July 26, 1985 agreement was forged. GRI argues that McCauley at least twice before the deposition admitted under oath the signature was his, once in the bank's late response to admissions and then in the bank's response to GRI's second set of interrogatories. There, the bank acknowledged the signature was McCauley's but that he had no independent recollection of the signature's date.

5. The court in its letter said the certificate of service for the responses was dated January 7, 1988, whereas the certificate was dated January 27. GRI argues the response is late even if mailed on January 27. Its requests were served by mail on December 22, 1987, thus the response was due thirty-three days later, or January 24. Because January 24 was a Sunday, the responses were due Monday, January 25, 1988, and the purported January 27 mailing was late.

that Graco, Inc., not GRI, was entitled to payment.

The bank also argues that uncontroverted evidence shows Mahon negotiated with both GRI and Graco, Inc. in connection with the agreement; that Graco, Inc. employees signed Schedule A; that GRI referred to itself as "GRI," while Graco, Inc. usually was referred to as "Graco"; that King and Frimberger submitted documents to the bank identifying Graco, Inc. as a "third party beneficiary" under the escrow agreement; and that the bank and Mahon intended to establish an escrow arrangement with Graco, Inc. The bank raised the question of whether the "Graco" in Schedule A was GRI in a submitted jury question, which the court rejected.

The escrow agreement does not controvert the admission that the bank is GRI's escrow agent. The document the bank references refers to "Graco" as the party entitled to payment, but does not contradict that the bank is GRI's escrow agent. The "Graco" in the document could, in fact, refer to GRI. Although the names on the document's Schedule A were identified in cross-examination as Graco, Inc. employees, the record does not show they were not also GRI employees or were not authorized to sign for GRI.

The Schedule A that lists as a vendor Graco of Minneapolis, not GRI of Michigan, was not approved by GRI and purportedly was prepared by the bank. The fact that GRI introduced it as a trial exhibit does not constitute waiver.

If the evidence controverts the bank's admission, it does so tangentially. In *Marshall v. Vise*, *supra*, the party who waived its deemed admissions did so by putting on its case in addition to relying on deemed admissions. Here, the miscellaneous suggestions are not clear enough to constitute waiver. Incidental references to "Graco" by parties associated with Graco, Inc. and GRI do not controvert the deemed admission. They may simply be casual usages by parties familiar with both entities. Also King, although a Graco, Inc. employee based in Minneapolis, was an authorized representative of GRI, so any reference to Graco in Minneapolis does not necessarily rule out a reference to GRI.

[30] The bank argues that GRI also waived the final group of admissions by not objecting to evidence that showed Red River paid money to the bank pursuant to an assignment and not an escrow agreement. Red River may have been operating pursuant to an assignment, but that does not mean that it was not bound by the escrow agreement once it received the money.

The bank argues in its third cross-point that GRI is not entitled to judgment here because it elected to pursue an inconsistent remedy by obtaining a judgment on the same claim in Michigan.

GRI sued Mahon in Michigan in 1987 on its contract with Mahon for collection of the indebtedness represented by the two invoices it had issued to Mahon and against Genevieve Frimberger as partial guarantor of the debt. On August 22, 1988, GRI obtained judgment against Mahon for $110,250.00 and against Mahon and Genevieve Frimberger, jointly and severally, for $440,000.00, for a total of $550,250.00. GRI later brought this suit against the bank on the escrow agreement. The Michigan court has ordered that any Texas recovery be set off against the Michigan judgment.

[31, 32] An election of remedies is the act of choosing between two inconsistent but coexistent modes of procedure and relief allowed by law on the same set of facts. When a party chooses to exercise one of them, it abandons the right to exercise the other and is precluded from resorting to it. The bar does not apply to the assertion of distinct causes of action against different persons arising out of independent transactions with such persons. *Custom Leasing, Inc. v. Texas Bank & Trust Co. of Dallas*, 491 S.W.2d 868, 871 (Tex.1973).

[33] The Michigan suit involved the contract between the contractor and the subcontractor on their contract and a guarantor to the contract. The Texas suit involves the escrow agent and the third-party beneficiary of the escrow agreement for breach of contract and related torts in conpection with the escrow agreement. The parties are different and the causes of action are different. Al-

though both contracts deal with the Red River funds, at most that means that if GRI had collected contract damages from Mahon it might have difficulty proving contract damages with the bank here. That would not affect the tort damages GRI was seeking from the bank.

The bank argues that if it is required to pay Mahon's debt, under normal circumstances it would step into GRI's shoes for the Mahon debt. But because the debt has been merged into a judgment and because of the Michigan court order, any payment the bank might make would result in a satisfaction of the Michigan judgment and would destroy the otherwise-existing subrogation right against Mahon. Even if that were true, the bank could pursue independent remedies against Mahon pursuant to its own escrow agreement.

The bank asserts in its fourth cross-point that it should be given a $419,500.00 credit on any judgment recovered by GRI because GRI had previously received that sum in satisfaction of the damages sought in this case.

Before the case was submitted to the jury, the bank moved for a dollar-for-dollar credit on any judgment that might be rendered. GRI's injuries were the failure of the bank to pay invoices under the escrow agreement. GRI obtained a Michigan judgment against Mahon and Mahon's guarantor for the same amount on the unpaid invoices. GRI also received a mortgage on property worth an appraised value of about $400,000.00 and collected $19,500.00 in satisfaction of the judgment.

[34, 35] A plaintiff may obtain only one recovery for the same injury. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991). Here, the owner of the real estate was not able to deed the land to GRI in lieu of foreclosure because of preexisting encumbrances. GRI recovered only a mortgage of indefinite value. There is no evidence of a value that could be used as a credit. The bank argues that if GRI is awarded a Texas judgment and collects on that judgment, it may use those proceeds to pay off the encumbrances against the land and foreclose on the land, thus getting a double recovery. If that occurs, the Michigan court will likely take that into account in any foreclosure proceedings to prevent a double recovery.

[36] As for the $19,500.00, the record shows that GRI sued Mahon for breach of contract and conversion on the underlying contract. GRI in an interrogatory response said it had collected $19,500.00 on its Michigan judgment. Because GRI can receive only one recovery for its injury and its Michigan breach of contract suit deals with the same funds as the Texas escrow suit, Oaklawn Bank is entitled to a $19,500.00 set-off on the Texas judgment.

[37–43] The bank also argues it is entitled to a set-off for the mortgage GRI recovered on real estate appraised at about $400,000.00. In Texas, a levy on land is not a satisfaction of the judgment, *Cundiff v. Teague*, 26 Tex. 475, 477 (1877). The judgment debtor, notwithstanding the levy, holds the title and possession and is in the enjoyment of the land's profits. *White v. Graves*, 15 Tex. 183, 187 (1855). Title does not pass by the levy. The judgment is not satisfied until the sale. *Id.*; *also see* 48 TEX.JUR.3d *Judgments* § 571 (1986). Indeed, generally a judgment for the payment of money can be satisfied only in money, unless the judgment's owner accepts some other thing of value, such as a mortgage on the debtor's property, 49 C.J.S. *Judgments* § 552 (1947), and the bank presents no that evidence GRI accepted a lien in satisfaction of the debt. Moreover, although the bank refers to a Michigan judgment, it wishes to use the lien as a set-off against a Texas judgment, so the procedural law of Texas as the forum state controls. If the bank wishes to demonstrate that under Michigan law a lien satisfies a judgment, it must demonstrate that Michigan law differs from Texas law in that regard. *Mathis v. Wachovia Bank & Trust Co.*, 583 S.W.2d 800, 802 (Tex.Civ.App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). Without such proof, we must presume that Michigan law is the same as Texas law. *Braddock v. Taylor*, 592 S.W.2d 40, 42 (Tex.Civ.App.—Beaumont 1979, writ ref'd n.r.e.).

GRI also contends that it is entitled to prejudgment interest on its contract claim.

[44–47] A prevailing plaintiff may recover prejudgment interest compounded daily,[6] based on a 365-day year, on damages that have accrued by the time of judgment. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 554 (Tex.1985). Prejudgment interest shall accrue at the prevailing rate that exists on the date judgment is rendered according to the provision of TEX.REV.CIV. STAT.ANN. art. 5069–1.05, § 2 (now ten percent). This applies to actions for breach of contract where the amount of damages is not ascertainable from the contract's face. *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930 (Tex.1988). The damages accrue for purposes of equitable prejudgment interest in such a breach of contract case from the date of injury to the date of judgment. *CKB & Assocs. v. Moore McCormack Petroleum*, 809 S.W.2d 577, 587 (Tex.App.—Dallas 1991, writ denied). The trial court has no discretion about the decision to award prejudgment interest or the rate of prejudgment interest. *Matthews v. DeSoto*, 721 S.W.2d 286, 287 (Tex.1986).

In *International Piping Systems v. M.M. White & Assocs.*, 831 S.W.2d 444 (Tex.App.—Houston [14th Dist.] 1992, writ denied), the court found that the jurors in a breach of employment contract case could not determine the damages due from the face of the contract. The jurors would have to examine sales and determine lost commissions and expenses saved, if any, to calculate damages.

[48] Here, the jurors could not determine damages from the escrow agreement's face, but had to use evidence about how much money Red River paid to Oaklawn and how much GRI invoiced the bank. Because the damages cannot be determined from the contract's face, GRI is entitled to prejudgment interest compounded daily from the time the damages accrued to the date of judgment. *Cavnar v. Quality Control Parking, Inc.*, *supra*.

[49, 50] Ordinarily, when we cannot tell when the damages accrued, we remand the cause to the trial court for a determination of that question. *Rio Grande Land & Cattle Co. v. Light*, 758 S.W.2d 747, 749 (Tex.1988); *see Swanson v. Schlumberger Technology Corp.*, 895 S.W.2d 719, 745 (Tex.App.—Texarkana 1994, writ granted). GRI requests prejudgment interest calculated from October 15, 1986, the date Mahon gave Oaklawn authorization to release $550,000.00 to GRI. We can tell, as a matter of law, that GRI had been injured by that date. It is probable that the injury occurred before that date, perhaps when the bank paid out funds in an unauthorized fashion, but GRI does not seek prejudgment interest from the date of actual injury. It only seeks interest from October 15, 1986.

[51] The bank also asks that we remand the case on the issue of prejudgment interest so it can offer evidence that GRI did not vigorously pursue its claim, thus deliberately letting interest accumulate.

The *Cavnar* prejudgment interest scheme does not create incentives for plaintiff delays. *Matthews v. DeSoto*, *supra*. If a plaintiff unnecessarily delays resolution of the case, the defendant has several methods to force the case to trial, such as objecting to the granting of continuances, objecting to the passing of the case, and moving for a special trial setting. *Id.* An equitable exception to *Cavnar* is not needed. *Id.* We need not remand the case for further fact finding.

GRI also asks for prejudgment interest on that portion of its attorneys fees that were paid before judgment, an amount it puts at $156,115.22.

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[52] Pecuniary and nonpecuniary damages subject to prejudgment interest, *Cavnar v. Quality Control Parking, Inc.*, *supra*, do not include attorney's fees. *Fuchs v. Life-*

6. TEX.REV.CIV.STAT.ANN. art. 5069–1.05, § 2, Act of May 4, 1983, 68th Leg., ch. 107, § 1, 1983 Tex. Gen.Laws 518–19, *amended by* Act of May 8, 1987, 70th Leg., ch. 154, § 1, 1987 Tex.Gen. Laws 1313–14. Although Article 5069–1.05, § 2 has been amended and now requires prejudgment interest to be compounded annually, this action was filed before the amendment and so is governed by *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929 (Tex.1988), which applied the standard of calculating interest from *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985). *Winograd v. Willis*, 789 S.W.2d 307, 312 (Tex.App.—Houston [14th Dist.] 1990, writ denied).

time Doors, Inc., 939 F.2d 1275, 1280 (5th Cir.1991); *cf. C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 325 (Tex.1994); *accord Hervey v. Passero*, 658 S.W.2d 148, 149 (Tex.1983).

For the reasons stated, the judgment is reversed and judgment is here rendered for GRI against the bank for $550,250.00 in contract damages, with a $19,500.00 set-off for its collection on its Michigan judgment, and $280,000.00 in attorney's fees, plus post-judgment interest from date of judgment as provided by law and prejudgment interest compounded daily from October 15, 1986 to the date of judgment, as provided by law.

Joshua Mark GUNTER, Appellant,

v.

The STATE of Texas, Appellee.

No. 06-95-00121-CR.

Court of Appeals of Texas, Texarkana.

Submitted Dec. 29, 1995.

Decided Dec. 29, 1995.

Defendant was convicted in the 292nd Judicial District Court, Dallas County, Michael Keasler, J., of aggravated robbery. Defendant appealed. The Court of Appeals, Bleil, J., held that instruction to disregard was sufficient to cure any error arising from detective's testimony that codefendant had been detained for similar offense day before defendant was taken into custody for robbery of which he was convicted.

Affirmed.

1. Criminal Law ⇐1169.5(2)

Jury instruction to disregard was sufficient to cure any error arising from detective's testimony in robbery prosecution that codefendant had been detained for similar offense day before defendant was taken into custody for robbery of which he was convicted; that testimony was not specific as to details of any type of crime committed, and was cut off before any unusually inflammatory details of any extraneous crime could be brought before jury. Vernon's Ann.Texas C.C.P. art. 37.07, § 3(a).

2. Criminal Law ⇐1169.5(1)

Instruction to disregard normally cures error, except in extreme cases where it appears that evidence is clearly calculated to inflame minds of jury and is of such nature as to suggest impossibility of withdrawing impression produced on jurors' minds.

John Hagler, Dallas, for appellant.

Sue Korioth, Assistant District Attorney, Dallas, Patricia Poppoff Noble, Assistant District Attorney, Dallas, for appellee.

Before CORNELIUS, C.J., and BLEIL and GRANT, JJ.

OPINION

BLEIL, Justice.

Joshua Gunter appeals from his conviction for the offense of aggravated robbery. He was convicted by a jury upon his plea of guilty and sentenced to fifty years' imprisonment.

The evidence shows that, while driving around in their car, Joshua Gunter and Michael Quertermous, a co-defendant, saw the victim washing his car. With bandannas pulled over their faces, they demanded that the victim, Michael Green, give them his money. He did so and heard one of them say that they ought to shoot him anyway. Green ran, and the gunman fired at him several times. He was hit in the neck and in his tennis shoe. Gunter was taken into custody the day after the robbery, and Quertermous admitted shooting at Green six times. The pistol that fired the shots was recovered.

At the punishment phase, Gunter sought leniency from the sentencing jury, presenting evidence of his parents' recent divorce, his

TRCP 71

HHD -

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FAX Transmission

TO: The Honorable Justice Nathan Hecht

FAX NUMBER: 512/463-1365

SUBJECT: "Proposed New Rule for T.R.C.P."

FROM: Paul Purtha, atty.

DATE: 2/14/96

NUMBER OF PAGES FAXED (INCLUDING THIS ONE): [4]

MESSAGE: (begins on following page)

3RD00159

MESSAGE: Justice Hecht: Our small firm has recently, on behalf of our client, been through a very unpleasant ordeal very similar to that which faced the unfortunate appellants in Johnson v. The Coca-Cola Co., 727 S.W.2d 756 (Tex. App. -- Dallas 1987 writ ref'd n.r.e.). Namely, as in Johnson, due to an inadvertent mistake in drafting our amended petition, our intended defendant was "let off the hook" for good in relation to our client's claims. I'm referring to the long-standing "dismissal by subsequent omission" doctrine of pleading in Texas, mentioned in Johnson and the cases cited therein.

This doctrine is unrealistic and overly harsh in the modern, hectic, and often over-worked, high-tech practice of Texas law offices. The irreconcilable problems it creates for plaintiffs, who may make even the most innocent or even understandable of unintended mistakes in amending their pleadings, is even more acute in relation to situations involving intended defendants whom are business entities, given the variations in name under which same may do business in our State and the necessary reliance upon others for such information. As in Johnson, our error arose because of a miscommunication of the intended defendant's name from the Secretary of State's Corporate Division offices to our offices.

Another unfortunate side effect of the doctrine which we personally observed in our case: it encourages opposing counsel to

engage in less than candid (at best) lawyering tactics with counsel for the erring side, keeping up appearances at all costs as though the plaintiff's claims are still valid against their client, but then coming forward with the truth only after the statute of limitations on the claims has passed. (as you may recall, Texas' "savings statute" only tolls the s.o.l. to a claim when suit was brought in a court of the "wrong jurisdiction", and therefore is of no avail to a plaintiff in such a predicament). Not only have such defendants not been mislead or "harmed" by such amendment of pleadings by plaintiff, but they themselves have become guilty of outright active deception toward plaintiff and counsel!

I hope that, after studying some of the line of cases mentioned in Johnson, you agree that this doctrine is no longer supportable in light of today's complex practice of the law in Texas, and, in order to avoid the harsh result of dismissal of a plaintiff's claims in such similar future situations, you agree to support a new proposed rule to the Texas Rules of Civil Procedure. This rule could read along the lines of the following:

> **No party shall be deemed dropped or dismissed from the claims of another party in a proceeding except upon leave or order of court to do so or upon the filing of a notice of nonsuit of claims by the party having made such claims.**

Such a rule would also be in keeping with the dual goals of certainty and reliability of the viability of the claims of the parties involved in a matter, at all times, apparently the ratio decidendi behind the "dismissal by omission" doctrine -- much in the same way and for the similar reasons that "Rule 11" agreements are required to be in writing and filed with the court involved in a suit.

I sincerely hope that you, and your fellow honorable members of the Court, will give serious attention to this matter and strive to enact such an important, needed court rule to our T.R.C.P. in the near future. Thank you.

pp

HHP,
SCAO Agenda
SCAO Sub C - Assigned
SBOT Staff
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Luke - This is the latest version of what I have worked on. I don't know what you folks are but I hope this will help.

Pat

This one is even NEWER.

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 venue2 based on improper venue or inconvenient county3 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 joinder grounded on venue6 may be contained in a

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.

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.

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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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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. The parentheses indicate that some oppose making the standard of proof on inconvenient 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.

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 the 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 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). 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

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 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.

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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.

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 15.011-15.017§ (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 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

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."

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 determined in accordance with Rules 258 and 259.

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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.

(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 preceding subdivision of this paragraph 3 or of Rule 88.

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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.

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((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 Transfer37. 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 the movant was a party to the prior proceedings or

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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.

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

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 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

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).

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.

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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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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SCAC Agenda
Sub C
J Hecht

February 24, 1997

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rules 86, 86a, 87 and 89

Dear Justice Phillips:

The Court Rules Committee has finally completed its suggested rule changes to the venue rules in view of the statute which the legislature past regarding venue. I am enclosing herewith the Court Rules Committee's suggested changes to Rule 86, 87, 89 and a new rule, 86a, which has been included. The Court Rules Committee requests that the court consider these suggested changes.

By copy of this letter, I am forwarding copies of these proposed rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: [signature]

O. C. Hamilton, Jr.

OCH/sam

Enclosures

3RD0172.1

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Ms. Laurie Baxter (w/encl.)
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STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing rules:

Rule 86. Motion to Transfer Venue

1. Time To File. An objection to improper venue is waived 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. 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. 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.

2. How to File. The motion objecting to improper venue 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, 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; 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.

The motion shall state the legal and factual basis for the transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87.

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 Motion to Transfer

1. Consideration of Motion. 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 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.

2. Burden of Establishing Venue.

(a) In General. A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county of suit. A party who seeks to transfer venue of the action to another specified county under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought. 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 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 in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.

(b) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. 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 such 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 action exists, it or a part thereof accrued in the county to which

transfer is sought.

(c) Other Rules. A motion to transfer venue based on the written consent of the parties shall be determined in accordance with Rule 255. 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 determined in accordance with Rules 258 and 259.

3. Proof.

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

(b) The Hearing. The court shall determine the motion to transfer venue 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 preceding subdivision of this paragraph 3 or of Rule 88.

(c) If a claimant had 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. 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.

(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.

4. No Jury. All venue challenges shall be determined by the court without the aid of a jury

5. Motion for Rehearing. 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 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.

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 determination.

Rule 88. Discovery and Venue

Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. 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. 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.

II. Exact wording of proposed rule:

The following amendments are proposed to Rules 86, 87 and 89 to conform these rules to the changes made to Chapter 15, Civil Practice and Remedies Code by the 74th Legislature. (Acts 1995, 74th Leg., ch. 138)

Rule 86. Motion to Transfer Venue

1. Time to File.

(a) ~~An objection to~~ A motion to transfer venue based on improper venue or inconvenient county is waived 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.

2. How to File. The motion to transfer venue 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.

(a) 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:

(1) The county where the action is pending is not a proper county;

(2) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions, which shall be clearly designated or indicated; or

(3) Maintenance of venue in the county of suit would be inconvenient.

(b) The motion to transfer venue shall specifically deny the plaintiff's pleaded venue facts believed not to be true, 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 that ~~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.

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.

86a. Objections to Multiple Plaintiffs and Intervening Plaintiffs Based Upon Venue

1. A motion to transfer timely filed by any defendant in a suit in which more than one plaintiff is joined challenges venue and the joinder of each plaintiff grounded on venue. Only one defendant needs to make such objection.

2. A motion to strike an intervening plaintiff based upon TEX. CIV. PRAC. & REM. CODE SEC. 15.003 is waived if not filed within twenty (20) days of service of intervenor's pleading on the objecting defendant. Only one defendant needs to object to the intervention of a plaintiff grounded on venue.

3. Each plaintiff to a lawsuit, whether joined initially or intervening, must establish venue as proper to that plaintiff independently of any other plaintiff or establish the elements of TEX. CIV. PRAC. & REM. CODE SEC. 15.003.

4. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion under this rule. The determination of a motion under this rule shall be made promptly by the court and 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.

Rule 87. Determination of Motions ~~to Transfer~~

1. Consideration of Motion.

Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer. 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 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.

2. Burden of Establishing Venue.

(a) In General.

(1) A party who seeks to maintain venue ~~of the action~~ in the ~~a particular~~ county of suit ~~in reliance upon Section 15.001 (General Rule), Sections 15.011 - 15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Section 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~ has the burden of ~~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 ~~of the action~~ to another specified county ~~under Section 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,~~ has the burden of ~~to make~~ proof, as provided in paragraph 3 of this rule, that:

(A) venue is ~~maintainable~~ either proper or mandatory in the county to which transfer is sought; or

(B) venue is inconvenient in the county of suit under Section 15.002(b), Civil Practice and Remedies Code, and is proper in the county to which transfer is sought.

~~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 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 in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.~~

(b) Claim. For the purposes of a venue hearing it is not necessary to prove a claim. The existence of a claim is not a venue fact. Where all or a substantial part of the events or omissions giving rise to an alleged claim is a basis for venue being proper, it must be pleaded and proven pursuant to paragraph 3 of this rule. Whatever a party asserts in a motion to transfer venue shall not constitute an admission that a claim exists.

~~Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. 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 such 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 action exists, it or a part thereof accrued in the county to which transfer is sought.~~

(c) Other Rules.

(1) 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 determined in accordance with Rules 258 and 259.

3. Proof.

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

(b) The Hearing.

(1) The court shall determine the motion to transfer venue 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 preceding subdivision of this paragraph 3 or of Rule 88.

(2) ~~(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 movant establishes that transfer is proper ~~motion to transfer is based~~:

(i) 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

(ii) on an established ground of mandatory venue; or

(iii) on grounds of an inconvenient county as provided in Section 15.002(b), Civil Practice and Remedies Code. ~~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.~~

(3) ~~(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.

4. No Jury. All motions to transfer venue ~~challenges~~ shall be determined by the court without the aid of a jury.

5. ~~Motion for Rehearing~~ Further Motions to Transfer. 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~~ on a motion to transfer, then no further motions to transfer shall be considered from the movant or respondent ~~regardless of whether 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 ground ~~claim~~ was not available to the ~~other~~ movant when the original motion was filed ~~or movants~~. Newly added defendants may timely challenge venue.

~~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.

Rule 89. Transferred if Motion is Sustained

If a motion to transfer venue is sustained, the ~~cause~~ suit shall not be dismissed, but the court shall transfer said ~~cause~~ suit, together with all properly joined parties and claims, to the proper ~~court~~ county; and the costs incurred prior to the time such suit is filed in the court to which said ~~cause~~ suit is transferred shall be taxed ~~against the plaintiff~~ as costs of court to be determined by the court to which said suit is transferred. When the suit is governed by a mandatory venue provision, the suit shall be transferred to the county of mandatory venue. If more than one county is shown to be proper, the court shall transfer the suit to the more convenient county.

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.

III. Brief Statements of Reasons for Requested Changes

Rule 86.

In Section 1, "An objection to venue" has been changed to "a motion to transfer venue," which Professor Hazel suggests is the better term. "Inconvenient county" has been added as a basis to transfer venue to conform to Section 15.002(b), Civil Practice and Remedies Code.

Section 1 has been divided into three paragraphs (a) - (c) for easier reference as suggested by Professor Hazel.

Subparts (1) and (2) of Section 3 have been changed to clarify that denials of venue facts and venue facts supporting transfer to a county under the mandatory venue provisions should be set out in the motion to transfer. Subpart (3) is added to provide that motions to transfer based on convenience should state maintenance of venue in the county of suit would be inconvenient.

Rule 86a.

Rule 86a is new. This rule deals with multiple plaintiffs and intervening plaintiffs and is necessary to conform the venue rules to Section 15.003, Civil Practice and Remedies Code. The rule provides that a timely filed motion to transfer venue challenges the joinder of each plaintiff grounded on venue. If the court sustains the objection to the joinder of plaintiffs grounded on venue, the court should enter an appropriate order under Rule 41. The rule provides that an objection to intervening plaintiffs is timely if filed within 20 days of the service of the intervenor's pleading on the objecting defendant. If the court sustains the objection to the intervention based on venue, the court should enter an appropriate order under Rule 60.

Rule 87.

Section 2(a), currently consists of three sentences; the first two sentences have been subdivided into parts (1) and (2) for easier reference.

2(a)(1) has been changed to delete the numerous statutory references. It was felt these references were unnecessary. "burden to make proof" has been changed to "burden to proof." No substantive changes are intended by these changes. "Maintainable" has been changed to "proper." "Proper venue" is now defined by Section 15.001(b), Civil Practice and Remedies Code.

2(a)(2) has been amended to delete "of the action." This is intended as a non-substantive change, the language "of the action" was felt to be unnecessary.

2(a)(2) has also been amended to provide that a party seeking to transfer venue has the burden to show either (A) venue is proper or mandatory in the county to which transfer is sought; or, (B) transfer is proper under Section 15.002(b), Civil Practice and Remedies Code, the new convenience transfer provision.

The third sentence of the current 2(a) has been deleted. This sentence, which dealt with parties seeking to transfer under a mandatory venue provision has been combined into 2(a)(2)(A).

2(b) has been rewritten completely to simplify the rule and conform it to Section 15.002, Civil Practice and Remedies Code, which now provides that lawsuits shall be brought in the county where "all or a substantial part of the events or omissions giving rise to the claim occurred." The rule continues to provide that the existence of a claim is not a venue fact and that whatever a party asserts in a motion to transfer venue shall not constitute an admission that a claim exists.

The deleted language in Section 3(a) is considered superfluous in light of the change to Section 2(b). The changes to the final two sentences of Section 3(a), including the deletion of the word "fully," are nonsubstantive.

The second paragraph of Section 3(b), currently paragraph (c) is amended to add language conforming the rule to Section 15.002(b), Civil Practice and Remedies Code. The deleted language is considered superfluous. The headings (c) and (d) were deleted from the last two paragraphs of Section 3. These paragraphs deal with the hearing and thus are more appropriately a part of paragraph (b), entitled "The Hearing."

Section 5 is amended to conform to Section 15.0641, Civil Practice and Remedies Code, which provides that no act or omission by one defendant will operate to impair or diminish the right of any other defendant to properly challenge venue.

Rule 89.

The current rule taxes costs incurred prior to the transfer against the plaintiff is a motion to transfer is sustained. Under the old venue law a motion to transfer could only be sustained if the

plaintiff filed in an improper county. Since current law allows for a transfer to be sustained even if the plaintiff has filed in a proper county, it was felt that it would be more appropriate to allow the court to which the case is transferred to determine how these costs are to be taxed in accordance with Rule 125 et. seq.

Respectfully submitted,

JAMES A. RODMAN
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Austin, Texas 78701
Telephone 512/481-0400
Telecopier 512/481-0500

Dated: February 21, 1997

MICHAEL A. STAFFORD
First Assistant County Attorney

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4513.001
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Orig: hhdgm.

MICHAEL P. FLEMING
County Attorney
Harris County, Texas

April 1, 1997

HHP,
Scott Ogende
✓ Sue C
Staff
SBOT

Honorable Justice Nathan Hecht
Supreme court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Request for change to TEX. R. CIV. P. 145

Dear Judge Hecht:

This letter is written on behalf of the District Clerk of Harris County to request consideration of a change to TEX. R. CIV. P. 145.

TEX. R. CIV. P. 145 authorizes a party who is unable to afford costs with a means to proceed with suit without paying the costs of court which are required to be paid to the District Clerk. The rule provides:

> In lieu of filing security for costs of an original action, a party who is unable to afford said costs shall file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Said affidavit and the party's action, shall be processed by the clerk in the manner prescribed by this rule.
>
> 1. **Procedure.** Upon the filing of the affidavit, the clerk shall docket the action, issue citation and provide such other customary services as are provided any party. After service of citation, the defendant may contest the affidavit by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court shall find at the first regular hearing in the court of the action that the party (other than a party receiving a governmental entitlement) is able to afford costs, the party shall pay the costs of the action. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action will be taken by a party

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Children's Protective Division: 5100 Southwest Freeway, Houston, TX 77056 (713) 599-5870 Fax (713) 599-7270

who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.

2. **Affidavit**. The affidavit shall contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a Notary Public.

3. **Attorney's Certification**. If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency, said attorney may file an affidavit to that effect to assist the court in understanding the financial condition of the party.

In concert with this rule, TEX. R. CIV. P. 142 requires the District Clerk to issue the requested process in the case without the required payment of fees when an affidavit in conformity with Rule 145 is on file. Also, at least one commentator has expressed that this procedure is available at any stage of the proceeding. O'CONNOR'S TEXAS RULES ch. 2, §3.3.

Although there is no question that the procedures authorized under these rules are necessary to ensure access to the courts for indigent parties, the procedures can be easily abused. Rule 145 no longer provides a procedure to allow the District Clerk to challenge questionable affidavits of inability to pay. The rule changed in 1988 to exclude the District Clerk's participation because, as one commentator indicated, the clerk's routine challenges were disfavored. Kilgarlin, Quesada, and Russell, *Practicing Law in the "New Age": the 1988 Amendments to the Texas Rules of Civil* Procedure, 19 TEX. TECH. L. REV. 887 (1988). However, as noted by the same commentator, numerous judges predicted this rule change would result in the current abuse.

Also, the District Clerk has observed that some attorneys routinely file cases with a pauper's oath affidavit. The District Clerk became keenly aware of this practice last year. Last year, a party came by the District Clerk's office to ask about his case. The deputy noted in this person's records that he had filed an affidavit of inability to pay. Nevertheless, the party informed the deputy that he had paid his attorney several hundred dollars to file a simple divorce. The deputy informed the party that he had filed an affidavit of indigency. The party did not recall signing a document of that nature. The client was surprised to learn that the attorney had not paid his court costs and thought the court costs were included in the attorney fees he paid. Upon further checking, it was

discovered that this party's attorney had filed all his cases in the Harris County District Courts in 1996 with pauper's oath affidavits. The affidavits were unchallenged. The total amount of outstanding and unpaid costs for this attorney's filings with the district clerk's office in 1996 totals $18,267.00. Although it is possible that an attorney could work for only indigent clients, it appears unlikely, at least, in this case.

TEX. CONST. Art. III, sec. 52 prohibits any law which would effectively authorize the county to lend credit or provide gifts of county property or services unless it serves a public purpose "with adequate controls" to ensure the public purpose is being served. *See* Tex. Att'y Gen. LA-008 (1995). In section TEX. GOV'T CODE ANN. §51.317 (Vernon 1988) and (Vernon Supp. 1996), the legislature set reasonable fees for court services provided in civil matters which are to be collected by the District Clerk at the time of filing suit so that the county is not put in the position of providing county resources for free. When a litigant obtains county resources for free, there must be a public purpose such as indigency authorizing the county to donate its expenses and services for that public purpose. Nevertheless, the procedure now in place under Rule 145 precludes adequate controls to ensure that public resources are not abused since the District Clerk is not authorized to challenge affidavits of indigency.

It is, therefore, requested that TEX. R. CIV. P. 145 be revised to allow a District Clerk to challenge an affidavit of inability to pay.

If you require further information, please do not hesitate to contact me.

Very truly yours,

MICHAEL P. FLEMING
COUNTY ATTORNEY

By: Sandra D. Hachem
Assistant County Attorney

cc: Mr. Luther H. Soles
Chairman of the Supreme Court
Advisory Committee
Soles & Wallace
100 West Houston Street, Suite 1500
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12-21-95
4543.001
cc: LHS
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TRCP 166a

December 21, 1995

HHD, SCAC Agenda ✓ Sub C (chairman) SCAC Staff J. Hecht

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Phillips:

The Court Rules Committee has recently completed its work on a proposed amendment to the summary judgment rule and I am enclosing herewith the Court Rules Committee's proposal for the Supreme Court's consideration.

By copy of this letter, I am sending a copy of this to Luke Soules, Chairman of the Supreme Court Advisor Committee and Lee Parsley.

The court's consideration of this proposed amendment would be appreciated.

Sincerely,

By: O C Hamilton Jr

O. C. Hamilton, Jr.

OCH/sam
Enclosure

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

3RD00173

cc: Ms. Laurie Baxter (w/encl.)
State Bar of Texas Committees
P.O. Box 12487
Austin, Texas 78711

Mr. Lee Parsley (w/encl.)
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULES OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording existing Rule:

Rule 166a. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be

rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

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

(e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the

court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

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

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

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

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

II. Proposed Rule:

Rule 166a. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits or other summary judgment evidence for a summary judgment ~~in his favor~~ upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits or other summary judgment evidence for a summary judgment ~~in his favor~~ as to all or any part thereof.

(c) Motion and Proceedings Thereon. ~~The~~ A motion for summary judgment shall ~~state the specific grounds therefor~~ list in numerical order (i) the undisputed facts upon which the motion relies and (ii) the contested issues of law. The response to a motion for summary judgment shall list in numerical order (i) the disputed facts upon which the response relies and (ii) the contested issues of law. Each party shall, in the motion for summary judgment or in the response thereto, specifically refer by page to any

portions of depositions relied upon; and copies of said deposition excerpts shall be attached to the motion for summary judgment or response. The motion and response may be contained in a single document with any supporting brief. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits or other summary judgment evidence shall be filed with the court and served on the respondent at least ~~twenty-one~~ thirty days before the time specified for hearing. Except on leave of court, ~~the adverse party, not later than seven days prior to the day of hearing may file and serve~~ for good cause shown, the respondent shall file and serve a written response, and any opposing affidavits or other ~~written response~~ summary judgment evidence, no later than twenty days following receipt of the motion. No oral testimony shall be received at the hearing. ~~The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.~~ Issues not expressly presented to the trial court by written ~~motion, answer or other~~ response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and

direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) ~~Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.~~ Burdens of Movant and Respondent. A party moving for summary judgment, on an issue upon which the movant would have the burden of proof at trial, shall have the burden to present evidence sufficient to establish facts which, if proved at trial, would entitle the movant to an instructed verdict. The movant shall not have the burden to produce evidence to establish the absence of a genuine issue of material fact with respect to an issue on which the respondent would have the burden of proof at trial. When a motion for summary judgment is made and supported as provided in this rule, the respondent may not rest upon the mere allegations or denials of the respondent's pleadings, but the respondent's response, by affidavits or as otherwise provided in this rule, must present specific facts showing that there is a genuine issue for trial as to a material fact. If the motion is based upon the absence of proof on an issue upon which the respondent has the burden of proof, the respondent must respond with evidence sufficient to entitle the respondent to submission of the issue to a jury. If

the respondent does not so respond, summary judgment shall be granted in favor of the movant, provided the motion complies with the other requirements of this rule.

(e) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

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

(g) **When ~~Affidavits Are~~ Summary Judgment Evidence is Unavailable.** Should it appear ~~from the affidavits of~~ by affidavit that a party opposing the motion ~~that he~~ cannot for reasons stated present ~~by affidavit~~ facts essential to justify ~~his opposition, the court may~~

~~refuse the application for judgment or may~~ that party's opposition, and if the affidavit sufficiently describes the expected proof, why the respondent expects the proof to be forthcoming, and how the proof will help it defeat the motion, the court shall order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. The Court ~~does~~ MUST reset the hearing on the motion for summary judgment in the order granting the continuance.

(h) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused ~~him~~ such other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

III. **Purpose of the Proposed Changes.** The proposed changes in this rule are designed to state the requirements for a the motion for summary judgment, the response thereto, the evidence to be considered by the court and to define who has the burden of proof both in the motion and the response. The proposed rule is more similar to the federal rule on summary judgments than the existing rule. The Court Rules Committee is of the opinion that the proposed rule will simplify the use of motions for summary judgment and will permit the courts to dispose of more suits by summary judgment than under the existing rule.

11-13-95
4543.001
cc: LHS
hhd
Vamf

Administrative Office of the District Courts
Harris County, Texas

Office of the Civil District Coordinators

301 Fannin, Room 510A
Houston, Texas 77002
Fax No. 713-755-5779

FAX COVER PAGE

TRCP 166a

HHD, SCAC agenda ✓ SubC Staff Staff J. Hecht

DATE: 11/10/95

TO: Luther H. Soules III

FROM: Judge Brister

DESCRIPTION OF FAX: letter

NUMBER OF PAGES INCLUDING COVER PAGE: 2

COMMENTS:

3RD00183

SCOTT A. BRISTER
JUDGE, 234TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713) 755-6262

November 10, 1995

Mr. Stephen D. Susman
Susman Godfrey
Fax: 653-7897

Dear Steve:

Would you ask your subcommittee to consider changing Rule 166a, the summary judgment rule, in the following respects:

1. providing that a summary judgment may be affirmed on any grounds in the motion, even if the trial court's order states a different ground; and

2. changing the burden of coming forward with evidence as per the federal practice.

Let me know if you need additional information. Thanks for your consideration.

Very truly yours,

Hon. Scott Brister
Judge, 234th District Court

cc: Hon. David Keltner
Fax: (817) 347-6650

Mr. Luther H. Soules III
Fax: (210) 224-7073

02/12/97 WED 15:42 FAX

001

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CC ~~HS~~
Duggins
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HAYNES AND BOONE, LLP

Fax Transmittal

Date: February 12, 1997

To/Company:	Fax:	Phone:
LUTHER H. SOULES, III / DAVID T. LOPEZ & ASSOC.	(210)224-7073	

h | b

From:	Phone:	E-Mail:
DEAN J. SCHANER	[713] 547.2044	@hayboo.com

Client Matter #: 97900.30	ID #: 8221
Total Pages [Including Cover]: 2	
Please call if you have any problems with this transmission. Sending Telephone:	

Message:

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HHD
TRCP 166a
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Attorneys
1000 Louisiana Suite 4300 Houston, Texas 77002
Telephone [713] 547.2000 Fax [713] 547.2600 http://www.hayboo.com

HAYNES AND BOONE, LLP

February 12, 1997

Direct Dial: (713) 547.2044
schanerd@hayboo.com

Via Facsimile

Mr. Luther H. Soules, III
Soules & Wallace
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

h|b

Re: Supreme Court Advisory Committee -- Proposed Changes to Texas Summary Judgment Rules.

Dear Mr. Soules:

I practice employment litigation in both federal and state courts. The members of Haynes and Boone's employment law section support the proposed summary judgment rules, but we suggest a few important changes.

First, we believe the application of different summary judgment standards based on an arbitrary, temporal cut-off is inadvisable. This timeline approach is confusing and unfair to defendants served early in multi-party cases. Instead, the *Celotex* summary judgment standard should apply throughout the pendency of a case.

Second, any suggestion that the new rule should: (i) require a summary judgment movant to proffer admissible evidence; but (ii) allow a nonmovant to defeat the motion with an unsworn affidavit, is troubling. Federal courts require competent evidence from both the movant and non-movant -- otherwise, every nonmovant could simply "jot down" an unsworn statement to create fact issues defeating summary judgment. The proposed rule provides that the parties must complete discovery or reach an advanced stage of discovery before moving for summary judgment. A nonmovant *should* have admissible evidence to create a fact issue on an essential element of his claim when discovery is completed. Therefore, the new rule should require both the movant and nonmovant to proffer admissible summary judgment evidence.

Third, any concern that the *Celotex* rule would mean a "rise in litigation costs" is unwarranted. The availability of attorneys' fee awards for frivolous summary judgment motions will prevent excessive filings of summary judgment motions. Moreover, the courts will not be burdened with summary judgment filings. Courts applying the *Celotex* standard have held universally that the trial court does not have to sift through the record to find a fact issue. Under *Celotex, the parties* have the burden to identify fact issues (or the lack thereof) and, accordingly, the burden on the trial court is substantially lightened.

Attorneys
1000 Louisiana Street Suite 4300 Houston, Texas 77002-5012
Telephone (713) 547.2000 Fax (713) 547.2600 http://www.hayboo.com

AUSTIN DALLAS FORT WORTH HOUSTON SAN ANTONIO WASHINGTON, D.C. MEXICO CITY

Fourth, a *Celotex* "no evidence" summary judgment standard will not "delay proceedings" or "interfere with the possibility of informal resolution." In our experience, a summary judgment motion forces the nonmovant to review the evidence realistically, assess the probable outcome at trial, and participate in an informal resolution process. Further, federal cases in Texas go to trial far more quickly than state court cases -- proof that the *Celotex* summary judgment rule leads to the just, efficient, and inexpensive resolution of litigation.

h | b

Thank you for considering our comments.

Sincerely,

Dean J. Schaner

DJS/cmc
h-83072.1

4543 C01 @
cc [redacted]
Eng. Ltr
3/26/97

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HHD
Stake Opinion
Sent
✓

March 24, 1997

Mr. Luther H. Soules, III
Chairman
Supreme Court Advisory Committee
100 West Houston Street
15th Floor
San Antonio, Texas 78205-1457

RE: Change in Summary Judgment Procedure

Dear Mr. Soules:

I am aware that you are chairing a committee that is studying the possibility of changing the current summary judgment rules. I strongly disapprove of any change in the rules.

A change that would have the effect of placing the burden of proof on the plaintiff and which would liberalize the court's discretion in granting a motion for summary judgment would be disastrous on the day to day practice of law. It will substantially burden the trial court's docket. It will have the effect of causing every case to go through a summary judgment process. This will drive up the cost of litigation dramatically and it is already far too high. Additionally, it will have the effect of causing more extensive discovery and this will make it much more difficult and expensive for the solo and small firm practitioner representing individuals and small businesses. I also predict that there will be a vast increase in the number of summary judgments granted and that there will be a commensurate increase in the number of appeals.

It is my judgment that a change in the rules such as has been described to me totally favors well-financed corporate litigants and the large firms that represent them. In this day of attempting to streamline and reduce the cost of litigation, I cannot think of a proposal that would be more inappropriate.

Finally, there is the question of access to a jury trial. A judge cannot determine the credibility of witnesses and the inferences and nuances that are available through live

testimony. Needless to say, it is also impossible to address all of the potential fact issues in discovery. A change in the summary judgment procedure would make trial lawyers to paper pushers, discovery mavens, brief writers and appellate lawyers.

Sincerely,

Fred Davis

Fred Davis
For the Firm

FD:jet

ROY D. BRANTLEY
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4543 CC1 ✓
cc: ~~HS~~
Orig: RHO
3/26/97

WHP
Rule agenda
✓ Soule

March 24, 1997

Mr. Luther H. Soules, III
Chairman, Supreme Court Advisory Committee
100 W. Houston Street, 15th Floor
San Antonio, TX 78205-1457

Re: Modification of the State Summary Judgment Practice.

Dear Mr. Soules:

I am a practicing civil litigator in the Brazos County. Our firm is a two attorney firm with one secretary. I am very familiar with the Federal Summary Practice and the *Trilogy*, and I, on behalf of myself and my partner, *highly* recommend that the Supreme Court of Texas *conform* the State Summary Judgment Practice to the Federal Rules. Unquestionably, the result will be to *weed-out merit-less law suits*. The increase in the trial court's paper work will be compensated by the fact that the court will have to call fewer cases to trial.

Sincerely,

Rob H. Holt

Rob H. Holt

cc: Roy D. Brantley (firm)

3RD0187.3

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713/626-3709 Fax

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Scare Agent
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SBOT Stobb
J Heidt

FACSIMILE COVER SHEET

TRCP 166b

TO:

NAME	FAX NO.	PHONE NO. (IN EVENT OF TRANSMISSION DIFFICULTIES)
David Holman	222-8810	
Alex Albright	512/471-6988	
Denice Smith	520-2525	
Steve Susman	653-7897	
Luke Soules	210/224-7073	

FROM: Paul Gold

RE:

TOTAL NO. PAGES (INCLUDING COVER): 3 **DATE:** 1/24/97

RETURN TRANSMITTED FAX TO: _____ **WITH CONFIRMATION?** ☐ Yes ☐ No

REMARKS:

IF YOU EXPERIENCE ANY PROBLEMS WITH THIS TRANSMISSION OR HAVE ANY QUESTIONS, PLEASE CALL (713) 626-3700.

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RANDAL A. KAUFFMAN
J. CHRISTOPHER DIAMOND
MONICA C. VAUGHAN

January 24, 1997

David Holman
Holman, Hogan, Dubose
& Townsend
440 Louisiana, #1400
Houston, Texas 77002

Via Telecopy: 222-8810

Dear David:

The case that I mentioned to you the other day at the Houstonian is ***ISK Biotech Corporation, v. Tony Lindsay***, 933 S.W.2d 565 (Tex. App. -- Houston [1st Dist.] 1996). While I agree with the holding in this discovery case, I am concerned about one aspect of the court's analysis. See page 568:

> We turn, first, to the question of whether Judge Lindsay's ruling constitutes a clear abuse of discretion. Her order does not specify which of Bownco's objections [the defendant reportedly served 4-5 boilerplate objections to each request that are identified in a footnote] she sustained to support her ruling. Accordingly, her ruling can constitute clear abuse of discretion only if none of those objections will suffice to support. . . (omitting citations).

I find such an approach to be counterproductive to the goal of efficient administration of justice. I believe a respondent to a discovery request should have to specify what precise objection(s) it is relying upon, just as they would have to do in a courtroom and the court should have to specifically state its ruling as to each discrete objection. Otherwise, parties will be encouraged to file voluminous, unfounded objections and trial courts will be encouraged to enter amorphous orders. It will be left to the appellate courts to have to undertake a painstaking analysis of each objection in search of one that will support the trial court's ruling. If this is truly the law, I believe steps should be taken to change it.

Best regards,

Very truly yours,

Paul N. Gold

PNG:lgc

cc: *Via Telecopy:*
Alex Albright
Steve Susman
Denice Smith
Luke Soules
Hon. Lupe Rivera

1/13/97
4543.001
cc: [illegible]
orig: hhd fr

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January 10, 1997

HHD, Scott Agenda Sub Cs
r J Hecht Sup

TRCP 167

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rule 167 and Rule 200

Dear Justice Phillips:

Enclosed herewith are proposed rule changes to Rules 167 and 200 which the Court Rules Committee has passed for approval to submission to the Supreme Court.

The Court Rules Committee has also approved a proposed rule change to Rules 86, 87 and 89, which are currently being drafted in final form. As soon as they are put in final form, I will forward those to you also.

By copy of this letter, I am forwarding copies of these rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: O. C. Hamilton, Jr.

OCH/sam

Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Ms. Laurie Baxter (w/encl.)
State Bar of Texas Committees
P.O. Box 12487
Austin, Texas 78711

STATE BAR OF TEXAS
COURT RULES COMMITTEE
REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

RULE 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING

1. **Procedure.** Any party may serve on any other party a REQUEST:

a. to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served; or

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

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

d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.

e. A true copy of the REQUEST and RESPONSE, together with proof of the service thereof on all parties as provided in Rule 21a, shall

be filed promptly in the clerk's office by the party making it, except that any documents produced in response to a REQUEST need not be filed.

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

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

2. **Time.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon the defendant. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.

3. **Order.** If objection is made to a request or to a response, either party may file a motion and seek relief pursuant to Rules 166b or 215.

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

II. Exact wording of proposed rule:

A. **The request.**

1. **Timing.** At any time no later than 30 days before the end of any applicable discovery deadline or 45 days before a trial date, whichever occurs first, any party may serve upon any other party a Request for

Production and for Inspection to discover documents, other tangible things, or real property that are within the scope of Rule 166b.

2. **Content.**

a. **Specific requests.** The request shall describe each requested item or category of items separately and with reasonable particularity. To sample or test a tangible thing, the requesting party must inform the responding party of the means, manner, and procedure for testing or sampling.

b. **Definitions and instructions.** Every request is deemed to include the standard definitions contained in Rule 166g and the following definitions and instructions:

(1) **"Possession, custody and control"** are defined as stated in Rule 166b.

(2) **"Events in dispute"** refers to the transaction(s) or occurrence(s) on which a claim or defense is based as identified by the pleadings, initial disclosures or other discovery responses.

(3) **Persons covered.** A reference to any entity refers to and includes its officers, directors, trustees, managing partners, employees, or servants as may apply under the circumstances. A reference to any individual refers to and includes that person's employees, or servants as may apply under the circumstances.

(4) **Abbreviations and pronouns.** Any request may refer to any entity, person, document or other tangible thing by using an obvious abbreviation or personal pronoun without any accompanying definition.

(5) **Conjunctives and disjunctives.** The words "and" and "or" shall be given their ordinary meaning and are not interchangeable.

(6) **Gender neutral.** Every request is deemed to be gender neutral regardless of the pronoun used.

c. **No definitions or instructions.** No definitions or instructions shall be included in the request, except that a different time period as allowed by subpart 3.b. may be provided for in a specific request. Failure to comply with this provision renders the entire request for production or for inspection invalid.

3. **Scope.**

a. **Standard.** All requests must be specific as to the item or categories of items requested, recite precisely what is wanted, and be limited to the case's subject matter. A general request to produce all items that support a party's allegations is insufficient.

b. **Time period covered.** Except as otherwise provided in a specific request, every request is deemed to include a time period beginning two years prior to the first event in dispute, as determined by the relevant claim or defense, through the time the response is served.

4. **Limits.** No more than two sets of requests may be served by one party on any responding party; however, a party may serve additional specific requests that relate solely to items newly identified during discovery.

B. **The response.**

1. **Timing.** The responding party shall respond in writing within 30 days after the service of the written request or within 50 days if the request accompanies citation.

2. **Content.**

a. **Form.** The response shall include a restatement of each request followed by a corresponding specific response.

b. **Substantive response.** Regarding each specific item or category requested, the response must state whether responsive items exist and identify the responsive items by category or name.

c. **Objections.** The response shall not state any objections to the requests based on any privilege or other discovery exemption. Any

other objection shall include a short, plain statement of its basis. Failure to do so waives the objection.

d. **Production information.** The response must also include a separate section that provides the following: (1) a good faith estimate of the responsive items' volume; (2) when the responsive items will be served or produced; (3) where the production will occur; and (4) how the production will be made.

3. **Privileges and exemptions.**

a. **Deemed objections.** No written objections based on any privilege or other discovery exemption shall be included in the response. Each response is deemed to assert every privilege or other discovery exemption that the responding party has to assert with out any related objection being stated.

b. **Disclosure of withheld documents.** The response must include a separate written statement disclosing whether any responsive documents are being withheld based on any claimed privilege or exemption. This disclosure shall describe the withheld documents by general category and their related claimed privilege or exemption. The disclosure shall include documents that, at that time, are known to exist and be subject to a claimed privilege or exemption.

c. **Privilege logs.** At any time after a disclosure of withheld documents has been made, the requesting party may ask, in writing, the responding party to provide a privilege log. Within 21 days after receiving a privilege log request, the responding party shall serve a privilege log, which must include at least the following information for each withheld document: (1) Bates No., (2) date, (3) author, (4) addressee, (5) other recipients, (6) general subject matter description, (7) the claimed privilege or exemption, and (8) a short, plain statement supporting the claimed privilege or exemption.

d. **Routine exempt documents.** A responding party is not required to disclose or list on a privilege log any privileged or exempt documents created after that party established an attorney client relationship regarding the specific matter at dispute or after that party learned that the claim has been threatened or asserted, whichever occurs first.

e. **Duty to supplement.** The responding party has a duty to supplement seasonably its disclosures or privilege logs when it finds additional documents that it withholds based on a privilege or exemption claim.

f. **Waiver.** Producing a document or tangible thing shall not waive any objection, privilege, or exemption for documents or tangible things not produced.

C. **The production.**

1. **Duty to produce.** Subject to any objection in the response or any claimed privilege or exemption identified in a disclosure or privilege log, the responding party must produce all responsive items within that party or person's possession, custody or control.

2. **When.** The responding party shall serve copies of the responsive documents with its response, along with a bill for copying at a reasonable charge, if the total number of documents is less than 200 pages. Otherwise, the responsive items or real property will be made available for inspection at a reasonable date within 30 days from the response's service date, subject to modification pursuant to Part F.

3. **Where.** Unless copies of responsive items are served with the response, the production shall occur at (a) the producing party's counsel's office or (b) the documents' location where they reside in the ordinary course of business. If the production occurs at the responding party's place of business and the items are located in multiple locations, the responding party shall accumulate the produced items to a central geographic location to the extent possible without unreasonably interrupting its business.

4. **How.**

a. **Documents.** The responding party shall produce documents either as they are kept in the ordinary course of business or by organizing them by Bates No., indexing, or otherwise to correspond to the specific requests. If the documents are produced as they are kept in the ordinary course of business, the responding party shall, when the inspection begins, disclose where specific documents or categories of documents can be found by the requesting party and make a good faith effort to assist the

requesting party in locating responsive documents. To the extent practical, the responding party shall Bates stamp documents before they are made available for inspection. The responding party may produce originals by allowing the requesting party to inspect and copy them.

b. **Tangible Things.** The responding party may produce tangible things or permit their inspection. Testing, sampling, or examination shall not materially alter a tangible thing without notice, hearing, and a prior order of the court.

5. **Copies.** Except as provided in Part C.,2., upon request and upon payment of copying and delivery expenses by the requesting party, the responding party shall deliver the requested copies to the office of the requesting party or its attorney. All copies provided to a requesting party shall be Bates stamped. If copies are served with the response or produced for inspection in lieu of originals, the responding party shall, upon reasonable written request, make the originals available for inspection.

D. **Expenses.** The responding party shall pay for producing documents and tangible things. Each party shall pay for its own copies. The requesting party will pay for inspecting, testing, sampling, and photographing documents and tangible things. If the responding party determines that it cannot reasonably retrieve the data or documents requested or produce it in the form requested, it may file a motion and seek relief pursuant to Rule 166b. After a hearing, the court may order the responding party to respond if the requesting party pays the reasonable expenses for any extraordinary steps required for retrieval and production.

E. **Electronic or magnetic data.** To obtain electronic data, magnetic data, or the information contained therein, the requesting party must specifically request it and specify the form of production. In response, the responding party shall produce the requested electronic data, magnetic data, or the information contained therein. If the responding party cannot reasonably retrieve the data or documents requested or produce it in the form requested, the response shall explain the inability to do so, and the requesting party may seek relief pursuant to Rule 166b.

F. **Modification.** These provisions may be modified by (1) court order, for good cause shown, or (2) by the requesting and responding party or non-party's agreement, subject to a court's contrary order.

G. **Filing.** A true copy of the request, response, any withheld document disclosures and privilege logs, together with proof of the service thereof on all parties or affected nonparties as provided in Rule 21a, shall be filed promptly in the clerk's office by the serving party or person. The responsive documents or tangible things, however, shall not be filed.

H. **Dispute resolution.** Any party seeking relief related to a request, response or production must meet the requirements of Rule 166b.7.

OFFICIAL COMMENTS

Revision Purpose. This revised rule eliminates many problem areas that create document production disputes and make the process more difficult and expensive for litigants. For example, the rule eliminates disputes over instructions and definitions by eliminating them from the process. Similarly, the rule eliminates clutter created by form objections by requiring the responding party to explain its objections with particularity. Additionally, the rule streamlines the process for asserting privileges by deeming all privileges and discovery exemptions to be asserted. This list is not exhaustive but illustrates the overall goal of simplifying the document production process.

Part A.,2.,a. Specific Requests. This provision is to be read with Part A.,3.,a. regarding the applicable standard.

Part A.,2.,b. Definitions or Instructions. A set of requests that is invalid under this rule does not have to be responded to and does not count as a general set of requests under Part A.,4.

Part A.,3.,a. Standard. The references to "items(s)" here and throughout this rule refers to documents, other tangible things, and real property as the context requires.

Part B.,2.,b. Substantive Response. The substantive response may state that the responding party has or is conducting a good faith search and that, at that time, cannot say whether responsive items exist or have been located. In that event, the responding party must supplement its response according to Rule 166b(6) without further request from or action by the requesting party.

Part D. Expenses. Each requesting party is required to pay for its own copies. Under Part C.,2., the requesting party is deemed to have agreed to pay for copying costs of less than 200 pages.

Proposed Rule 167 Distinguished From S.C.A.C. Rule 11

Proposed Rule 167 addresses a number of issues which are not covered by S.C.A.C. Rule 11. Among them are:

- provisions dealing with definitions and instructions
- a scope provision which establishes relevant time periods
- a limitation on the number of sets of production requests
- clarification of costs and expenses issues
- clarification of the responding party's obligations and the proper form of the response

While the philosophy of both rules is essentially the same, Proposed Rule 167 is a more comprehensive effort to solve the problems being experienced by parties conducting discovery under the current rules.

10-13-95
4543.001
cc: HHS
WHd
Sam

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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October 12, 1995

HHD
Subc TRCP 167
Agenda
Staff
SBOT
Jury

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

Dear Luke:

Enclosed is a letter Justice Cornyn received from Bob Gwinn regarding the Rules of Civil Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Gwinn & Roby
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October 9, 1995

Honorable John Cornyn
Supreme Court of Texas
Supreme Court Bldg.
P.O. Box 12248
Austin, Texas 78711

PERSONAL

RE: Revisions to the Texas Rules of Civil Procedure

Dear Justice Cornyn:

Please let me express my appreciation to you for taking the time to attend the Dallas Bench and Bar Conference and more particularly for your presentation regarding proposed revisions to the Texas Rules of Civil Procedure. Following up on our brief discussion, I would like to express my concern regarding the present lack of any real limitation in the rules to requests for production. I know that covering all the topics in your talk in detail would not have been possible but I did not pick up on any suggestion that there is going to be dramatic attention being given to Rule 167 in much the same fashion as limitations apparently are going to be placed on interrogatories and witness depositions.

Frankly, from the standpoint of product manufacturers, application of Rule 167 has created a substantial and unnecessary expense. When a party to the litigation seeks complete production of all documents surrounding design and manufacture of a particular product, responding to such a broad request can involve literally hundreds/thousands of man hours and thousands of dollars in client expense.

From my personal experience in a multitude of these cases, after the manufacturer has produced boxes and boxes of product information, the requesting party's expert witnesses do not give more than cursory examination of these materials as a part of their preparation for opinions regarding the quality of the product.

Please carry my concerns to the committee members working on the revisions to the T.R.C.P. I would be happy to appear before that commission and go into greater detail regarding this area of

discovery which appears, from all I have heard, to not be the subject of much revision in the drafting process.

Sincerely,

Robert A. Gwinn

RAG:msr
f:\rgwinn\cornyn

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February 3, 1997

Mr. Luke Soules
SOULES & WALLACE
100 W. Houston Street, Suite 100
San Antonio, Texas 78205-1457

Mr. Steve Susman
SUSMAN GODFREY, L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096

Gentlemen:

I am not sure if you are both still on the Supreme Court Advisory Committee which has been considering changes to the rules of discovery, but if not, I hope each one of you will forward this letter to somebody who is on that committee today.

My secretary recently pointed out to me that legal secretaries all over the state are spending an exorbitant amount time typing interrogatories into their computers as required by Rule 168 and typing Requests for Production and Request for Admissions into their computers (which is customary even though not required) and very little time then typing answers such as "Yes", "None", etc. Her point was everybody uses computers now days and the legal secretary of the party that propounded the discovery requests already has all this information on her computer in a data file that could have been downloaded to a floppy disc and sent with the printed copies of the discovery requests when they were served. Even though all the lawyers don't use the same word processing program, virtually every word processing program I am aware of has conversion utilities in them to convert documents prepared in the major formats (Word or the various releases of WordPerfect) so that three or four minutes of reformatting could easily save a secretary an hour or more of typing.

The more I thought about it, the more sense it made to me to require that a party sending discovery requests either send a floppy disc with the requests on them or be required to provide that upon request of the party on whom the requests were served. Since a floppy disc only costs about twenty-five cents now days, there is no significant expense involved (and a party that receives a floppy disc would always be required to send it back with the answers).

3RD00206

Since there are a lot of things that I would like to have my secretary doing besides re-entering documents somebody else has sitting on a hard disc across town, I thought I would write and suggest the committee might consider recommending some rule to this effect.

Very truly yours,

Richard E. Tulk

RET/klr

12/4/96
4543.001
cc: LHS
orig hhd sm
(3)

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

NHD, Supreme Court Staff ✓ TRCP 168

November 27, 1996

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Steven Amis regarding Rule 168. I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

AMIS & MOORE

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PARALEGALS

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‡BOARD CERTIFIED LEGAL ASSISTANT, CIVIL TRIAL LAW
††BOARD CERTIFIED LEGAL ASSISTANT, PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

October 31, 1996

The Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, TX 78711

Dear Justice Hecht:

I enjoyed seeing you at the Page Keeton Conference in Austin and appreciated your recent update on the proposed changes to the Rules of Procedure and Evidence. For me, it was one of the most constructive portions of the conference. To refresh your memory, I spoke with you briefly after your talk about a proposed rules clarification or change and, at your suggestion, I offer the following thoughts and comments.

Rule 168 requires that interrogatories be answered in writing, under oath, signed and verified by the person making them. We have always assumed that the client is the only proper party to sign interrogatories since the rule provides that they are to be answered by "the party served" and the provisions of Rule 14 do not apply. It has always been well accepted that the client's verification was to be based on personal knowledge and not on the client's information and belief. This, along with the fact that the client is the one authorized to sign the interrogatories, has always presented a problem for many attorneys.

Most interrogatory questions do not call for information that is within the personal knowledge of the client. Rather, much of the information sought, such as the identity of fact and expert witnesses, is the type of information that is most often provided by the attorney. Strict adherence to the rule most often finds the client stating that he has personal knowledge of answers to which he actually has no knowledge. I mention this as preface to my comments which follow.

I have also found it interesting that attorneys waste considerable time supplementing interrogatories to include the names of witnesses named by an opposing party - time for which they must ultimately charge the client. Insofar as Rule 168 was intended to require each side to reveal fact and expert witnesses, what purpose can be served by requiring one party to name the opposing party's fact and expert witnesses as a prerequisite to calling one or more of those witnesses at trial when the identities of those witnesses are already known to the opposing party?

Finally, based on lower court rulings, we had assumed that supplemental answers to interrogatories did not require verification or even the signature of our client if the original interrogatory answers were properly verified. Soefje v. Stewart, 847, S.W.2d, 311 (Tex App -- San Antonio 1992 - writ denied. Kramer v. Lewisville Memorial Hospital, 831 S.W.2d 46 (Tex App -- Ft. Worth 1992, affirmed 558, S.W.2d 397). However, the recent decision of Dawson-Austin v. Austin, 920 S.W.2d 776,792 (Tex. App. -- Dallas, 1996, n.w.h.) is in conflict with these prior decisions insofar as it requires verification of supplemental answers to interrogatories. I am hopeful the Court will address whether such supplemental interrogatory answers must be verified, particularly if the only information supplied is the identity of fact or expert witnesses.

Most of our practice is limited to Dallas and Tarrant County. With the recent opinion requiring verification of supplemental answers many of the Dallas County Courts are following this decision. On the contrary, based on a survey we conducted of Tarrant County Courts, most are following the previous line of cases and do not require a verification. Given the fact that our practice involves personal injury defense, for the most part confined to automobile accident cases, the position taken by the Dallas County Courts has created havoc with our practice. During the course of discovery, it is not uncommon to file second and even third supplemental answers to interrogatories. The opinion in Dawson-Austin v. Austin and the subsequent decision by some of the Dallas Courts to follow that decision and require verification of supplemental answers is disconcerting to say the least given the fact that almost all supplemental answers to interrogatories are filed for the sole purpose of naming fact and/or expert witnesses -- facts about which our clients seldom, if ever, have personal knowledge.

With the foregoing in mind, I believe that the discovery process could be further simplified and brought into line with reality if Rule 168 were changed to provide that:

1. A party may call as a witness any person named by an opposing party as a fact and/or expert witness identified in response to mandatory disclosure or an appropriate interrogatory even if the party seeking to call the witness has not named the witness as a fact and/or expert witness.

2. Each party be required to verify only those answers to which the party has personal knowledge. The answers to those interrogatories which are not based on the personal knowledge of the party should require no verification if the answer is provided by the attorney. This could be accomplished by a verification setting forth specifically those interrogatory answers about which the party signing the verification has personal knowledge.

It may be that the proposed Rule 9 - Standard Request for Disclosure - will solve the problem especially as it pertains to the disclosure of fact and expert witnesses in supplemental answers to interrogatories. However, if Rule 168 remains unchanged, adoption of proposed Rule 9 will not cure the problem created when parties invariably are forced to verify answers about which they have no personal knowledge.

It has always been my understanding that interrogatories are a discovery tool meant to allow parties to obtain full disclosure about an opposing party's case. Clearly, providing information about fact and expert witnesses in unverified supplemental answers to interrogatories is in keeping with the intent, if not the letter, of Rule 168. However, the decision of some courts to follow the Dawson-Austin decision is producing results which, although they may be in keeping with a strict interpretation of the rule, were never intended by the spirit of Rule 168.

Thank you for agreeing to hear me out on this matter. Since the rules have not yet been adopted, I hope this letter and my suggestions are not too late for consideration. If you have any questions, I am at your disposal.

Very truly yours,

Steven P. Amis

SPA/mrc
becht.ltr

12/4/96
4913.001
cc: HS
Doug; hhd

MEMORANDUM

HHD, Scope Agenda Subcs Staff J. Hall

TRCP 21 173 177b 181 329b

TO: Members of the Court Rules Committee

FROM: Patrick Hazel, Subcommittee Chair

DATE: December 3, 1996

SUBJECT: Rules 21, 173, 177b, 181, and 329b.

Three members (named below) of the Subcommittee on "Hearings on Appointment of Guardian ad Litem, Motion for New Trial/Appealabliity, and Three Day Notice of Motions" met by telephone conference on December 2, 1996.

A version making certain amendments to the above rules was first circulated for discussion. The results of our discussion are noted following each of the amendments.

In summary we recommend passage of the recommended amendments to Rules 21, 173, 177b, and 181. We do not recommend passage of the amendments to Rule 329b. This needs a lot more discussion and, perhaps, some sort of research to determine whether a large problem exists and, if so, what the best way to resolve it might be.

Subcommittee members who discussed the proposals:

J. Patrick Hazel

Janet Spielvogel

Bill Cox

THANKS

CONSIDERATIONS FOR AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE

RULE 173. GUARDIAN AD LITEM

When a minor, ~~lunatic, idiot,~~ or ~~a~~ other person who is non-compos mentis may be a defendant to a suit and has no guardian within this State, or where such person is a party to a suit either as plaintiff, defendant or intervenor and is represented by a next friend or a guardian ~~who appears to the court to have an interest adverse to such minor, lunatic, idiot or non-compos mentis~~, the court on its own or on the motion of any party and with notice and hearing shall determine from the evidence whether there exists such an adverse interest between the person or persons represented and the representative that a guardian ad litem is necessary. Upon determination that such an adverse interest exists the court shall appoint a guardian ad litem for such person or persons and shall allow the guardian ad litem a reasonable fee for the services which shall be taxed as a part of the costs.

The court shall upon termination of the case include in the judgment, or, if terminated by settlement, in a separate final order, recitations of the court's findings requiring the appointment, the identity and qualifications of the guardian ad litem, and the amount of the reasonable fees awarded.

COMMENT: Language which is no longer politically correct is dropped from the rule. Further, the present rule mandates appointment of a guardian ad litem simply when it "appears" that an adverse interest exists. These changes would require the court to give notice to all parties, conduct a hearing, and make a finding of adverse interest. Further, requiring recitation of the findings in an order makes it possible to appeal or seek a writ of mandamus from an appellate court.

One member of the subcommittee raised a problem she has experienced in family law cases. That is that taxing the fee as costs (which is the present system) means that a lot of guardians ad litem never get paid. The problem is where else get the money? The subcommittee both doubted that a trial judge could order the fee to be paid out of county monies and questioned whether this would be a feasible fund even if judges could do that. No solution was reached - we only raise the question.

12/4/96
4913.001
cc: (HS)
cc: hhd

MEMORANDUM

HHD, Sept Agenda Subcom Staff J. Hebert

TRCP 21 173 177b 181 329b

TO: Members of the Court Rules Committee

FROM: Patrick Hazel, Subcommittee Chair

DATE: December 3, 1996

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Subcommittee members who discussed the proposals:

J. Patrick Hazel

Janet Spielvogel

Bill Cox

THANKS

CONSIDERATIONS FOR AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE

RULE 177b. COMPELLING APPEARANCE OF PARTIES AND PRODUCTION OF DOCUMENTS AND THINGS.

A party, or an agent or employee who is subject to the control of a party, may be compelled to appear for testifying and producing specified documents and things at any trial or hearing by notice to the party or the party's attorney. Such notice shall be served upon all parties or their attorneys a reasonable time before the trial or hearing, and it shall have the same effect as a subpoena and subpoena duces tecum.

COMMENT: This new rule would permit forcing an adverse party to appear at trial and to produce specified documents and things without the need for a subpoena or subpoena duces tecum. It simply uses the same language as applies in discovery. The language for the persons who could be so compelled is taken from Rule 201-3.

12/4/96
4913.001
Cc: HS
bcc: hhd

MEMORANDUM

HHD, Supreme Agenda, Subcom, Staff, J. Hedt

TRCP 21 173 177b 181 329b

TO: Members of the Court Rules Committee

FROM: Patrick Hazel, Subcommittee Chair

DATE: December 3, 1996

SUBJECT: Rules 21, 173, 177b, 181, and 329b.

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Subcommittee members who discussed the proposals:

J. Patrick Hazel

Janet Spielvogel

Bill Cox

THANKS

CONSIDERATIONS FOR AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE

~~RULE 181. PARTY AS WITNESS~~

~~Either party to a suit may examine the opposing party as a witness, and shall have the same process to compel his attendance as in the case of any other witness.~~

COMMENT: This rule can be deleted in light of interpretations of Rule 215 and in light of passage, if it happens, of Rule 177b.

4543.001
cc: ~~Bill~~ Hud
Vang

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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HHD, SAC agenda ✓ Subc Staff SBOT Staff J. Hecht Tex

October 10, 1995

Ms. Holly Duderstadt
Soules & Wallace
100 West Houston Street, Suite 1500
San Antonio, TX 78205-1457

NEW TRCP 182

Dear Holly:

Enclosed is a copy of a letter from Kevin R. Madison proposing Texas Rule of Civil Evidence 182 regarding firearms as evidence. As usual, this letter is being forwarded to Mr. Soules for consideration by the Advisory Committee as he deems appropriate.

Sincerely,

E. Lee Parsley
Rules Staff Attorney

enc.

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

1/13/97
4543.001
Cc: LHS
orig: hhd ltr

MORRIS ATLAS
ROBERT L. SCHWARZ
GARY GURWITZ
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(210) 542-1850

January 10, 1997

HHD
Scott Ayende
Sub Cs
J Hecht
Tue

TRCP 200

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rule 167 and Rule 200

Dear Justice Phillips:

Enclosed herewith are proposed rule changes to Rules 167 and 200 which the Court Rules Committee has passed for approval to submission to the Supreme Court.

The Court Rules Committee has also approved a proposed rule change to Rules 86, 87 and 89, which are currently being drafted in final form. As soon as they are put in final form, I will forward those to you also.

By copy of this letter, I am forwarding copies of these rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: O. C. Hamilton, Jr.

OCH/sam

Enclosures

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording existing Rule:

Rule 200. Depositions upon Oral Examination.

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

Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.

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

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

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

II. Proposed Rule:

Rule 200. Depositions Upon Oral Examination.

1, 2, 3 & 4 - No change from Proposed Rule 200, Revised December 21, 1995 (see attached)

5. **Cost of Expert Witness Depositions.** Except by agreement or as may be permitted by the court after hearing upon a showing of good cause, when a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition shall be paid by the party that retained the expert. Except by agreement or as may be permitted by the court after hearing upon a showing of good cause, the party that takes the deposition of a non-retained expert shall pay the reasonable fees for that expert for time spent in preparing for, giving, reviewing and correcting the deposition.

III. Brief statement of reasons for requested change and advantages to be served by the proposed new rule:

The proposal is part of a design to cut down on the cost of litigation. In the past, there have been many disagreements necessitating court hearings regarding which party must bear the cost of an expert witness fee for giving a deposition. The practice among courts throughout the state varies widely, and the purpose of this rule is to establish uniformity and to prevent disputes over who should pay the expert fees. The committee believes that it is far more expedient for each party to pay that party's own expert fees, rather than create adversarial situations between a party and opposing experts over the payment of fees. The committee also feels that, on balance, this proposal is fair to both sides of the docket in most types of cases.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULES OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording existing Rule:

Rule 200. Depositions Upon Oral Examination

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

II. Proposed Rule: 3RD00224

Rule 200. Depositions Upon Oral Examination

1. No Change.

2. No Change.

b. No change.

c. No change.

3. Limitation. Each party to an oral deposition shall be entitled to not more than six hours in which to conduct the party's examination of the witness being deposed, except where the depositions are being taken through an interpreter in which event each party shall be entitled to eight hours in which to examine such witness. If more than one party is represented by the same attorney(s) such parties shall be considered as one party. The court reporter shall note on the record the time of the commencement of the deposition, the time taken for breaks, including off the record discussions, and the time of termination of the deposition. Time taken for breaks and off the record discussions shall not be counted as part of the examination. The time for each party to examine a witness may be extended by agreement of all parties in writing prior to the commencement of the deposition, by agreement of the parties present at the oral deposition announced on the record of the deposition or by order of the court upon motion of any party or the court's own initiative.

4. **Deposition Conduct.**

a. Deponent. Before the first question is asked in the deposition, the officer taking the deposition, or someone else when no officer is present, shall read, as part of the record, the following to the deponent:

> "You are obliged to be honest and cooperative in this deposition and not to cause any unreasonable delay. Do you understand?

and obtain, as a part of the record, an affirmation of the deponent that he or she understands such obligations.

b. Counsel. All counsel are expected to be courteous and cooperate with each other and the deponent. Objections, side bar remarks or comments which are argumentative or coach the deponent's answers are prohibited and may be grounds for termination of the deposition. A deponent shall not be instructed not to answer a question except to preserve a privilege, to enforce a protective order, to protect a witness from an abusive question, or to secure a ruling from the court prior to answering a question.

c. Termination of Deposition. A deposition may be terminated upon the expiration of time provided in this rule or for conduct prohibited by this rule or to obtain a ruling prior to an answer. If the termination of the deposition is brought to the attention of the court through the filing of a motion, it shall be determined in accordance with Rule 215.

III. Brief statement of reasons for requested change and advantages to be served by the proposed new rule:

The proposal is part of a design to cut down on the cost of litigation. By limiting oral depositions to six hours or eight hours if an interpreter is required, without agreement of the parties or court order, unnecessary lengthy depositions can be avoided and costs reduced. In addition, witnesses should be advised that they are not to cause any unreasonable delays in the deposition and lawyers are to conduct themselves in such a manner as they do not "coach" the witness by side bar remarks, comments and argumentative objections. If such conduct occurs this is grounds for terminating the deposition and seeking a court order for sanctions against the offending attorney and/or witness.

01-02-96
4543.001
cc: (HS)
hhd
Vann

RICHARD R. ORSINGER
ATTORNEY AT LAW
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TEXAS BOARD OF LEGAL SPECIALIZATION

BOARD CERTIFIED
CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TRCP 216-236

December 29, 1995

WHD, Supreme Court Steph SBOT J. Hecht

Ms. Paula Sweeney
ATTORNEY AT LAW
2911 Turtle Creek Blvd.
Suite 1400
Dallas, Texas 75219

Re: Jury-related rules

Dear Paula:

I am writing to you in your capacity as Chair of the Supreme Court Advisory Committee's Subcommittee on jury-related rules. I am enclosing a copy of new jury rules adopted by the Supreme Court of Arizona on October 24, 1995. I thought you might want to cull these rules for possible changes to Texas procedure.

I would like to call your attention to three provisions in particular:

1. On p. 13, Rule 18.5(c) permits the court to have the parties make brief opening statements to the entire jury panel, prior to voir dire. Perhaps Texas should consider this. As it is, many lawyers try to work in an opening statement throughout their voir dire, and there are no clear rules on how far you can go in that regard. A short opening statement would take that part of voir dire and encapsulate it at the beginning where it will do the most good for the panel. The Court could instruct the venire that nothing the lawyer's say is evidence. Then the Court could stop lawyers from presenting disguised opening arguments during the real voir dire. Such short opening statements would probably help the venire to keep an interest in proceedings during the voir dire, since they will have something to relate to as the voir dire questions are asked.

2. On p. 15, Rule 18.6(e) permits the court to instruct jurors that they may submit written questions. I favor this procedure, since it helps the court

and the lawyers direct the evidence into areas that may be unclear to jurors. As it is now, presenting evidence is just guess work as to what you think the jurors may need to know or want to hear in deciding the case. Having this feedback will permit lawyers to adjust their presentation to the needs of the listener.

3. On p. 19, Rule 22.4, Comment, the Arizona Rules contain a suggested "dynamite instruction" to give to a deadlocked jury. None of the Pattern Jury Charge books contain such an instruction except for the Family Law PJC 200.08 (copy enclosed). Perhaps we should undertake to draft an "approved" dynamite instruction as a comment to a jury charge rule, so that the practice is standardized.

Thank you.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je
Enclosure

cc. Luke Soules
Hon. Nathan Hecht
Lee Parsley

PJC 200.08 Instructions to Deadlocked Jury

I have your note that you are deadlocked. In the interest of justice, if you could end this litigation by your verdict, you should do so.

I do not mean to say that any individual juror should yield his or her own conscience and positive conviction, but I do mean that when you are in the jury room, you should discuss this matter carefully, listen to each other, and try, if you can, to reach a conclusion on the questions. It is your duty as a juror to keep your mind open and free to every reasonable argument that may be presented by your fellow jurors so that this jury may arrive at a verdict that justly answers the consciences of the individuals making up this jury. You should not have any pride of opinion and should avoid hastily forming or expressing an opinion. At the same time, you should not surrender any conscientious views founded on the evidence unless convinced of your error by your fellow jurors.

If you fail to reach a verdict, this case may have to be tried before another jury. Then all of our time will have been wasted.

Accordingly, I return you to your deliberations.

COMMENT

Source. The foregoing instructions are modeled on the charge in *Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223 (Tex. 1978), and on Tex. R. Civ. P. 226a.

SUPREME COURT OF ARIZONA

Rules 16, 32, 32(a)(5), 39(b)(c), (f) and (h), 47(a)(1), (b)(2), (f) and (g), and 51(a) and (b)(3), Rules of Civil Procedure, Rules 16.3, 18.5(b), (c), (d), (f) and (h), 18.6(c) and (d), 19.1(a), 19.4, 21.3(d), 22.2(b) and 22.4, Rules of Criminal Procedure, and Rule 611, Rules of Evidence, Relating to Trials by Jury, and the Official Comments thereto, and Arizona Jury Management Standard 16(c)(i)	Supreme Court No. R-94-0031 No. R-92-0004 O R D E R

The Court having considered the captioned petition and public comment thereon, IT IS ORDERED amending the attached rules*, effective December 1, 1995. These amendments shall be applicable to all cases in which the prospective jurors are sworn for jury selection on or after December 1, 1995. The Arizona Jury Management Standards shall be amended to conform with these amendments.

Dated this 24th day of October, 1995.

For the Court:

Stanley G. Feldman
Chief Justice

3RD00230

* Changes or additions in text are indicated by underscoring, and deletions from text are indicated by ~~strikeouts~~.

DERIVATION TABLE*

R-94-0031 (Recommendations of the Committee on More Effective Use of Juries)

1. Encourage Mini-Opening Statements Before Voir Dire

found at:
Rule 47(b)(2), Rules of Civil Procedure
Rule 18.5(c), Rules of Criminal Procedure

2. Allow Judges to Choose Between the "Struck" and "Strike" Replace Methods of Jury Selection

found at:
Rule 47(a)(1), Rules of Civil Procedure
Rule 18.5(b), Rules of Criminal Procedure

3. Assure Lawyers The Right To Voir Dire in all Cases

found at:
Rule 47(b)(2), Rules of Civil Procedure
Rule 18.5(d), Rules of Criminal Procedure

4. Set and Enforce Time Limits for Trials

found at:
Rule 16(h), Rules of Civil Procedure
Rule 16.3(a)(3), Rules of Criminal Procedure
Rule 611(a), Rules of Evidence

5. Juror Notebooks Should be Provided in Some Cases

found at:
Rule 47(g), and Rule 39(d)(3),
Rules of Civil Procedure
Rule 18.6(d), Rules of Criminal Procedure

6. Extend Use of Preliminary Jury Instructions

found at:
Rule 39(b)(1) and Rule 51(a),
Rules of Civil Procedure

*Not a part of the formal promulgating order

7. Ensure Note Taking by Jurors in All Cases

found at:
Rules 39(d)(3) and (e),
Rules of Civil Procedure
Rule 18.6(d), Rules of Criminal Procedure

8. Improve Management of Trial Exhibits

found at:
Rule 611 (Comment) Rules of Evidence

9. Deposition Summaries Should Be Used

consideration by the Court continued

10. Allow Jurors To Ask Questions of the Witnesses or Court

found at:
Rule 39(b) (10) and Comment,
Rules of Civil Procedure
Rule 18.6(c) and (e), and Comment,
Rules of Criminal Procedure

11. Allow Jurors To Discuss The Evidence Among Themselves During The Trial

found at:
Rule 39(f), Rules of Civil Procedure

for criminal cases, consideration by the Court continued

12. Jurors Be Allowed To Have Written Copies of the Jury Instructions

found at:
Rule 51(b)(3), Rules of Civil Procedure
Rules 21.3 and 22.2, Rules of Criminal Procedure

13. Final Instructions Be Read Before Closing Arguments of Counsel, Not After

rejected by the Court

comments added to Rule 39(c),
Rules of Civil Procedure, and
Rule 19.1(a), Rules of Criminal Procedure

14. Alternate Jurors Should Not Be Released From Service In Criminal Cases Until A Verdict Is Announced or the Jury is Discharged

found at:
Rule 47(f), Rules of Civil Procedure
Rule 18.5(h), Rules of Criminal Procedure

15. Jurors Remaining At End Of Civil Case To Deliberate And Vote

rejected by the Court

alternative provision found at:
Rule 47(f), Rules of Civil Procedure

16. Offer Assistance to Jurors at Impasse

found at:
Rule 39(h), Rules of Civil Procedure
Rule 22.4, Rules of Criminal Procedure

R-92-0004 (Recommendations of the Advisory Committee on Jury Management)

1. Furnish Counsel with Prospective Juror's Names, Zip Code, Employment Status, etc., Before Voir Dire

found at:
Rule 47(a)(4), Rules of Civil Procedure
Rule 18.3, Rules of Criminal Procedure

2. Keep All Jurors' Home And Business Phone Numbers Confidential

found at:
Rule 47(a)(4), Rules of Civil Procedure
Rule 18.3, Rules of Criminal Procedure

3. In Limited Jurisdiction Courts, Record Jury Instructions on Audiotape and Provide Them to the Jury

found at:
Rule 51(b)(3), Rules of Civil Procedure
Rule 21.3(d), 22.2(b), Rules of Criminal Procedure

RULE 16, RULES OF CIVIL PROCEDURE

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) - (b) [No change]

(c) Subjects to be discussed at Comprehensive Pretrial Conference. At any Comprehensive Pretrial Conference under this rule the Court may:

(1) - (16) [No change]

(17) Discuss the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary jury instructions, and the effective management of documents and exhibits.

~~(17)~~ (18) Make such other orders as the court deems appropriate.

(d) - (g) [No change]

(h) The Court may impose reasonable time limits on the trial proceedings or portions thereof.

RULE 39. TRIAL BY JURY OR BY THE COURT

(a) [No change]

(b) **Order of Trial by Jury; Questions by Jurors to Witnesses or the Court.** The trial by a jury shall proceed in the following order, unless the court for good cause stated in the record, otherwise directs:

(1) Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court as set forth in Rule 39(b)(10), and the elementary legal principles that will govern the proceeding.

~~1~~ (2) The plaintiff or the plaintiff's counsel may read the complaint to the jury and make a statement of the case.

~~2~~ (3) The defendant or the defendant's counsel may read the answer and may make a statement of the case to the jury, but may defer making such statement until after the close of the evidence on behalf of the plaintiff.

~~3~~ (4) Other parties admitted to the action or their counsel may read their pleadings and may make a statement of their cases to the jury, but they may defer making such statement until after the close of the evidence on behalf of the plaintiff and defendant. The statement of such parties shall be in the order directed by the court.

~~4~~ (5) The plaintiff shall then introduce evidence.

~~5~~ (6) The defendant shall then introduce evidence.

~~6~~ (7) The other parties, if any, shall then introduce evidence in the order directed by the court.

~~7~~ (8) The plaintiff may then introduce rebutting evidence.

~~8~~ (9) The defendant may then introduce rebutting evidence in support of the defendant's counterclaim(s) if any. Rebuttal evidence from other parties or with respect to cross-claims or third party complaints may be introduced with the permission of the court in an order to be established at the court's discretion.

The statements to the jury shall be confined to a concise and brief statement of the facts which the parties propose to establish by evidence on the trial, and any party may decline to make such statement.

(10) Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

Rule 39(b)(10), Comment to 1995 Amendment

The court should instruct the jury that any questions directed to witnesses or the court must be in writing, unsigned and given to the bailiff. The court should further instruct that, if a juror has a question for a witness or the court, the juror should hand it to the bailiff during a recess, or if the witness is about to leave the witness stand, the juror should signal to the bailiff. If the court determines that the juror's question calls for admissible evidence, the question should be asked by court or counsel in the court's discretion. Such question may be answered by stipulation or other appropriate means, including but not limited to additional testimony upon such terms and limitations as the court prescribes. If the court determines that the juror's question calls for inadmissible evidence, the question shall not be read or answered. If a juror's question is rejected, the jury should be told that trial rules do not permit some questions to be asked and that the jurors should not attach any significance to the failure of having their question asked.

(c) [No change]

(d) **Verdict, Deliberations and Conduct of Jury; Sealed Verdict; Access to Juror Notes and Notebooks.**

(1) [No charge]

(2) [No change]

(3) Jurors shall have access to their notes and notebooks during recesses, discussions and deliberations.

(e) [No change]

(f) **Admonition to Jurors; Juror Discussions.** If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.

Rule 39(f), Comment to 1995 Amendment

In exercising its discretion to limit or prohibit jurors' permission to discuss the evidence among themselves during recesses, the trial court should consider the length of the trial, the nature and complexity of the issues, the makeup of the jury, and other factors that may be relevant on a case by case basis.

(g) [No change]

(h) **Assisting Jurors at Impasse.** If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.

Rule 39(h), Comment to 1995 Amendment

Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged very soon thereafter and a mistrial declared when it would be appropriate and might be helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive or unduly intrusive.

The judge's response to the jurors' report of impasse could take the following form:

> "This instruction is offered to help your deliberations, not to force you to reach a verdict.
>
> "You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.
>
> "If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.
>
> "I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try."

If the jury identifies one or more issues that divide them, the court, with the help of the attorneys, can decide whether and how the issues can be

addressed. Among the obvious options are the following: giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns.

(h) - (n) [Reletter as (i) - (o)]

Rule 39(o), 1995 Comment

The Court has discretion to give final instructions to the jury before closing arguments of counsel instead of after, in order to enhance jurors' ability to apply the applicable law to the facts. In that event, the court may wish to withhold giving the necessary procedural and housekeeping instructions until after closing arguments, in order to offset the impact of the last counsel's argument.

(p) **Note Taking by Jurors.** The court shall instruct that the jurors may take notes regarding the evidence and keep the notes for the purpose of refreshing their memory for use during recesses, discussions and deliberations. The court shall provide materials suitable for this purpose. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall promptly destroy them.

RULE 47. JURORS

(a) Trial Jury Procedure; List; Striking; Oath

(1) When an action is called for trial by jury, the clerk shall prepare and deposit in a box ballots containing the names of the jurors summoned who have appeared and have not been excused. The clerk shall then draw from the box as many names of jurors as the court directs ~~eight names, and in addition thereto as many more as equal the number of peremptory challenges to which the parties are entitled~~. If the ballots are exhausted before the jury is completed, the court shall order to be forthwith drawn in the manner provided for other drawings of jurors, but without notice and without the attendance of officers other than the clerk, as many qualified persons as necessary to complete the jury.

Rule 47(a)(1), Comment to 1995 Amendment

Prior to the 1995 amendment, Rule 47(a)(1) was read to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusal for cause of a juror in the initial group. Challenges for cause are heard and decided with the jurors being examined in the box. A juror excused for cause leaves the courtroom in the presence and view of the other panel members, after which the excused juror's position is filled by a panel member who responds to all previous and future questions of the potential jurors.

The purpose of this amendment is to allow the trial judge to use the "struck" method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the "strike and replace" method. See T. Munsterman, R. Strand and J. Hart, The Best Method of Selecting Jurors, The Judges' Journal 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1984).

The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken, and all legal issues arising therefrom have been resolved, the clerk calls the

first eight names remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.

(2) - (3) [No change]

(4) The court shall furnish counsel with the name, zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, and felony conviction status of prospective jurors in writing before the voir dire examination is conducted on the day when jury selection is commenced within a specific time schedule as established by the court. The court shall keep all jurors' home and business telephone numbers and addresses confidential unless good cause is shown to the court which would require such disclosure.

(b) Voir Dire Oath; Examination of Jurors; Brief Opening Statements.

(1) [No change]

(2) The court shall conduct a ~~preliminary~~ thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination. The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion the court may require counsel to do so. Following such statements, if any, the court shall conduct a thorough examination of prospective jurors.

Rule 47(b)(2), Comment to 1995 Amendment

Under the 1995 amendment to Rule 47(b)(2), the judge can control the length and content of the parties' voir dire. The court should instruct counsel that voir dire is permitted to enable counsel to propound questions seeking relevant information from and about the jurors but not to ask questions intended to impart information or arguments to the jurors. The court should be particularly sensitive to the prejudice which can arise from voir dire by an unrepresented party.

(c) - (e) [No change]

(f) Alternate Jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. ~~Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.~~ Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and

challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. If alternate jurors are impanelled, their identity shall not be determined until the end of trial. At the time of impanelment, the trial judge should inform the jurors that at the end of the case, the alternates will be determined by lot in a drawing held in open court. The trial judge shall also explain the need for alternate jurors and the procedure regarding alternates to be followed at the end of trial. The alternate, or alternates, upon being physically excused by the court at the end of trial, shall be instructed to continue to observe the admonitions to jurors until they are informed that a verdict has been returned or the jury discharged. In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew. ~~An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.~~ Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. ~~The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.~~

(g) Juror Notebooks. In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.

Rule 47(g), Comment to 1995 Amendment

In trials of unusual duration or involving complex issues, juror notebooks are a significant aid to juror comprehension and recall of evidence. At a minimum notebooks should contain: (1) a copy of the preliminary jury instructions, (2) jurors' notes, (3) witnesses' names, photographs and/or biographies, (4) copies of key documents and an index of all exhibits, (5) a glossary of technical terms, and (6) a copy of the court's final instructions. The preliminary jury instructions should be removed, discarded and replaced by the final jury instructions before the latter are read to the jury by the court.

RULE 51. INSTRUCTIONS TO JURY; OBJECTIONS; ARGUMENTS

(a) Instructions to Jury; Objection. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court as set forth in Rule 39(b)(10), and the elementary legal principles that will govern the proceeding. ~~At the close of the evidence or at such earlier~~ Prior to the commencement of a jury trial or at such other time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Counsel shall be deemed to have waived request for other instructions except those which could not reasonably have been anticipated prior to trial. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of hearing of the jury.

(b) Instructions to Jury; Notations; Filing Transcript.

(1) - (2) [No change]

(3) The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court. Upon retiring for deliberations the jurors shall take with them all jurors' copies of final written instructions given by the court. In limited jurisdiction courts, the court may record jury instructions on audiotape and provide these audio instructions to the jury for their use during deliberations.

(c) - (d) [No change]

RULE 16.3, RULES OF CRIMINAL PROCEDURE

RULE 16.3 PROCEDURE ON OMNIBUS HEARING

(a) Scope of Proceeding. The court shall:

(1) Hear all motions made at or prior to the hearing;

(2) Obtain stipulations to facts relevant to the case;

(3) ~~Consider~~ Discuss and determine any other matters which will promote a fair and expeditious trial including the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary instructions, and the effective management of documents and exhibits; and

(4) Set such further hearings for the taking of evidence or argument of motions as are needed.

(b) - (f) [No change]

RULE 18.3 JURY INFORMATION

Prior to the voir dire examination on the day when jury selection is commenced, the parties shall each be furnished with a list of the names of the panel of prospective jurors called for the case together with ~~biographical information~~ the zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, and felony conviction status as to each potential juror within a specified time schedule as established by the jury commissioner, if one is utilized, or the court, if one is not. The jury commissioner shall obtain and maintain such information as to each potential juror in a manner and form to be approved by the supreme court, but all information obtained shall be limited to use for the purpose of jury selection only. The court shall keep all jurors' home and business telephone numbers and addresses confidential unless good cause is shown to the court which would require such disclosure.

RULE 18.5, RULES OF CRIMINAL PROCEDURE

RULE 18.5 PROCEDURE FOR SELECTING A JURY

(a) [No change]

(b) **Calling Jurors for Examination ~~a Full Jury Box~~.** The court or clerk shall then call to the jury box a number of jurors equal to the number to serve plus the number of alternates plus the number of peremptory challenges allowed the parties. Alternatively, and at the court's discretion, all prospective jurors may be examined by court and counsel.

Rule 18.5(b), Comment to 1995 Amendment

Prior to the 1995 amendment, Rule 18.5(b) was read to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusal for cause of a juror in the initial group. Challenges for cause are heard and decided with the jurors being examined in the box. A juror excused for cause leaves the courtroom in the presence and view of the other panel members, after which the excused juror's position is filled by a panel member who responds to all previous and future questions of the potential jurors.

The purpose of this amendment is to allow the trial judge to use the "struck" method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the "strike and replace" method. See T. Munsterman, R. Strand and J. Hart, The Best Method of Selecting Jurors, The Judges' Journal 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1994).

The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken and all issues under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and other legal issues arising therefrom have been resolved, the clerk calls the first eight or twelve names, as the law may require, remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.

(c) **Inquiry by the Court; Brief Opening Statements.** The court shall initiate the examination of jurors by identifying the parties and their counsel, briefly outlining the nature of the case, and explaining the purposes of the examination. It shall ask any questions which it thinks necessary touching the prospective jurors' qualifications to serve in the case on trial. The parties may, with the court's consent, present brief opening statements to the entire jury panel, prior to voir dire. On its own motion the court may require counsel to do so.

(d) **Voir Dire Examination.** ~~The court shall conduct the voir dire examination, putting to the jurors all appropriate questions requested by counsel. The court may in its discretion examine one or more jurors apart from the other jurors.~~

~~If good cause appears, the court may permit counsel to examine an individual juror.~~

The court shall conduct a thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination.

Rule 18.5(d), Comment to 1995 Amendment

Under the 1995 amendment to Rule 18.5(d), the judge can control the length and content of the parties' voir dire. The court should instruct counsel that voir dire is permitted to enable counsel to propound questions seeking relevant information from and about the jurors but not to ask questions intended to impart information or arguments to the jurors. The court should be particularly sensitive to the prejudice which can arise from voir dire by an unrepresented defendant.

(e) [No change]

(f) **Challenge for Cause.** At any time that cause for disqualifying a juror appears, the court shall excuse the juror ~~and call another member of the panel to take the~~ before the parties are called upon to exercise their peremptory challenges. Such a juror shall be excused and another member of the panel shall be called to take the excused juror's place in the jury box and on the clerk's list of jurors when fewer than all of the members of the jury panel have been examined. Challenges for cause shall ~~may~~ be made out of the hearing of the jurors, but shall be of record.

(g) [No change]

(h) **Selection of Jury.** The persons remaining in the jury box or on the list of the panel of prospective jurors shall constitute the jurors for the trial. Just before the jury retires to begin deliberations, the clerk shall, by lot, determine the juror or jurors to be designated as alternates. The alternate, or alternates, upon being physically excused by the court, shall be instructed to continue to observe the admonitions to jurors until they are informed that a verdict has been returned or the jury discharged. In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew.

RULE 18.6 PREPARATION OF JURORS

(a) - (b) [No change]

(c) Preliminary Instructions. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court as set forth in Rule 18.6(e), and the elementary legal principles that will govern the proceeding.

(d) Note Taking; Access to Juror Notes and Notebooks. The court shall instruct the jurors that they may take notes regarding the evidence presented ~~and keep the notes for the purpose of refreshing their memory when they retire for deliberation~~. The court shall provide materials suitable for this purpose. In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by jurors during trial to aid them in performing their duties. Jurors shall have access to their notes and notebooks during recesses and deliberations. After the jury has rendered its verdict, the notes shall be collected by the bailiff or clerk who shall destroy them promptly.

Rule 18.6(d), Comment to 1995 Amendment

In trials of unusual duration or involving complex issues, juror notebooks are a significant aid to juror comprehension and recall of evidence. At a minimum notebooks should contain: (1) a copy of the preliminary jury instructions, (2) jurors' notes, (3) witnesses' names, photographs and/or biographies, (4) copies of key documents and an index of all exhibits, (5) a glossary of technical terms, and (6) a copy of the court's final instructions. The preliminary jury instructions should be removed, discarded and replaced by the final jury instructions before the latter are read to the jury by the court.

(e) Juror Questions. Jurors shall be instructed that they are permitted to submit to the court written questions directed to witnesses or to the court; and that opportunity will be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

Rule 18.6(e), Comment to 1995 Amendment

The court should instruct that any questions directed to witnesses or the court must be in writing, unsigned and given to the bailiff. The court should further instruct that, if a juror has a question for a witness, or the court, the juror should hand it to the bailiff during a recess, or if the witness is about to leave the witness stand, the juror should signal to the bailiff. The court should also instruct the jury that they are not to discuss the questions among themselves but rather each juror must decide independently any question he or she may have for a witness. If the court determines that the juror's question calls for admissible evidence, the question should be asked by court or counsel in the court's discretion. Such question may be answered by stipulation or other appropriate means, including but not limited to additional testimony upon such terms and limitations as the court prescribes. If the court determines that the juror's question calls for inadmissible evidence, the question shall not be read or answered. If a juror's question is rejected, the jury should be told that trial rules do not permit some questions to be asked and that the jurors should not attach any significance to the failure of having their question asked.

RULE 19.1(a), RULES OF CRIMINAL PROCEDURE

1995 Comment to Rule 19.1(a)

The Court has discretion to give final instructions to the jury before closing arguments of counsel instead of after, in order to enhance jurors' ability to apply the applicable law to the facts. In that event, the court may wish to withhold giving the necessary procedural and housekeeping instructions until after closing arguments, in order to offset the impact of the last counsel's argument.

RULE 21.3 RULINGS ON INSTRUCTIONS AND FORMS OF VERDICT

(a) - (c) [No change]

(d) Jurors' Copies. The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court. In limited jurisdiction courts, the court may record jury instructions on audiotape and provide these audiotape instructions to the jury for their use during deliberations.

RULE 22, RULES OF CRIMINAL PROCEDURE

Rule 22.1 RETIREMENT OF JURORS

[No change]

RULE 22.2 MATERIALS USED DURING DELIBERATION

Upon retiring for deliberation the jurors shall take with them:

(a) [No change]

(b) All jurors' copies of written or recorded instructions ~~given by the court~~,

(c) - (d) [No change]

RULE 22.3 FURTHER REVIEW OF EVIDENCE AND ADDITIONAL INSTRUCTIONS

[No change]

RULE 22.4 ASSISTING JURORS AT IMPASSE

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.

Rule 22.4, Comment to 1995 Amendment

Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged very soon thereafter and a mistrial declared when it would be appropriate and might be helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive or unduly intrusive.

The judge's response to the jurors' report of impasse could take the following form:

"This instruction is offered to help your deliberations, not to force you to reach a verdict.

"You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

"If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

"I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try."

If the jury identifies one or more issues that divide them, the court, with the help of the attorneys, can decide whether and how the issues can be addressed. Among the obvious options are the following: giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns.

RULE ~~22.4~~ 22.5 DISCHARGE

[No change]

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court; Time Limitations. 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. The court may impose reasonable time limits on the trial proceedings or portions thereof.

Comment to Evidence Rule 611(a), 1995 Amendment

Following are suggested procedures for effective document control:

(1) The trial judge should become involved as soon as possible, and no later than the pretrial conference, in controlling the number of documents to be used at trial.

(2) For purposes of trial, only one number should be applied to a document whenever referred to.

(3) Copies of key trial exhibits should be provided to the jurors for temporary viewing or for keeping in juror notebooks.

(4) Exhibits with text should and, on order of the court, shall be highlighted to direct jurors' attention to important language. Where important to an understanding of the document, that language should be explained during the course of trial.

(5) At the close of evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g., an index, is provided to the jurors to assist them in finding exhibits during deliberations.

(b) - (c) [No change]

11-08-95
4543.001
cc: LHS
MHd

Vamf

SCOTT A. BRISTER
JUDGE, 234TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713)755-6262

November 3, 1995

HHP, SCAC Appeals Subc ✓ Staff & Hecht.

TRCP 223

Ms. Paula Sweeney
Misko Howie & Sweeney
2811 Turtle Creek, Suite 2811
Dallas, Texas 75219

Dear Paula:

Would you ask your subcommittee to consider dropping Rule 223, the provision for a jury shuffle? Allowing these shuffles is detrimental in four ways:

1. It invites racial and gender discrimination, as there is little basis for deciding upon a shuffle prior to questioning other than such discriminatory grounds;

2. It scrambles an otherwise randomly-selected panel;

3. Like all procedures involving drawing things out of a hat, it is subject to less-than-random results; and

4. It wastes time.

Let me know if you need additional information. Thanks for your consideration.

Very truly yours,

Scott Brister

Hon. Scott Brister
Judge, 234th District Court

cc: Hon. David Peeples
Fourth Court of Appeals
3200 Justice Center
San Antonio, Texas 78205

Mr. Luther H. Soules III
Soules & Wallace
100 West Houston, Suite 1500
San Antonio, Texas 78205

01-14-96
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cc: CHS
Rnd
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HJD
SCAC agenda
SubC (Paula Sweeney) Staff
8301
J. Hall

January 18, 1996

Mr. Luther H. Soules, III
SOULES & WALLACE, P.C.
100 W. Houston Street
Suite 1500
San Antonio, Texas 78205

Re: TRCP 226a, 269, and 286

Dear Luke:

I would propose that we adopt rules permitting jurors in civil cases to submit written questions, and to take notes. I would also propose giving the trial court the power to permit lawyers to reargue the case if the jury is deadlocked.

I am enclosing copies of two *National Law Journal* articles on new approaches to jury trials.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je
Enclosures

cc: Paula Sweeney, Subcommittee Chair

Jury Pragmatism

IF IT IS POSSIBLE TO discern a thread linking legislative action regarding the legal system, it is the placing of limits on discretion. The federal sentencing guidelines, for example, curbed federal judges' wiggle room in sentencing convicts. And part of tort reform concerns itself with curbing jurors, with proposals that would restrict panels' ability to assess punitive damages by compelling them to apply a multiplier to the compensatory damages they already have awarded.

To many critics of the system, the O.J. Simpson trial seemed to crystallize all that is wrong with the jury system. They maintain that jurors in general are prone to disregard the facts in favor of their prejudices and are incapable of evaluating complex scientific evidence such as DNA or the testimony offered by experts.

There is another party that is as concerned about jurors' limitations but believes these not to inhere in the individual juror but to be imposed by the circumstances of jury service. Pointing to studies that show that jurors who are more involved will remain engaged and will be less prone to nod off, they would let jurors ask questions. When highly technical evidentiary issues arise, reformers say, courts should have their own experts evaluate the experts, rather than leave it to jurors to puzzle over a scientist's wisdom and believability.

Some, including New York's Chief Judge Judith Kaye, say Arizona's example bears watching: If a jury says it is deadlocked, it can ask the lawyers to speak to the questions it cannot resolve. Similarly, some argue that jurors should be permitted to take notes, since it will help them retain facts and perceptions germane to the case, and they should be able to discuss the evidence among themselves as the case proceeds.

Certainly, as complex suits proliferate, involving toxins in almost immeasurable quantities and esoteric antitrust analyses of market share, the lay jury can seem like an anachronism. (Indeed, the *Markman* case, heard by the U.S. Supreme Court last week, turns on the question of whether juries should continue to hear patent disputes.)

Still, the jury remains a specimen of democracy embedded in what is otherwise, but for various due process guarantees, our undemocratic system of justice. That simply means that decisions are supposed to be reached on the merits, not on the basis of popular appeal.

But democracy comes in at least two varieties: representative and participatory. Let panels henceforth include not only welfare mothers but lawyers and even judges. The former will have been educated in the school of hard knocks and often bring an understanding of the milieu of a criminal defendant or hapless plaintiff. The latter will bring training of the bookish sort to the evaluation of complex evidence.

But participatory democracy risks plunging trials into a sort of "Jenny Jones" show under state auspices. With too much juror participation, litigants will lose control of how they choose to frame a case. 3RD00257

Let jurors ask questions, but only after the trial judge approves and tailors them. And let them ask for the reiteration of difficult, confusing evidence, but let the burning desire to know still more remain the vice of media addicts.

Jury System Undergoes Patchwork Remodeling

Reformers argue that service can be pleasant and also further justice.

BY ANDREW BLUM
NATIONAL LAW JOURNAL STAFF REPORTER

DO JURORS GET in the way of justice?

These days—fueled in part by the O.J. Simpson verdict—just about everyone seems to have an opinion on what ails the American jury system and on how to fix it.

While suggestions range greatly, they can be grouped into one of two categories: They depict jurors either as victims of the system or as a cause of its problems.

For those who view jurors as victims, New York announced changes in its jury system. Among other things, to ease protracted jury selection, judges will preside over voir dire in civil suits. [NLJ, 9-11-95.]

For those who see jurors as the problem, in California, Gov. Pete Wilson led a campaign to end unanimous verdicts.

And in a move that may straddle the categories, Arizona has begun what an envious New York Chief Judge Judith Kaye calls an "astounding procedure."

The Arizona courts, effective last Dec. 1, allow jurors to hear more arguments from counsel when they are unable to reach a verdict. They are also allowed to take notes and ask questions during trial.

The new rule has already had an ef-

[SEE 'JURIES' PAGE A22]

Courts' Experiments Try To Improve Jury System

['JURIES' FROM PAGE A1]

fect. In mid-December, a jury was stuck on two conspiracy counts in a double murder trial in Phoenix, Maricopa County Superior Court Judge B. Michael Dann chose two points for elaboration after reading a jurors' note. "I ordered rearguments, one hour for each side," he says. "Ninety minutes later they came back with an acquittal on all charges."

Judge Dann, the chair of a 26-member committee on reform, reports, "A juror told me following a three-month murder case before another judge, 'Having to sit on our hands for three months and keep our mouths shut...We were more like hostages than adult decision-makers.' A lot of jurors felt that way."

Envious: New York Chief Judge Judith Kaye says Arizona's jury rules are 'astounding.'

Juries are under scrutiny as never before, not only in the states but at the federal level. Many current reforms stem from years of complaints and studies. Nevertheless, the Simpson verdict considerably boosted the decibel level in the debate and impelled some changes.

The plethora of problems and remedies swirling around juries include, for the jurors-as-victims crowd:

■ Protracted jury selection. Proposed solution: Allow fewer peremptory challenges.

■ Non-representative juries. Proposed solutions: Expand jury pools and eliminate automatic exemptions.

■ Lengthy trials, drawn out by complicated evidence. Proposed solution: Jurors take notes and pose their own questions to witnesses.

■ Hardship and "battle fatigue" due to prolonged sequestration. Proposed solution: "Special handling" of jurors in high-profile cases.

For those who view jurors as the problem:

■ Juror ignorance of complex issues. Proposed solution: Allow jurors to discuss cases among themselves during trial and provide court-appointed experts.

■ Unrepresentative jurors chosen by lawyers aided by jury consultants. Proposed solution, from Illinois state legislators: Ban non-lawyers as jury consultants because it skews the selection process.

Perhaps the most radical solution: Abolishing the jury system outright, replacing lay jurors with those trained as professional arbitrators.

$2.9M Coffee Spill

Much of the debate focuses on criminal cases, but the $11.1 billion verdict in the 1985 Texaco-Pennzoil case and the $2.9 million verdict in the 1994 McDonald's coffee-spill case are two civil trials in which jurors' decisions were heavily criticized. At least one critic suggests that jury reform might be a variation on tort reform:

"A law that places a cap on damages...is really a way of controlling jury power," says University of Houston Law Center Prof. David Dow. "I characterize that as jury reform. Tort reformers are behind jury reform."

Tort reformers disavow the label. Professor Dow acknowledges: "Generally speaking, tort reformers distance themselves from [jury reform]. They don't want to look anti-populist."

While criticism of juries arose in the early 1970s, much of the current reform movement traces its roots to a 1983 American Bar Association task force on jury standards. Its 19 guidelines have been adopted by 14 states; seven others are reviewing them. Four other states were already in compliance with the ABA standards, which cover selection, exemptions, fees and treatment. Issued in conjunction with several national judges and court administration groups, the guidelines stemmed from an effort to provide a blueprint for state court administrators.

G. Thomas Munsterman of Arlington, Va., director of the Center for Jury Studies at the National Center for State Courts, calls the standards modest: "They are not meant as pathbreakers." Rather, he says, the aim was "the democratization of the jury," widening the jury pool and eliminating discrepancies "in who serves and who doesn't."

Many states then began their own jury evaluations. The latest reform comes from New York state which, on Jan. 1, eliminated all automatic exemptions—including one for lawyers—and gave judges the option to preside over voir dire in civil suits. The reforms, which grew out of a 1993 study of the New York court system, also created an ombudsman service to answer questions from those summoned.

Noting that New York calls more than 450,000 people a year for service, Chief Judge Kaye, a moving force behind the reforms, says the jury service is "a tremendous opportunity to show people the system works well."

Judge Kaye says the reforms have just begun. Next up: a proposal to reduce peremptory challenges, which could save an estimated 90,000 juror days per year. In Class A felonies, they would go from 20 challenges plus two for each alternate per party to 15 plus one per alternate.

'Hungry for Reform'

Judge Dann of Arizona says his state's changes were impelled by public dissatisfaction, loss of faith in the system and questions about jurors' ability to decide controversial, complex cases. The people were "hungry for reform," he says. "Judges and lawyers finally see...they better reform what goes on in courtrooms or it will be reformed for them."

The judges chaired a committee composed of jurists, attorneys and ex-jurors—as well as a psychologist and an anthropologist. Academic books and monographs critical of the jury process were reviewed. "As we discussed ideas, we tried to take into account the social science material available," says Judge Dann. He notes such support for brief opening statements, note-taking and allowing jurors to discuss evidence among themselves during trial—but no social science support for more arguments to a hung jury.

Arizona's unique "re-argument" rule has formally given judges the power to allow more arguments and give hung jurors more information. A judge can tell jurors to list issues dividing them, then decide what warrants elaboration. Then, after the supplemental stuff, they go back to deliberate," says Judge Dann, who proposed the idea to the committee, and who did his law school thesis on juries.

Calling New York and Arizona wonderful models, Vanderbilt University School of Law Prof. Nancy King says that in Arizona, the judges initiated reform, while in New York, there seemed to be more public outcry for change.

Ms. King, who teaches criminal procedure and evidence, says the Simpson verdict was merely an impetus for jury reform. The idea has been kicked around for years among legislators from across the country.

"If anything, [the O.J. case] created the need for us to be more aggressive in addressing problems that faced us for years," says Mike Roddy, a member of the Court Administrators Standing Advisory Committee and court executive officer of the Sacramento County courts. Mr. Roddy says court personnel told the judicial council they had been living with a raft of problems: too few jurors in pools, low yield in selection and public apathy. "We were working to put together a cogent argument to convince people," he says. "We did not do it because of Simpson, but the timing helped get it done."

California's Jury Improvement Project will review sequestration, along with other issues. "[I]t may be appropriate to consider rules or standards...governing the special handling of jurors in high-profile cases," a project summary says. In the Simpson case, jurors were sequestered for 265 days.

Changes are brewing at the federal level as well. A bill introduced Nov. 27 in the Senate, S. 1426, calls for an end to unanimous jury verdicts in criminal and civil trials. A spokesperson for Sen. Strom Thurmond, R-S.C., one of the sponsors, says his belief that it is needed has been long held. The change, the senator said on the Senate floor, would "reduce the likelihood of a single juror corrupting an otherwise thoughtful and reasonable deliberation of the evidence."

Bigger Is Better

Elsewhere, at the federal level, the U.S. Administrative Office of Courts proposed rules changes governing the size of juries, increasing the present minimum of six to the 12-member entity that has defined civil juries for centuries. The change would invalidate local federal court rules setting smaller jury sizes. "Twelve-member juries substantially increase [their] representative quality," the proposal states. "Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members."

Beyond official reform, there is ad hoc change. In Tucson, U.S. District Judge Richard M. Bilby, a consultant on the Arizona reforms, says he has been implementing most of them for years—as have many of his fellow jurists. He says he has come to believe it essential for jurors to refresh their memories with notes. He also allows them passport-size pictures of witnesses. "I allow questions because frequently lawyers miss the most basic things," the judge says. As jurors' questions come to him, the test he uses is: Would I ask it? "It's wonderful," he says. "It keeps them much more awake."

New Approach: Judge B. Michael Dann lets lawyers elaborate for jurors after closing arguments.

Guide: G. Thomas Munsterman says the ABA's jury reforms are modest but seek to widen pools.

Missoula, Mont., County Attorney Robert Deschamps, ex-president of the National District Attorneys Association, agrees with such reforms as using notes, saying they're more reliable than memory alone. "A jury asking questions is something that seems frightening to a great many folks," he adds. "I do inquests in death cases and grand juries. In both, jurors are free to ask questions. I've always been impressed with...the questions."

Still, many feel jurors are overwhelmed by cases that hinge on complex scientific evidence.

University of Michigan Law School Prof. Richard O. Lempert points to civil suits becoming more complicated because of the increased use of specialists to discuss highly technical evidence. An expert in evidence and litigation psychology, Professor Lempert notes, "Scientists honestly disagree. How can a jury resolve a disagreement like that?"

Professor Lempert says he proposes three reforms: ensuring that better-educated people serve on juries, improving the clarity of jury instructions and having court-appointed experts help jurors decide between each side's experts.

Abolish Lay Juries?

But the University of Houston's Prof. Dow says many of the reforms to date don't go far enough. In fact, he favors abolishing the system outright. Instead of lay jurors, he prefers professional jurors trained as arbitrators. Trials today "end up with [jurors] who do not know a lot about complicated issues," says Professor Dow, who teaches contracts and constitutional law and has handled death-penalty appeals.

Professor Dow, who says he is not a tort reformer, notes that he's received several letters from anti-tort reformers since raising his abolish-the-jury proposal: "They appreciated my honesty but disagreed with my 'tort reform' agenda."

No tort reform group backs jury reform as framed by the current debate. The American Tort Reform Association distanced itself from any such implication at a press briefing it held on punitive damages in the recently argued Supreme Court case *BMW of North America v. Gore*, 94-896. In response to a question on how he would reform juries, the counsel for the defendant-appellant, BMW, Andrew L. Frey, of the Washington, D.C., office of Mayer, Brown & Platt, said he would remove jurors from setting punitives. ATRA officials on hand quickly said Mr. Frey's comments reflected his opinion only. [NLJ, 10-16-95.]

Mr. Frey suggests that either courts set punitives in the same manner in which criminals are sentenced, according to guidelines, or that jurors be required to obey strict guides when awarding punitives: "My belief is there are certain kinds of things jurors are not competent to deal with."

He says that, based on their experience, "jurors have no frame of reference" for setting punitives properly in products liability or antitrust cases. He adds that, intellectually, jurors are incapable of sorting out which expert is a better guide to setting amounts. Asked if adding lawyers to the pool would help, Mr. Frey says he doesn't think a lawyer could do any better as a juror in a complicated case.

Overall, U.S. District Judge Bilby of Arizona says, reform should help jurors. "None of us want to see the jury system go," he says. "The real solution is not to change the number of people needed for a verdict, but to enhance the ability of juries to understand complicated cases.

The judge says the worst result of the Simpson case is its use as a basis for reform: "That case was an aberration. It ought to be treated that way." ■

3/21/97
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cc: LHS
orig: hhd gnd

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March 18, 1997

HAD, SCAC agenda / SCAC J. Hecht

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rules 226a and 281

Dear Justice Phillips:

Enclosed are proposed rule changes to Rules 226a and 281 which have been approved for submission to the Supreme Court by the Court Rules Committee.

By copy of this letter, I am forwarding copies of these proposed rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: [signature]
O. C. Hamilton, Jr.

OCH/sam

Enclosures

3RD0259.1

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
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State Bar of Texas Committees
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STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Existing Rule:

Rule 226a. ADMONITORY INSTRUCTIONS TO JURY PANEL AND JURY

The court shall give such admonitory instructions to the jury panel and to the jury as may be prescribed by the Supreme Court in an order or orders entered for that purpose.

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:

Ladies and Gentlemen of the Jury Panel:

The case that is now on trial is _____ vs. _____. This is a civil action which will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I am now going to give you, as well as others which you will receive while this case is on trial. If you do not obey the instructions I am about to give you, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. These instructions are as follows:

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

a. Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.

b. If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.

Do you understand these instructions? If not, please let me know now.

Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.

The attorneys will now proceed with their examination.

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:

Oral Instructions

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice. I now give you further instructions which you must obey throughout this trial.

It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you.

(A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.)

As you examine the instructions which have just been handed to you, we will go over them briefly together. The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:

(The written instructions set out below in this Section II shall thereupon be read by the court to the jury.)

Counsel, you may proceed.

Written Instructions

1. Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.

2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.

3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss the case, report it to me at once.

4. Do not even discuss this case among yourselves until after you have heard all of the evidence, the court's charge, the attorneys' arguments and until I have sent you to the jury room to consider your verdict.

5. Do not make any investigation about the facts of this case. Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of this trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.

6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court. Do not let anyone else do any of these things for you.

7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.

8. Do not discuss or consider attorney's fees unless evidence about attorney's fees is admitted.

9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind.

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.

The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.

You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.

3RD0259.4

III.

That the following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

(Definitions, questions and special instructions given to the jury will be transcribed here.)

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

_____

Judge Presiding

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged:

The court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations, and that you should not discuss this case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish.

After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.

3RD0259.5

II. Exact wording of proposed Rule (the proposed new wording has been underlined):

Rule 226a. ADMONITORY INSTRUCTIONS TO JURY PANEL AND JURY

Preamble - Unchanged.

I. - Unchanged.

II. - Unchanged through paragraph 9 under "Written Instructions".

. . .

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

(The court may, in its discretion, allow the jurors to take notes during the trial for the purpose of refreshing their memories during their deliberations. The court shall see that suitable materials are provided for this purpose, shall retain custody and ensure confidentiality of the notes during the trial and shall collect and destroy the notes after the jurors render their verdict. If the court allows the jury to take notes, it shall read the following instructions to the jury:)

11. You will be allowed to take notes during the trial and, after the arguments of counsel, take them into the jury room for the purpose of refreshing your memories during your deliberations. You must, however, follow these instructions:

a. The notes are not considered evidence.

b. The notes should not be considered any more accurate than the memory of a juror not making notes.

c. Your note taking should not interfere with your ability to pay attention to the evidence.

d. You have been provided materials to use in taking notes. Do not remove the notes from the courtroom at any time during the trial or from the jury room during your deliberations. During any morning and afternoon breaks, you may leave your notes on your chairs. At the noon break and at the end of the day, please hand your notes to the bailiff for safekeeping. No one will look at your notes during the breaks. At the end of the trial, leave your notes with the bailiff and they will be destroyed.

. . . the remainder of paragraph II is unchanged.

III.

That the following written and oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Written Instructions

Ladies and Gentlemen of the Jury:

This case is submitted to you . . . (remainder of the rule down through the form for the jury to sign is unchanged).

Oral Instructions

(If the court allowed the jury to take notes during the trial, after the final arguments of counsel and before the jury retires to deliberate, the following instructions shall be given by the court to the jury:)

You may take your notes to the jury room but remember to follow the instructions I gave you before, including the following:

a. The notes are not considered evidence.

b. The notes should not be considered any more accurate than the memory of a juror not making notes.

IV. - Unchanged.

III. Brief statement of reasons for requested change and advantages to be served by the proposed new rule:

The purpose of the proposed rule is allow jury note-taking during the trial, and to allow the juror notes in the jury room during deliberations.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Existing Rule:

Rule 281. PAPERS TAKEN TO JURY ROOM

The jury may, and on request shall, take with them in their retirement the charges and instructions, general or special, which were given and read to them, and any written evidence, except the depositions of witnesses, but shall not take with them any special charges which have been refused. Where part only of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded.

II. Exact wording of proposed Rule (the proposed new wording has been underlined):

The jury may, and on request shall, take with them during ~~in~~ their deliberations ~~retirement~~ the following: the originals and any copies provided by the court of the charges and instructions, general or special, which were given and read to them, ~~and any written evidence, except the depositions of witnesses,~~ any notes taken by them during the trial pursuant to the instructions of the court, and any exhibits admitted in evidence. ~~but shall not take with them any special charges which have been refused. Where part only of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded.~~

III. Brief statement of reasons for requested change and advantages to be served by the proposed new rule:

The revisions allow the jurors to take their notes and copies of the charge into the jury room during deliberations. The revisions also attempt to clarify what can be taken into the jury room. The last sentence is eliminated as unnecessary.

10/18/96
4543.001
cc LHS
Original ... (CH) ...

BAYLOR UNIVERSITY
SCHOOL OF LAW
Louis S. Muldrow • Professor
Waco, Texas 76798 • (817) 755-3611

October 15, 1996

HHD -
SCAC agenda
✓ Sub C
SCAC Staff
J Hecht
LHS Nov Mtg
Fley

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
200 W. 14th Street, Capitol Station
P.O. Box 12248
Austin, TX 78711

Re: Proposed revisions to Rs. 271-279, T.R.C.P.

Dear Chief Justice:

I have recently received from Luther Soules a copy of the Court's proposed revisions to the Charge rules. and take the liberty of tendering the following observations.

Rule 271: "...The charge shall be signed by the judge and filed with the clerk."

This sentence has always been confusing. To my knowledge, it is universally ignored. for when the charge is prepared and ready for submission. the charge is read aloud, and. following arguments. is delivered physically to the jury, and taken by them to deliberations. Only after it has become the verdict is it filed with the clerk.

Perhaps the sentence could be revised to read: The charge shall be signed by the judge, and, after verdict of the jury, shall be filed with the clerk.

Rule 277: "A party is not entitled to the submission of a question. instruction or definition regarding a matter that is not affirmatively raised by the written pleadings and raised by the evidence."

A general denial has always been a sufficient pleading to support the introduction of evidence of inferential rebuttal positions. The 1941 Rules (279) provided that a party was not entitled to the submission of an issue based only on a general denial. and not on an affirmative pleading by that party. After 277 was amended to prohibit submission of inferential rebuttals in issue form. a few courts have held that the general denial was still a sufficient pleading to support the submission of inferential rebuttals by way of instruction.

3RD00260

Is it the intent of the amendment to change this latter matter? That is. to require an affirmative pleading for not only questions. but also for instructions and definitions?

Current Rule 278 requires an affirmative written pleading for issue (question) submission, but expressly excepts from that requirement "trespass to try title, statutory partition proceedings, and other special proceedings" in which the pleadings are specially defined by statutes or procedural rules.

I believe it may still be correct that the defendant's pleading in a trespass to try title suit is "Not Guilty." I must plead ignorance as to partition proceedings, and the others. In such cases, how is one to plead "affirmatively"?

The last two sentences of proposed R. 277 state: "A proper disjunctive question that submits a defensive theory as an alternative to a claimants theory is not an impermissible inferential rebuttal submission. However, inferential rebuttal questions shall not be submitted."

It seems to me that greater clarity is achieved by reversing the order of the two statements: "Inferential rebuttal questions shall not be submitted. However, a proper disjunctive question that submits a defensive theory as an alternative to a claimants theory is not an impermissible inferential rebuttal submission."

Rule 278. PRESERVATION OF APPELLATE COMPLAINTS

I gather from R. 278(b) that error is preserved only by way of objections. Subsection (a) of 278 refers, however. to requests. And Rule 271 states: "After requests and objections are made and ruled upon...." It seems. therefore. that some question might be raised about just exactly what a request does. if anything, in preservation of error.

The concluding sentence of 278(a): "Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made..." would seem to suggest that if a request is made, and denied. error might be preserved thereby.

One of the Court's chief complaints (as expressed in Payne) is the confusion that results from the omission-commission problem and the objection-request problem. To fix it. it seems to me that one should be able to look at the Rules and tell what one must do. If objection is required. and if objection. only, preserves error. as proposed 278(b) suggests. then confusion about requests should be removed by a clear statement that the Court's rulings on requests do not preserve complaint on appeal.

I know that Payne states that there should be but one test for preservation of error: and I also know that it is desirable. at least. that the parties assist the trial court with requests. I gather that the dilemma is in how to accomplish both. In order to encourage the parties to assist the court by requests. you might consider a provision to the effect that an objection to the omission of an instruction or definition. and an objection to the omission of a question on which that party has the burden. will not be considered to be a sufficient objection. if. upon request by the court. the party fails to accompany his objection with a helpful request in

writing; and that, having requested, that party will not then be heard to object to the court's submission of what he requested.

It also seems to me that some requirement should be made that requests, whether given or refused, be signed by the judge and filed with the clerk, so that there is a record of who requested what, and a record that the judge saw it.

Rule 279: The next to last sentence of proposed Rule 279 states: "If no such written findings are made, the omitted elements shall be deemed found...if such deemed findings are supported by legally and factually sufficient evidence."

The problem with this — as it has been for a long time — is that the trial court, by its judgment, may be deemed to have answered the omitted issue "No." And, of course, a "No" requires no "evidence."

I just don't know whether you want to try to clarify that in the Rule or not. I merely point it out.

Very truly yours,

Louis S. Muldrow

LSM/lsl/1A

cc: Hon. Nathan Hecht
Mr. Luther Soules, III ✓

Lee Ann GROSSNICKLE, Appellant,

v.

Richard Dean GROSSNICKLE, Appellee.

No. 06-95-00008-CV.

Court of Appeals of Texas, Texarkana.

Submitted March 5, 1996.

Decided July 16, 1996.

Former wife appealed from order of the 6th Judicial District Court, Lamar County, Henry Braswell, J., dividing property in divorce proceeding. The Court of Appeals, 865 S.W.2d 211, reversed and remanded. On remand, the 102nd Judicial District Court, Bowie County, made property division, and former wife again appealed. The Court of Appeals, Grant, J., held that: (1) trial court erred in failing to consider three community bank accounts, which former husband admitted in his inventory to be in existence at time of divorce; (2) trial court improperly failed to consider amounts expended from community property funds by former husband on another woman; (3) based upon division of entire community estate totaling $1,276,739, errors which amounted to three percent of community estate did not constitute an abuse of discretion; (4) preservation order denying former wife use of estate's assets pending appeal was void; and (5) order limiting former wife's freedom of speech contravened the First Amendment and free speech article of the Texas Constitution.

Affirmed in part; set aside in part.

1. Divorce ⇐286(3.1)

Trial court's division of property in divorce proceeding should be corrected on appeal only if trial court clearly abused its discretion by ordering division that is manifestly unjust and unfair.

2. Divorce ⇐286(2)

Presumption arises on appeal that trial court correctly exercised its discretion in dividing property in divorce proceeding, and burden rests on appellant to show from record that division was so disproportionate, and thus unjust and unfair, as to constitute an abuse of discretion.

3. Divorce ⇐287

Court of appeals should remand entire community estate for new division in divorce proceeding if it finds reversible error in a specific part of the division that materially affects trial court's just and right division of entire community estate.

4. Appeal and Error ⇐662(4), 1008.1(1, 2)

Findings of fact in case tried to the court have the same force and dignity as jury's verdict upon special issues; however, findings of fact are not conclusive when record includes complete statement of facts.

5. Husband and Wife ⇐272(1)

Generally, community assets are to be evaluated as of time of divorce, and subsequent increases in value are separate property.

6. Trial ⇐393(2)

Trial court's instructing prevailing party to prepare findings of fact and conclusions of law and a proposed judgment based upon trial court's rulings is not an impropriety, because judge is not bound to accept drafts as submitted, but may make changes or completely rewrite proposed document; practice is clerical in nature, appropriate, and not a ground for error.

7. Exceptions, Bill of ⇐54

Bystander's bill was defective, where accompanying affidavits were provided by plaintiff, her attorney, and paralegal in attorney's law firm, as accompanying affidavits must be provided by disinterested persons. Rules App.Proc., Rule 52(b, c).

8. Trial ⇐400(1), 401

Civil procedure rule governing request for additional or amended findings contemplates that request specify additional or amended findings that party making request desires trial court to make and file. Vernon's Ann.Texas Rules Civ.Proc., Rule 298.

9. Trial ⇐401

Civil procedure rule governing request for additional or amended filings requires trial court to make additional findings of fact and conclusions of law only if they relate to ultimate or controlling issues; court is not required to make additional findings that are unsupported in record, that relate merely to other evidentiary matters, or that are contrary to other previous findings. Vernon's Ann.Texas Rules Civ.Proc., Rule 298.

10. Divorce ⇐282

Former wife's request for additional finding whether office furniture was included in list of "medical equipment and fixtures" provided in findings made in divorce proceeding, was waived on appeal, where former wife's brief did not sufficiently apprise Court of Appeals of significance of requested additional finding, whether it was supported by the evidence, whether it related to other evidentiary matters, or whether furniture was shown to be community property. Vernon's Ann.Texas Rules Civ.Proc., Rule 298.

11. Divorce ⇐253(3)

Whether an appraisal is near enough in time to date of divorce to be considered in determining value of land for purpose of property division is generally left to discretion of trial court.

12. Pretrial Procedure ⇐42

It is duty of counsel to advise expert witnesses to provide supplemental discovery reports timely so they can be furnished to opposing counsel. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 6.

13. Pretrial Procedure ⇐45

When party fails to identify evidence timely in response to discovery request, trial court must exclude all evidence not properly identified in discovery, including opinion evidence based upon information not provided in discovery. Vernon's Ann.Texas Rules Civ. Proc., Rule 215, subd. 5.

14. Divorce ⇐85

Trial court in divorce proceeding did not err in failing to exclude testimony of former husband's expert updating appraisal of ranch property, despite former wife's contention that testimony should have been stricken because of expert's failure to supplement his prior opinion; former wife's production request asked for tangible reports prepared by expert or for expert in anticipation of trial or deposition testimony, and record failed to show that tangible second report existed; moreover, former wife failed to obtain court order to reduce such information to tangible form if it had not been put in such form. Vernon's Ann.Texas Rules Civ.Proc., Rule 215, subd. 5.

15. Husband and Wife ⇐265

Reimbursement for expenditures made on community property may be offset by benefits such as usage by party making such expenditures.

16. Trial ⇐398

Texas law requires that effort be made to reconcile conflicts in findings of fact, and same rule applies to conflicts between findings of fact and conclusions of law.

17. Judgment ⇐527

Effort should be made to reconcile conclusions of law and judgment; thus, when two possible interpretations exist, interpretation should be chosen that will harmonize judgment with findings of fact and conclusions of law upon which it is based.

18. Divorce ⇐254(1)

Trial court's conclusion of law that former husband was not entitled to reimbursement from the community for funds he spent in maintaining community-owned ranch properties since date of divorce was not inconsistent with judgment dividing property, despite former wife's contention that judgment setting value of ranch based on indebtedness at time of divorce, instead of at time of property division trial, allowed former husband reimbursement for his maintenance and payments on the property because he was credited with payments by reduction of amount of mortgage owed; conclusion of law could be construed as consistent with judgment in that there was no money allotted from community assets to reimburse former husband for upkeep of property as stated in conclusion, but, in effect, offset was allowed for payments made on property after divorce

because those payments reduced mortgage owed.

19. Divorce ⇐286(9)

Any error in allowing into evidence general ledger reflecting former husband's business income and liabilities after divorce, instead of requiring production of underlying documents, was harmless in property division trial; ledger was introduced for purpose of proving reimbursement for expenditures made in business after divorce, and trial court specifically denied any reimbursement for such expenditures.

20. Husband and Wife ⇐270(8)

Evidence supported trial court's finding that there were outstanding community expenses of approximately $67,500 as of date of divorce; former husband's "Second Amended Inventory and Appraisement of Petitioner" listed community debts as of April 1992 totaling over $70,000, and document was admitted into evidence and was subject of extensive questioning by counsel during former husband's testimony that he had paid the community debts.

21. Divorce ⇐252.3(2)

Failure of trial court in property division trial to take into account positive effects upon former husband's personal federal income taxes of his payment of portion of community liabilities that constituted business expenses was not error; trial court was not required to consider tax ramifications that might have resulted from community property becoming separate property.

22. Divorce ⇐253(3)

It is not necessary for trial court to go beyond date of divorce in determining actual income of parties for purposes of property division; earning capacities and abilities should be established at time of divorce, and while such factors portend future earnings, it is not necessary to have actual earnings figures after divorce.

23. Divorce ⇐85

Trial court in property division trial did not err in disallowing discovery about separate property income that occurred after divorce, nor in refusing to reveal former husband's income tax returns after date of divorce.

24. Divorce ⇐253(3)

Based upon conflicting evidence, trial court as trier of fact in property division trial could reach figure in between values offered by the parties as representing value of diamond engagement ring awarded to former wife as separate property.

25. Divorce ⇐252.3(2)

Trial court erred in property division trial in failing to consider three community bank accounts, which former husband admitted in his inventory to be in existence at time of divorce; amount of accounts should have been considered as part of assets awarded to former husband.

26. Evidence ⇐555.6(1)

Trial court in property division trial did not err in admitting expert testimony about value of former husband's optical shop, notwithstanding that documents which expert stated at deposition he would produce to support his appraisal valuing optical shop as a growing business were not produced; trial court properly refused to permit expert to testify on that issue, but could permit expert to testify that sole value of shop consisted of hard assets, because such testimony was not based upon the nonproduced documents, but upon expert's personal knowledge and expertise.

27. Divorce ⇐253(3)

Trial court in property division trial could appropriately value optical shop which was operated solely as an adjunct to former husband's medical practice as ophthalmologist, based solely upon physical assets of shop, given evidence that shop was not saleable without medical practice, and thus any good will that existed was not capable of valuation as an asset apart from former husband's earning capacity.

28. Divorce ⇐252.5(1)

Trial court in property division trial did not err in holding former wife responsible for deterioration of community property home that reduced its value by $80,000; there was substantial testimony that house was heavily

damaged by mildew, roof leaks, removal of light fixtures, removal of yard fixtures, vandalism, destruction of one of the two air-conditioning units, and neglect of in-ground pool; moreover, change in condition occurred while property was in former wife's possession and control.

29. Divorce ⇐252.5(3)

Former husband did not breach any fiduciary duty in not providing former wife with money with which to care for community property home; theory of breach of fiduciary duty was based upon marital relationship, and time about which former wife complained was after termination of marriage when former husband no longer owed any fiduciary duty; moreover, there was no court order providing for former husband to fund house care.

30. Divorce ⇐223, 227(1), 252.3(2)

Trial court in divorce proceeding has great discretion in deciding whether to award attorney fees to either party and in determining amount of such award; same principle applies to whether trial court should consider party's payment of attorney fees out of community funds in division of community property.

31. Divorce ⇐252.3(2)

Allocation of attorney fees is factor to be considered by court in making an equitable division of community estate.

32. Divorce ⇐252.3(2)

Prior payments out of community estate to attorneys in divorce action are to be taken into account in division of marital estate; such payments must necessarily come from community, because trial court has no authority to direct one party to expend separate property funds on the other's behalf for attorney fees; rather, sole authority of trial court to require payment of attorney fees lies in court's authority to divide marital estate.

33. Divorce ⇐252.3(2)

Trial court's failure to give credit specifically to either party for expenditures of community funds on attorney fees incurred in divorce was not an abuse of discretion in property division trial; trial court could have considered that both parties had similar community expenditures for attorney fees, both being involved in the same litigation, and that such expenditures canceled each other out in division of community assets.

34. Divorce ⇐252.4

In dividing community property, trial court can appropriately consider existing tax liability for sale of capital assets that has been realized by parties at time of divorce.

35. Divorce ⇐252.4

Where question of future taxation arises in process of dividing community property, trial court errs in allowing credit for future tax figure that must be derived from speculation or surmise.

36. Divorce ⇐252.4

Trial court did not abuse its discretion in property division trial by failing to consider potential tax liability which might be incurred by former wife when assets were withdrawn from retirement account; early withdrawal triggering additional tax would be at election of former wife, and tax rate would depend upon tax bracket at the time and also income tax law in effect at the time.

37. Divorce ⇐253(2)

Trial court did not err in not considering in its division of marital estate $8,000 withdrawn from retirement account by former husband, where former husband testified that withdrawal from account was due to payment erroneously made into account that should have been made into employee profit-sharing account; trial court could accept former husband's testimony and properly disregard withdrawal.

38. Divorce ⇐252.3(4)

Trial court did not err in considering in its division of marital estate $16,000 Individual Retirement Account(IRA) that former wife expended between time of divorce and property division; IRA was transferred to former wife in first property division reversed on appeal and was depleted by former wife after divorce; thus, expended resource could be considered part of marital estate as of date of second property division.

39. **Husband and Wife ⇐272(5)**

Determination of amount spent by husband on another woman out of community property during the marriage requires an accounting to the community, as such expenditure amounts to fraud upon community estate.

40. **Divorce ⇐252.3(1)**

Husband and Wife ⇐272(5)

Trial court's failure to require accounting of money that former husband spent on another woman during marriage, and to specifically consider such expenditures in dividing assets, was error in divorce proceeding.

41. **Appeal and Error ⇐456**

Appellate court's jurisdiction is limited to matters designated in notice of limitation of appeal.

42. **Divorce ⇐219**

Temporary spousal support ends when divorce is final.

43. **Divorce ⇐219**

Trial court may properly award temporary spousal support pending appeal of divorce.

44. **Divorce ⇐213**

Where former wife did not appeal divorce itself, she was not entitled to spousal support during appeal on other issues.

45. **Appeal and Error ⇐419(1)**

Only severable portions of judgment are subject to limitation on appeal. Rules App. Proc., Rule 40(a)(4).

46. **Divorce ⇐226, 228**

It is acceptable practice to allow attorney fees in a suit for divorce to be recovered directly by attorney representing spouse, regardless of whether attorney was named as party in divorce suit; such fees may also be recovered by spouse in separate suit.

47. **Divorce ⇐287**

First appeal in divorce case did not affect attorney fee award to attorney for former wife, considering that award was clearly severable, but was not issue designated for limited appeal, and was not addressed by court on appeal.

48. **Divorce ⇐284**

Temporary orders for preservation of property issued pursuant to section of the Family Code may only be made within 30 days after perfection of appeal. V.T.C.A., Family Code § 3.58(h).

49. **Divorce ⇐284**

Trial court's preservation order denying former wife use of estate assets pending appeal in divorce proceeding was void, where order was made more than 30 days after perfection of appeal. V.T.C.A., Family Code § 3.58(h).

50. **Constitutional Law ⇐90(1)**

Major purpose of freedom of speech provisions in United States and Texas Constitutions is to protect free discussion of governmental affairs, including public officials. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 6.

51. **Constitutional Law ⇐90(3)**

Presumption in all cases under the freedom of speech provision of the Texas Constitution is that prespeech sanctions or prior restraints are unconstitutional. Vernon's Ann.Texas Const. Art. 1, § 6.

52. **Constitutional Law ⇐90.1(1, 3)**

Divorce ⇐87

Order in divorce case that former wife refrain from any utterance, whether written or spoken, which in any matter reflected upon integrity of court, or any officer of court, opposing counsel, or any Supreme Court justice or appellate justice, in any district or region, and at any time, violated First Amendment and freedom of speech provision of the Texas Constitution; nothing in record justified broad prohibition and interference with former wife's constitutional right of free speech. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 6.

53. **Husband and Wife ⇐257**

Good will is not a divisible portion of spouse's individually owned private professional practice.

54. Divorce ⇐286(9)

Reversal of property division is not required unless errors in valuation make the division so disproportionate as to constitute an abuse of discretion.

55. Divorce ⇐286(9)

Based upon division of entire community estate, errors in property division which amounted to three percent of community estate of $1,276,739 did not constitute an abuse of discretion, so as to require reversal.

Lee Ann Grossnickle, Texarkana, for appellant.

Edward E. Ellis, Ellis & Clark, Paris, for appellee.

Before CORNELIUS, C.J., and GRANT and STARR, JJ.

OPINION

GRANT, Justice.

Lee Ann Grossnickle appeals from the division of marital property entered in connection with her divorce from Richard Dean Grossnickle.

Richard Grossnickle and Lee Ann Grossnickle married in 1981. Richard Grossnickle filed for divorce in November 1988. The first trial in this case was heard in District Court in December 1991, and the divorce was granted on April 2, 1992. Lee Ann Grossnickle appealed from the property division. She prevailed in this Court and obtained a new trial on the property division because she had timely requested a jury trial and had been denied that right. *Grossnickle v. Grossnickle*, 865 S.W.2d 211 (Tex.App.—Texarkana 1993, no writ). The remand was on the property division only. *Id.*

After being granted a new trial on her failure to be provided a jury trial, Lee Ann Grossnickle then waived her right to a jury trial on the property division, and the case was heard by the trial court. The trial court signed the judgment on the property division (Modified Judgment) on October 31, 1994, and findings of fact and conclusions of law were entered by the court.

Lee Ann Grossnickle appeals once again from the property division by the trial court, contending the trial court erred

1) by not entering additional findings of fact and conclusions of law, and she asks this Court to remand the case to the trial court so that she can seek those additional findings or conclusions;

2) by setting a certain value on the ranch because the evidence presented by Richard Grossnickle was not provided during discovery, the evaluations were from 1992 (time of divorce) instead of 1994 (time of second trial), and Richard Grossnickle's expert witness mixed property values in 1994 with the mortgage in 1992 to obtain his projected value of the ranch;

3) by valuing the cattle as of 1994 because there was no factual or legal evidence supporting that value;

4) by allowing into evidence general ledgers reflecting Richard Grossnickle's business income and liabilities instead of requiring production of the underlying documents. She also complains that the liabilities indicated by the ledger are not supported by the other evidence admitted;

5) by failing to consider positive tax consequences of Richard Grossnickle's payment of interest on the liabilities and by refusing to compel Richard Grossnickle to produce his 1992 income tax return;

6) by refusing to consider Richard Grossnickle's earnings pending appeal when dividing the community estate;

7) by including in the court's inventory separate property jewelry belonging to Lee Ann Grossnickle;

8) by not making a specific finding about the engagement ring that Lee Ann Grossnickle threw at Richard Grossnickle and by failing to specifically award the ring to Lee Ann Grossnickle as her separate property;

9) by failing to consider the value of specific bank accounts;

10) by admitting expert testimony about the value of Richard Grossnickle's optical shop, even though Richard Grossnickle had failed to produce the documents upon which that testimony was based;

11) by finding that Lee Ann Grossnickle was responsible for physical deterioration of the community property home pending appeal and that the home accordingly declined in value. In a related complaint, Lee Ann Grossnickle also contends that she was forced to sell the house to Richard Grossnickle for $95,000, when she had earlier had an offer of $130,000 from a third party that Richard Grossnickle had refused to accept;

12) by not determining the value of the home at the time that it was transferred to her, rather than after it had deteriorated, because it deteriorated due to Richard Grossnickle's breach of a fiduciary duty by refusing to transfer funds to her with which to maintain the house;

13) by failing to take into account Richard Grossnickle's payment of his attorney's fees for the divorce from community funds;

14) by not reducing the face value of the Vanguard retirement account ($363,000) to reflect its actual value, considering a ten percent penalty for early withdrawal and the thirty-three percent federal income tax to be levied against the amount as income to her;

15) by not considering $8,000 withdrawn by Richard Grossnickle from the Vanguard account and by considering the $16,000 individual retirement account that Lee Ann Grossnickle had expended between 1992 and 1994;

16) by not crediting the community estate for monies paid out on behalf of Richard Grossnickle's girlfriend;

17) by making a finding of fact that all parts of the previous order were withdrawn, because the appeal from the April 2, 1992 judgment was a limited appeal and the temporary spousal support and attorney's fees remain final;

18) by denying attorney's fees and temporary support pending appeal on the basis that the divorce was final and simultaneously denying use of the estate's assets after January 24, 1995 on the basis that the divorce was *not* final;

19) by issuing an order limiting Lee Ann Grossnickle's freedom of speech in contravention of the United States Constitution and the Texas Constitution;

20) by not identifying and valuing Richard Grossnickle's goodwill in his business and not dividing that value as part of the marital estate; and

21) by awarding a disproportionate amount of property to Richard Grossnickle.

[1–3] The trial court's division of the property should be corrected on appeal only if the trial court clearly abused its discretion by ordering a division that is manifestly unjust and unfair. *McKnight v. McKnight*, 543 S.W.2d 863 (Tex.1976); *Martin v. Martin*, 797 S.W.2d 347, 351 (Tex.App.—Texarkana 1990, no writ). A presumption arises on appeal that the trial court correctly exercised its discretion in dividing property in a divorce proceeding, and the burden rests on the appellant to show from the record that the division was so disproportionate, and thus unjust and unfair, as to constitute an abuse of discretion. *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 509 (Tex.App.—Austin 1994, no writ); *Martin*, 797 S.W.2d at 351. A court of appeals should remand the entire community estate for a new division if it finds reversible error in a specific part of the division that materially affects the trial court's just and right division of the entire community estate. *Jacobs v. Jacobs*, 687 S.W.2d 731 (Tex.1985).

[4] In this case, the trial court issued findings of fact and conclusions of law. Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon special issues. *City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 395 (Tex.Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.). Findings of fact are not conclusive, however, when the record includes a complete statement of facts. *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex.1985).

[5] We must first address a matter not raised by a point of error on appeal, but which relates to the property valuations in this case. This concerns the date for determination of the value of the community as-

sets. Generally, community assets are to be evaluated as of the time of the divorce, and subsequent increases in value are separate property. *Sutherland v. Cobern*, 843 S.W.2d 127 (Tex.App.—Texarkana 1992, writ denied). At least one court has held that the determination of whether to use the time of the divorce or the time of division as the valuation date of an asset, when the divorce and division of the property occur at different dates, is so fact-specific that it should be left to the discretion of the trial judge in order to avoid possible inequities that could result from a bright-line rule. *Parker v. Parker*, 897 S.W.2d 918, 932 (Tex.App.—Fort Worth 1995, writ denied). In spite of the flexibility that may be given to the court in limited situations for the purposes of equity, the better rule—and the rule generally followed in Texas—is to value the community assets as of the date of the divorce. *Baccus v. Baccus*, 808 S.W.2d 694 (Tex.App.—Beaumont 1991, no writ); *May v. May*, 716 S.W.2d 705 (Tex.App.—Corpus Christi 1986, no writ).

In the present case, some of the arguments underscore the problem of the trial court's failure to use consistently the date of the divorce as the time of evaluation.

Lee Ann Grossnickle specifically filed a motion asking that the property be evaluated as of the date of the new trial and not on the date of the divorce. She cannot now complain of the use of the date of the new trial (1994) for evaluation. Her specific complaint, however, is that the trial court abused its discretion in entering a pretrial order to the effect that the 1992 values would be used and then using the current values (1994) in its valuation of the cattle. She states that because of such ruling she was not prepared to go forward with evidence of 1994 values and that she was not allowed to make any discovery concerning the 1994 values of the herd of cattle. The pretrial order by the court did not provide that the date of the divorce (1992) would be the date used for the evaluation; rather it provided that the trial court would determine the division of the property *"that existed* on April 2, 1992." This language appears twice in the order. In another place in the pretrial order, the parties were allowed to discover all relevant matters "to determine the inventory of the community estate on April 2, 1992." In the pretrial order, the trial court did not limit the evidence to the 1992 values, but rather limited the division to the property held by the community on that date.

[6] Lee Ann Grossnickle first contends that this Court should remand this case to the trial court so that she can file requests for additional findings of fact and conclusions of law. In numerous motions and petitions for mandamus she has filed with this Court, she has characterized the findings of fact and conclusions of law made by the trial court [1] as secret findings, alleging that they were never sent to her. Based upon this allegation, she complains that she was not afforded the opportunity to file a request for amended or additional findings of fact as set out by TEX.R. CIV. P. 298.

The record reflects that the findings were signed on October 21, 1994. Lee Ann Grossnickle filed a document designated as a bystander's bill, stating that she had no knowledge that these findings had been made until March 1995. In a response to the document, a deputy clerk swore in an affidavit that she mailed a copy to each attorney in the case on October 25, 1994.

[7] The document filed by Lee Ann Grossnickle does not meet the requirements of a bystander's bill. Texas Rule of Appellate Procedure 52(c) sets out the requirements for a bystander's bill. This rule requires that a formal bill of exception first be presented to the judge, and then if the party is dissatisfied with the action of the judge,

1. Lee Ann Grossnickle also argues under this point of error that impropriety occurred because the filed findings and conclusions were prepared by counsel for Richard Grossnickle. This is a standard practice. The prevailing party at a trial court is usually instructed to prepare findings of fact and conclusions of law and a proposed judgment based upon the trial court's rulings when appropriately requested. This is not an impropriety, because the judge is not bound to accept these drafts as submitted, but may make changes or completely rewrite the proposed document. It has been described as clerical in nature, appropriate, and not a ground for error. *Berkman v. D.M. Oberman Mfg. Co.*, 230 S.W. 838, 840 (Tex.Civ.App.—Austin 1921, writ dism'd).

the party may procure the signatures of three respectable bystanders, citizens of this state, attesting to the correctness of the bill that the party has filed. This procedure was not followed in the present case, nor was a hearing requested to make an offer of proof of conduct occurring outside the courtroom as is permitted under TEX.R.APP. P. 52(b). As recognized by this Court in *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753 (Tex. App.—Texarkana 1992, writ denied), when the affiants are attorneys or parties in the case, the bill is defective. The term *bystander* relates to one who has no concern in the outcome of the case on trial. In this case, Lee Ann Grossnickle, sometimes acting as her own attorney, her attorney Danny Woodson, and a paralegal for Woodson's law firm provided the affidavits. Thus, no disinterested persons provided affidavits as required for a bystander's bill.

The document in the present case attempts to inform this Court about actions not taken by the district clerk's office. We construe these affidavits as supporting Lee Ann Grossnickle's motion to abate for an opportunity to file a request for additional findings of fact and conclusions of law, as authorized by TEX.R.APP. P. 19(d).

Lee Ann Grossnickle also argues that this Court should not consider the response to her bystander's bill. Lee Ann Grossnickle asked this Court to refuse to file or consider the response because any controverting affidavits to a bystander's bill are to be filed within ten days of the bill itself. TEX.R.APP. P. 52(c)(8). Because it is not a bystander's bill, this rule has no application. She also opines that, because the fifteen-day grace period has passed since the filing of the original transcript, no supplements can be filed. This statement is incorrect, as supplemental transcripts may be filed as found to be appropriate by this Court. TEX.R.APP. P. 55(b).

The remaining question is the meaning of the language of TEX.R. CIV. P. 297 stating, without any deadline included, that "[t]he court shall cause a copy of its findings and conclusions to be mailed to each party in the suit." Rule 298 states that any request for additional or amended findings "shall be made within ten days after the filing of the original findings and conclusions by the court." This rule should be changed to allow requests for additional or amended findings of fact based upon the critical time when the original findings and conclusions are either mailed or received.

[8] Rule 298 contemplates that the request for further findings should specify the additional or amended findings that the party making the request desires the trial court to make and file. *Wagner v. Riske*, 142 Tex. 537, 178 S.W.2d 117, 119–20 (1944); *Alvarez v. Espinoza*, 844 S.W.2d 238, 241 (Tex.App.—San Antonio 1992, writ dism'd w.o.j.). In the instant case, the appellant specifies the following additional or amended findings that she requests the trial court to make and file:

1) the value of the good will of the medical practice,

2) the consideration given to the income of the parties pending appeal,

3) the characterization of a diamond bracelet and ring,

4) whether office furniture was included in the list of the "medical equipment and fixtures" provided in the findings made,

5) the consideration, if any, given to tax consequences of withdrawal of the Vanguard account,

6) the value of the mortgage on the ranch and office in 1994, and

7) whether 1992 tax liabilities were considered.

[9] Rule 298 requires the trial court to make additional findings of fact and conclusions of law only if they relate to ultimate or controlling issues. *Associated Telephone Directory Publishers v. Five D's Publishing Co.*, 849 S.W.2d 894, 901 (Tex.App.—Austin 1993, no writ). The trial court is not required to make additional findings that are unsupported in the record, that relate merely to other evidentiary matters, or that are contrary to other previous findings. *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex.App.—Houston [1st Dist.] 1995, no writ); *Simmons v. Compania Financiera Libano*, 830 S.W.2d 789, 791–92 (Tex.App.—Houston [1st Dist.] 1992, writ denied).

[10] The need for additional findings on all the points set forth above are eliminated by the specific rulings by this Court under points of error discussing the substantive issues involved, except for additional requested Finding of Fact No. 4. This additional request would have asked the court to find whether office furniture was included in the term "medical equipment and fixtures." Appellant's brief does not sufficiently apprise this Court of the significance of this requested additional finding, whether it was supported by the evidence, whether it related to other evidentiary matters, or whether such was shown to be community property. Without appropriate references to the record, we cannot rule on this request, and this portion of the complaint was waived on appeal. This point of error is overruled.

Lee Ann Grossnickle next contends that the trial court erred in its valuation of the ranch because the evidence presented by Richard Grossnickle was not provided during discovery in response to interrogatories (postdating the first decree) and because the evaluations were from 1992 (time of divorce) instead of 1994 (time of trial on the property division).

Counsel for Lee Ann Grossnickle did not object to the admission of the written report of Richard Grossnickle's expert, William Patrick Murphy, that had been furnished in the 1992 trial or to Murphy's testimony about that report and his evaluation as of that date.[2] Richard Grossnickle's expert testified that the gross value of the ranch, both at the date of the divorce and the date of the new trial on the property division, was $426,000. On the other hand, Lee Ann Grossnickle's expert testified that the gross value of the ranch was $750,000, using the value at the time of the second trial, or $712,000, using the value at the time of the divorce.

[11] Counsel for Lee Ann Grossnickle objected to any testimony by Murphy updating his report to a current evaluation some two years later. Counsel for Richard Grossnickle advised the opposing counsel by letter, characterized as a supplement to the 1992 report, that Murphy would testify as to the 1992 value and the 1994 value of the property. Counsel did not say what that testimony would be. Murphy's testimony was that the value had not changed. It is questionable whether any supplementation is required, even with the passage of time, for an expert to testify that in his opinion the value of property is the same. Rule 166b(6) of the Texas Rules of Civil Procedure sets forth a duty to supplement when a party obtains information making his response incorrect, incomplete, or misleading. A supplementation would be required if the expert had significantly changed his or her opinion as to the value because of the passage of time. It has been held, however, that whether an appraisal is near enough in time to the date of the divorce to be considered in determining the value of the land in question for purpose of the property division is generally left to the discretion of the trial court. *Finch v. Finch*, 825 S.W.2d 218 (Tex.App.—Houston [1st Dist.] 1992, no writ).

The problem in this case arose when Murphy testified on rebuttal about some comparable sales that occurred after the original report and after the first trial. Murphy was asked if he used the new comparables to form his opinion of the 1994 value of the property. Murphy twice testified that these new comparables formed the basis of his opinion that the value of the property did not change from 1992 to 1994.

Lee Ann Grossnickle takes the position that the opinion as to the value in 1994 should have been struck because of Richard Grossnickle's failure to supplement his expert's opinion. In ruling on this objection, the trial judge suggested that the production rule did not apply to this situation because the information was given on rebuttal. Rule 215(5) of the Texas Rules of Civil Procedure provides that the trial court can allow such

2. In a pretrial discussion, counsel for both parties agreed that the written reports furnished to opposing counsel would suffice in lieu of answers to the interrogatories actually requesting the experts' opinions. These statements to the court could not be construed as a stipulation beyond agreeing that these reports would be substituted for the actual answers to the interrogatories. It could not be construed to allow expert opinions based on a later report requiring supplementation that was not made.

evidence if it determines that good cause existed for the failure to complete the discovery request. In the case of *Klekar v. Southern Pacific Transp. Co.*, the court set forth four factors a trial court can consider in determining good cause. 874 S.W.2d 818 (Tex.App.—Houston [1st Dist.] 1994, writ denied). The third factor is the use of the witness in rebuttal in some circumstances. This opinion cites *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 916 n. 6 (Tex.1992). A footnote in *Alvarado* suggests that there may be some circumstances for admitting testimony of an undisclosed witness on rebuttal when the need for the testimony could not reasonably have been anticipated, but the Supreme Court does not give its blessing to a finding of good cause merely because the evidence happened to be presented on rebuttal.

[12, 13] In the present case, the underlying information that supported the expert's initial testimony and formed the basis of his opinion that the value of the property had not increased from the time of the 1992 trial until the 1994 trial did not come out until the rebuttal evidence was being offered. This does not mean that if a new report existed, it did not have to be furnished in the discovery process. It is the duty of counsel to advise expert witnesses to provide such reports timely so they can be furnished to opposing counsel.

As the Supreme Court points out in *Alvarado*, Rule 215(5) prescribes the sanction for failing to supplement discovery (830 S.W.2d at 915), and the rule has not changed in that regard since the 1992 Supreme Court opinion. The sanction is that when a party fails to identify evidence timely in response to a discovery request, the trial court must exclude all evidence not properly identified in discovery. This would include opinion evidence based upon the information not provided in the discovery. (The trial court also has discretion to postpone the trial and compensate the non-offending party for any wasted expense in preparing for trial.) *Id.*

[14] Lee Ann Grossnickle made the following request for production prior to the 1994 trial:

> Any and all documents and tangible things, including all tangible reports, physical models, compilations of data, and other material, *prepared by an expert* who may be called as an expert witness or *for an expert in anticipation of the expert's trial or deposition testimony* and any such material prepared by an expert used for consultation.... [3]

(Emphasis added.)

Richard Grossnickle gave the following response:

> This information is being prepared and will be exchanged with the Respondent once Respondent's expert reports and documents are ready to be exchanged with Petitioner.

The production request asked for tangible reports prepared by an expert or for an expert in anticipation of trial or deposition testimony. When Murphy was asked if he had made an appraisal to arrive at his updated opinion, he answered that he just made an oral update of his opinion, which was based upon comparables gathered every day by his office and used for other appraisals. He further testified that he did not furnish any of that work to the attorneys in the present case. The only evidence that suggested that anything was placed in writing was Murphy's statement that he handed the underlying information to the attorneys the day before his rebuttal testimony. The record is not clear whether this was a supplemental report prepared by Murphy or prepared for his testimony in this particular case, or was some of the data gathered daily by his office, which had been used by him for appraisals in other matters. The attorney for Richard Grossnickle represented to the court that the witness had not made an additional report, but

3. This generally tracks the language in Rule 166b(2)(e)(2) of the Texas Rules of Civil Procedure. Rule 166b(2)(e)(4) further provides that if the factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the trial judge may order these matters reduced to tangible form and produced within a reasonable time before the date of trial. Such a reduction to tangible form was not requested in this case.

had simply been asked if there had been a change in value from 1992 to 1994. The trial court expressed an understanding that there was only a single report, the one furnished in discovery for the previous trial. Counsel for Lee Ann Grossnickle stated that he had no objection to the first opinion or report.

Based upon the wording of the discovery request in this case and the failure of the record to show that a second report existed that was prepared by the expert or for the expert's testimony, and alternatively, Lee Ann Grossnickle's failure to obtain a court order to reduce this information to a tangible form if it had not been put in such form, this Court finds the trial court did not err in failing to exclude this testimony.

Lee Ann Grossnickle further argues under this contention that, although the trial court found that Richard Grossnickle was not entitled to reimbursement from the community for funds he spent maintaining the community-owned ranch property since the divorce, the trial court, nevertheless, actually awarded Richard Grossnickle reimbursement for mortgage payments. In Conclusion of Law # 11, the trial judge found that "Petitioner is not entitled to reimbursement from the community for the funds he spent in maintaining the community-owned ranch properties since April 2, 1992."[4] The trial court acknowledged the cost to Richard Grossnickle of maintenance and improvement to the community-owned ranch property after the divorce and determined that this asset should be awarded to Richard Grossnickle without any reimbursement from the community. Lee Ann Grossnickle suggests that setting the value of the ranch based on the indebtedness at the time of the divorce, instead of the indebtedness at the time of the trial on the property division, in effect allows Richard Grossnickle reimbursement for his maintenance and payments on the property because he is credited for those payments by the reduction of the amount of mortgage owed.[5] The trial court did not err by using this method to credit Richard Grossnickle for making the payments on the mortgage after the divorce.

[15] Reimbursement for expenditures made on property may be offset by benefits such as usage by the party making these expenditures. *See Penick v. Penick*, 783 S.W.2d 194, 195 (Tex.1988); *see also Rogers v. Rogers*, 754 S.W.2d 236 (Tex.App.—Houston [1st Dist.] 1988, no writ). Richard Grossnickle testified that he continued to make the mortgage payments from April 1992 through August 1994. In addition to this, he testified that he also spent considerable sums of his after-divorce income on upkeep and improvements on the property.

[16, 17] Texas law requires that an effort be made to reconcile conflicts in findings of fact. *First Financial Dev. Corp. v. Hughston*, 797 S.W.2d 286, 294 (Tex.App.—Corpus Christi 1990, writ denied); *Yates Ford v. Benavides*, 684 S.W.2d 736, 739 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). The same rule has been applied to conflicts between findings of fact and conclusions of law. *Hartford Ins. Co. v. Jiminez*, 814 S.W.2d 551 (Tex.App.—Houston [1st Dist.] 1991, no writ). This same reasoning should be applied in reconciling conclusions of law and the judgment. When two possible interpretations exist, the interpretation should be chosen that will harmonize the judgment with the findings of fact and conclusions of law upon which it is based.

[18] The trial court in its conclusion of law provides that Richard Grossnickle will not be reimbursed for funds he spent in maintaining the community-owned ranch. The record contained evidence of other funds from Richard Grossnickle that were used to

4. The trial court's finding of fact was as follows:

Although Petitioner has spent considerable funds in the maintenance of the community owned ranch property since April 2, 1992, and such maintenance was vital to maintaining the value of the property, Petitioner personally enjoys owning and using the ranch to improve a special breed of cattle; one-half of the funds he spent benefitted himself by improving the community assets; and he receives considerable farm income tax deductions in arriving at his net taxable income each year, resulting in considerable tax savings to Petitioner.

5. The trial court valued the ranch at $426,000, subject to the mortgage amount that remained payable at the date of divorce, (in the amount of $303,000), leaving a net value of $123,000.

maintain the physical assets of the ranch. *Maintaining* does not necessarily include his right of offset against the indebtedness for making the mortgage payment and is not necessarily included in the trial court's conclusion of law. This conclusion of law can be construed as consistent with the judgment in that there was no money allotted from the community assets to reimburse Richard Grossnickle for upkeep of the property as stated in the conclusion of law, but, in effect, an offset was allowed for the payments made on the property after the divorce because these payments reduced the mortgage owed. This point of error is overruled.

Lee Ann Grossnickle next contends that the trial court erred in considering the 1994 value of the cattle because there was no factual or legal evidence supporting that value. She complains that William Oakley, Richard Grossnickle's expert on the value of the cattle, had not inspected the cattle since 1991 and erroneously calculated a fifteen percent commission for the sale of the cattle when the actual sales commission should have been 5.8 percent. She urges that because of these errors, this testimony should not be considered.[6] Whether William Oakley had sufficient knowledge and basis upon which to evaluate the cattle was a matter that should have been preserved by an objection that counsel had failed to lay the proper predicate for its admission. We find no such objection. Counsel for Lee Ann Grossnickle stated that he did not have any objection to Oakley's testimony.

Richard Grossnickle's expert valuated the cattle at $222,000 at the date of the divorce, but the trial court reduced the value of the herd because of this expert's testimony that the market value of Limousine cattle had decreased at the time of the new trial on the property division, finding the value to be $205,000.[7]

As previously stated, whether an appraisal is near enough in time to the date of the divorce to be considered in determining the value of the property in question for purpose of the property division is generally left to the discretion of the trial court. *Finch*, 825 S.W.2d 218. As the fact finder, the trial court had a right to decide between the figures offered by Lee Ann Grossnickle's expert and by Richard Grossnickle's expert. There was legally and factually sufficient evidence for the trial court to reach the valuation of the herd set forth in the findings of fact. This point of error is overruled.

[19] Lee Ann Grossnickle next contends that the trial court erred in allowing into evidence general ledgers reflecting Richard Grossnickle's business income and liabilities after the divorce instead of requiring production of the underlying documents. The ledgers contained summaries of expenses and income incurred at Richard Grossnickle's offices between the April 1992 divorce and the August 1994 trial. The trial court found that the underlying checks had been made available to Lee Ann Grossnickle. She specifically complains that this response to discovery was not timely and that other underlying instruments were not made available. If the checks were the sole basis of the ledgers, then other data would not generally be a prerequisite for its introduction. However, we shall not make a determination concerning whether the trial court should have applied a discovery sanction, because the trial court did not allow any of these expenditures.[8] This ledger was introduced for the

6. On cross-examination, Oakley testified that the actual calculations of the value of the herd should be $212,000, not $205,000.

7. Although Lee Ann Grossnickle does not complain on appeal of the inconsistency in using the market value at the time of the trial on the property division, two years after the divorce, but using the size of the herd at the time of the divorce, she was penalized by valuating the herd based on the loss in market value after the divorce, but not considering any calving that may have occurred to increase the herd after the divorce. This points up the problem of placing a value on the assets two years after the divorce was granted. (Richard Grossnickle's expert did take into consideration the embryo value at the time of the divorce.) For the sake of consistency, the higher value of the herd as it existed at the time of the divorce should have been used, or alternatively, if the court was to use the value two years later, then it should have considered the entire herd as it existed on that date.

8. Richard Grossnickle testified separately about the funds expended in making payments on the mortgage on the property.

purpose of proving reimbursement for expenditures made in the business after the divorce. The trial court specifically denied any reimbursement for these expenditures; therefore, the admission of this evidence was harmless. This point of error is overruled.

[20] Lee Ann Grossnickle next contends that there was no evidence to support the court's finding that there were outstanding community expenses of approximately $67,500 as of April 2, 1992. Richard Grossnickle's "Second Amended Inventory and Appraisement of Petitioner" lists community debts as of April 1992 (exclusive of debts secured by realty) totalling over $70,000. This document was admitted in evidence and was the subject of extensive questioning by counsel during Richard Grossnickle's testimony. Richard Grossnickle testified that he had paid these community debts. Although there is also evidence to the contrary, the trial court is the trier of fact, and this document constitutes evidence that the trial court could rely upon to reach its finding.

[21] Lee Ann Grossnickle includes under this point of error that the trial court erred by not taking into account the positive effects upon Richard Grossnickle's personal federal income taxes of his payment of that portion of the community liabilities that constituted business expenses. The record does not reflect whether the trial court took this factor into consideration; however, we know of no rule or case in which the trial court has been required to consider the tax ramifications that may have resulted from community property becoming separate property. Because of the complexity of the tax laws, both benefits and disadvantages may flow from such a situation. While such factors may be taken into consideration by the trial court, failure to do so in this case was not error. This point of error is overruled.

Lee Ann Grossnickle next contends that the trial court erred by refusing to consider Richard Grossnickle's earnings during the appeal of the original decree. She also complains that the trial court refused to order production of Richard Grossnickle's federal income tax returns after 1991.

The Texas Supreme Court has stated that fault and disparity in the parties' incomes are two of the many factors the trial court should consider when dividing a marital estate. *Stafford v. Stafford*, 726 S.W.2d 14 (Tex.1987)(*citing Murff v. Murff*, 615 S.W.2d 696, 699 (Tex.1981), which provides that disparity *may* be considered).[9] In its fact finding, the trial court specifically stated that it had considered disparity of earning power between the parties, need for future support, contributing factors to the separation of the parties, the abilities of the parties to handle assets assigned them, and the possibilities of waste and expense in selling assets.

[22, 23] The court determined both parties to be professional business people, Richard Grossnickle being a medical doctor specializing in ophthalmology (the treatment of diseases of the eyes) and Lee Ann Grossnickle being an attorney at law in the State of Texas. It is not necessary for the trial court to go beyond the date of the divorce in determining the actual income of the parties. Earning capacities and abilities should be established at the time of the divorce, and while these factors portend future earnings, it is not necessary to have the actual earning figures after the divorce. The trial court did not err in disallowing discovery about separate property income that occurred after the divorce, nor in refusing to reveal Richard Grossnickle's income tax returns after the date of the divorce. This point of error is overruled.

Lee Ann Grossnickle contends that the court erred by failing to characterize a diamond bracelet and a diamond ring as her separate property. She testified that the diamond bracelet in question was separate property, being a gift to her when her daugh-

9. Factors that may be considered by the trial court in making an unequal division of the community estate include disparity in incomes or earning capacities, fault in the breakup of the marriage, the spouses' capacities and abilities, benefits which the party not at fault would have derived from a continuation of the marriage, business and employment opportunities, education, relative physical conditions, relative financial conditions and obligations, disparity of ages, size of separate estates, custody of dependent children, and length of marriage. *Capellen v. Capellen*, 888 S.W.2d 539, 543 (Tex.App.—El Paso 1994, writ denied).

ter was born. This was undisputed in the evidence and was sufficient to overcome the presumption of community property. Richard Grossnickle had testified that this diamond bracelet was worth $7,000. He also testified that she had jewelry containing diamonds, rubies, sapphires, and emeralds, a gold necklace, and a gold and diamond watch. He testified that she had lost "a couple of these items" and had replaced the watch. He did not testify which items were lost. He testified that she spent between $15,000 and $20,000 on jewelry during the marriage. Lee Ann Grossnickle testified that the total jewelry in her possession was of an estimated worth of $4,000, of which $1,500 was separate property and $2,500 was community property. She produced a box of jewelry in the court for examination by the trial judge. The trial judge placed the value of the jewelry awarded to Lee Ann Grossnickle at $10,000.

Richard Grossnickle takes the position that the $25,000 engagement ring was not the original engagement ring that was a gift to Lee Ann Grossnickle, but was another ring purchased during the marriage and presumed to be community property. As stated in the next point of error, the whereabouts of the diamond engagement ring is not known at this time. Therefore, there is some question about what value should be attributed to Lee Ann Grossnickle for what may be a lost ring.

The court looked at the jewelry and stated that he was no connoisseur of diamonds. Lee Ann Grossnickle testified that certain items contained diamonds and gold of at least eighteen, maybe twenty-two carats and of white gold or platinum. She testified she had four bracelets, a watch, and two necklaces, which were community property. She valued the diamond bracelet, which she claimed as separate property, at $1,500, leaving a total value in her opinion of $2,500.

[24] The trial court in its findings used the terminology in the award to Lee Ann Grossnickle, "Respondent's jewelry *of questionable value* at a value of $10,000." (Emphasis added.) The record in the present case contains conflicting evidence as to the value of the jewelry. The trial court had before it evidence from one side concerning the amount of money that had been expended from the community for the jewelry in question and conflicting evidence as to what was community property and what was separate property. The court also viewed some of the jewelry in question and heard testimony about the diamonds and metals contained therein. Based upon this conflicting evidence, the trial court as trier of fact reached a figure in between the values offered by the parties. This was in the discretion of the trial court. This point of error is overruled.

Lee Ann Grossnickle also contends that the trial court erred by not making a specific finding about the $25,000 engagement ring and by failing specifically to award the ring to her. She testified she threw the ring at Richard Grossnickle. The police officer called by Lee Ann Grossnickle to testify about the ring did not recall whether the ring that she had thrown was a diamond ring. Lee Ann Grossnickle and Richard Grossnickle testified that they did not have the ring or know where it was. The judgment does not specifically mention the ring. In his brief, Richard Grossnickle takes the position that the court's award of all jewelry to Lee Ann Grossnickle included the diamond engagement ring.

Richard Grossnickle's concession that Lee Ann Grossnickle has been awarded the ring and the fact that he is not contesting this award is conclusive as to Lee Ann Grossnickle's ownership of the ring. Therefore, we hold that the engagement ring is the separate property of Lee Ann Grossnickle, as awarded to her in the divorce. If the trial court had determined that Richard Grossnickle possessed the ring, the trial court could have ordered it returned to Lee Ann Grossnickle. However, because the trial court, as the finder of fact, did not determine the location of the ring or that Richard Grossnickle had possession of the ring or had destroyed the ring, and because Richard Grossnickle has disclaimed any interest or ownership in the ring under the terms of the judgment, Lee Ann Grossnickle was not damaged by the failure of the court to specifically award the ring to her and by not adding the $25,000 to her portion of the

community estate. If the ring is located, it will be the separate property of Lee Ann Grossnickle. This point of error is overruled.

[25] Lee Ann Grossnickle contends that the trial court failed to consider specific bank accounts in its division of the community estate. Richard Grossnickle's initial inventory, which is in evidence, lists three checking accounts as community property: (1) People's National Bank $4,995 (optical shop account); (2) People's National Bank $5,337 (personal account); and (3) Lamar National Bank $15,117 (ranch account).

The three accounts in existence at the time of divorce were judicially admitted by Richard Grossnickle in his sworn inventory, and these three accounts, amounting to $25,449, should have been considered by the court in the division of the property. The trial court in the findings of fact states that it considered both parties' inventories. If these accounts in the inventory were considered, they were not listed as a part of the award to either party or reflected in the totals of the property awarded to the parties. This point of error is sustained to the extent that the trial court did not consider it as a part of the property awarded to Richard Grossnickle on the basis that his inventory reflected its existence and his possession of these accounts. This factor will be considered in our final determination of the case.

Lee Ann Grossnickle also contends that a Liberty Bank account should have been included. This account, however, was opened after the divorce was granted, and we have found no evidence in the record to reflect that this asset was traced to community property except that which may have come from accounts receivable from patients, which was already considered by the trial court in the net amount of $40,000. Because this asset came into existence after the divorce, there was no presumption that this was community property.

Other deposits about which Lee Ann Grossnickle complains were shown by the evidence to have been gifts from Richard Grossnickle's parents made after the divorce, and are thus his separate property. This contention is overruled.

[26] Lee Ann Grossnickle also contends that the trial court erred by admitting expert testimony about the value of Richard Grossnickle's optical shop when Richard Grossnickle had refused to produce the documents upon which that testimony was based. For that reason, the court refused to permit the expert to testify about the value of the practice. The court did permit the expert to testify that the facility and equipment in the shop were its sole worth, because it was a minimal optical shop operated solely as an adjunct to the doctor's practice.

The expert had been deposed and stated during his deposition that he would produce specific documents that he was using to support his appraisal valuing the optical shop as a going business. The documents were not produced, and the trial court accordingly refused to permit him to testify on that issue. The trial court, however, permitted the expert to testify that the sole value of the shop consisted of its hard assets, because the testimony was not based upon the non-produced documents, but rather upon the expert's personal knowledge and expertise. The fact that the expert did not produce documents, as agreed, on one aspect of his testimony did not necessarily invalidate or make inadmissible testimony not based upon those documents.

[27] Lee Ann Grossnickle's expert testified that the shop was worth $165,000 with Richard Grossnickle, and $100,000 without him. The record shows that Richard Grossnickle is an ophthalmologist, and the optical shop consists of a single room in which patients could purchase and be fitted with eyewear. The shop was not advertised, had no outside sign, and was described as an adjunct to the doctor's practice. Richard Grossnickle's expert witness testified the shop was not saleable separately from his medical practice. In his inventory, Richard Grossnickle valued the equipment, frame stock, and accounts of that portion of the business at $5,000 in 1992. Accordingly, the trial court was presented with conflicting testimony about the nature and the value of the shop, and the court entered a valuation in the division of $5,000 for the assets of Oak Creek Optical. The trial court had evidence upon which it could

determine that the shop was not saleable without Richard Grossnickle's medical practice. The trial court entered a finding of fact that "any goodwill that may exist is not capable of valuation as an asset apart from the individual's earning capacity, and, therefore, is not a property interest subject to division." Based upon this factual conclusion, the trial court could appropriately value the property based upon the physical assets. This point of error is overruled.

[28] Lee Ann Grossnickle next contends that the court erred in finding that Lee Ann Grossnickle was responsible for the deterioration of the community property home pending appeal and in finding that it accordingly declined in value. In a related complaint, Lee Ann Grossnickle also complains because she was required to sell the house to Richard Grossnickle for $95,000, when she had earlier had an offer of $130,000 from a third party that Richard Grossnickle had refused to accept. The evidence shows that, as part of the first property division in April 1992, the house was awarded to Lee Ann Grossnickle. The house had been on the market before the appeal for $200,000, and Richard Grossnickle testified that at that time it had been appraised at and had a fair market value of $175,000.

Lee Ann Grossnickle testified that in June of 1992, she had an opportunity to sell the house, but did not testify about the amount of that offer. She also testified that she had another offer for the house for $125,000 in early 1993, but that the potential buyer's credit was insufficient. She stated that she had received an offer for $130,000 only a month before trial. However, the trial court, which corrected her statement and took judicial notice from prior hearings that she had received a written offer for $100,000, which would have required extensive costs to implement, netting only $92,500. The court then ordered the house sold to Richard Grossnickle for $95,000.

There was substantial testimony that the house was heavily damaged by mildew, roof leaks, removal of light fixtures, removal of yard fixtures, vandalism, destruction of one of the two air-conditioning units, and neglect of the in-ground pool. Based upon the testimony of the condition of the house and grounds and the fact that the change in condition occurred while the property was in Lee Ann Grossnickle's possession and control, the court did not err by holding her responsible for the damage that reduced its value by $80,000. This point of error is overruled.

[29] Lee Ann Grossnickle further argues that Richard Grossnickle breached a fiduciary duty by not providing her with money with which to care for the house. Her theory is based upon the marital relationship. The time about which she complains was after the termination of the marriage. Richard Grossnickle did not owe her a fiduciary duty, nor was there a court order providing for Richard Grossnickle to fund the care for the house. This point of error is overruled.

Lee Ann Grossnickle next contends that the trial court erred by failing to consider in its division of the community that Richard Grossnickle had used $60,000 of community funds before the divorce to pay his attorney's fees. She also suggests that the court should have factored in the total of $315,000 paid by Richard Grossnickle to his attorneys after the divorce but before June 29, 1994. Richard Grossnickle testified that he spent $100,000 on attorney's fees after the divorce, but unless this was traced specifically to community assets in existence at the time of the divorce, this could not be considered an expenditure of community funds. He also testified that he spent approximately $60,000 on attorney's fees prior to the divorce.

[30] The trial court has great discretion in deciding whether to award attorney's fees to either party and in determining the amount of attorney's fees to be so awarded. *Mills v. Mills*, 559 S.W.2d 687 (Tex.Civ. App.—Fort Worth 1977, no writ). This same principle applies to whether the trial court should consider a party's payment of attorney's fees out of community funds in the division of the property. Because the award of attorney's fees in a divorce case can be part of the property division, the trial court can award them to either party, regardless who is successful in the trial court or on appeal. *Parker*, 897 S.W.2d at 935; *Mat-*

thews v. Matthews, 725 S.W.2d 275, 280–81 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

Lee Ann Grossnickle does not seek a further award of attorney's fees in this case, but she asked the trial court, in dividing the assets of the estate, to consider the amounts expended by Richard Grossnickle for attorney's fees.

[31, 32] The allocation of attorney's fees is a factor to be considered by the court in making an equitable division of the community estate. *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002, 1005 (1950); *Capellen v. Capellen*, 888 S.W.2d 539, 544 (Tex.App.—El Paso 1994, writ denied). Prior payments out of the community estate to attorneys in the divorce action are likewise to be taken into account in the division of the marital estate. *Eikenhorst v. Eikenhorst*, 746 S.W.2d 882, 890 (Tex.App.—Houston [1st Dist.] 1988, no writ). ~~Those payments~~ must necessarily come from the community, because the trial court has no authority to direct one party to expend separate property funds on the other's behalf for such fees, because the sole authority of a trial court to require payment of attorney's fees lies in the court's authority to divide the marital estate. *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex.App.—Houston [14th Dist.] 1989, writ denied).

[33] In the present case, there was no showing of the amount of expenditures made by Lee Ann Grossnickle for attorney's fees out of community funds, but the record does reflect that, as a duly licensed attorney, she represented herself during the course of these proceedings. Such services rendered during the marriage were a community resource.

Richard Grossnickle takes the position that Lee Ann Grossnickle has caused him to expend these funds, that she has retained at least eight attorneys at various times and acted pro se at other times as a duly licensed attorney, and that she has filed numerous motions both in the trial court and the appellate court which required responses from his attorney. The record reflects that Lee Ann Grossnickle has filed forty-one motions in connection with her second appeal and six petitions for mandamus relief with this Court.

The trial court found that "[e]ach side had incurred considerable legal expense, for which each party is responsible to some extent for a continuation of their former marital conflicts." The trial court may have considered that both parties had similar community expenditures, both being involved in the same litigation, and that these expenditures canceled each other out in considering the division of the community assets. Therefore, the court's failure to give credit specifically to either party for expenditures of community funds on the divorce was not an abuse of discretion. This point of error is overruled.

Lee Ann Grossnickle next contends that the trial court erred by not reducing the face value ($363,000) of the Vanguard retirement account awarded to her to a net figure reflecting the actual value of the fund after a ten-percent tax penalty for early withdrawal and the thirty-one to thirty-three percent tax that she anticipated would be levied against the amount for federal income tax.[10]

[34–36] A trial court can appropriately consider the tax liability for the sale of capital assets that *has been realized* by the parties at the time of the divorce, *i.e.*, existing tax liabilities. *Penick*, 783 S.W.2d at 197; *Robbins v. Robbins*, 601 S.W.2d 90, 92 (Tex.Civ.App.—Houston [1st Dist.] 1980, no writ). However, where the question of future taxation arises, a trial court errs in allowing a credit for a future tax figure that must be derived from speculation or surmise. *Harris v. Holland*, 867 S.W.2d 86, 88 (Tex.App.—Texarkana 1993, no writ). In the present case, early withdrawal triggering an additional tax would be at the election of Lee Ann Grossnickle after the divorce. The tax rate would depend upon the tax bracket of the taxpayer at that time and also the income tax law in effect at that time. This approach

10. The value of the account at the time of the divorce was $313,000. Lee Ann Grossnickle does not complain of the use of the later value of $363,000, which includes interest accumulated after the divorce.

would be analogous to allowing a discounted value on every piece of property because there might be future tax consequences if sold at a profit. The trial court did not abuse its discretion by failing to consider potential tax liability which might be incurred when the assets are withdrawn. This point of error is overruled.

[37] Lee Ann Grossnickle next contends that the trial court erred by not considering in its division of the marital estate the $8,000 withdrawn from the Vanguard account by Richard Grossnickle and by considering the $16,000 IRA that Lee Ann Grossnickle had expended between 1992 and 1994. Richard Grossnickle testified that the $8,000 withdrawn from the account during 1992 was due to a payment erroneously made into the account that should have been made into an employee profit-sharing account. The trial court, as fact finder, could accept this testimony and properly disregard this withdrawal.

[38] The $16,000 IRA, part of the community at the time of the divorce, was transferred to Lee Ann Grossnickle in the first property division and was depleted by Lee Ann Grossnickle after the divorce. The court did not err by including this expended resource as part of the community estate as of April 2, 1992. This point of error is overruled.

[39, 40] Lee Ann Grossnickle also contends that the trial court erred by not crediting the community estate for money that Richard Grossnickle spent on another woman. Richard Grossnickle testified that he had spent about $1,200 on gifts for another woman before the divorce. Lee Ann Grossnickle reviewed American Express receipts in evidence and concluded that he spent over $12,837 on the girlfriend. A determination of the amount spent on another woman out of community property during the marriage requires an accounting to the community. *Simpson v. Simpson*, 679 S.W.2d 39, 42 (Tex. App.—Dallas 1984, no writ). This type of gift or expenditure amounts to fraud upon the community estate. It was not disputed that such expenditures were made. The amount of these expenditures was disputed and was a determination for the fact finder. However, the trial court should have required an accounting for these expenditures and specifically considered them in dividing assets. Failure to do so was error. This point of error is sustained.

Lee Ann Grossnickle contends that this Court's ruling denying her motion for contempt requires that 1994 values be used in the property division, because she states that this Court held in its disposition of one of her applications for writ of mandamus that the divorce was not final. This Court did not hold that the divorce was not final in any of these preliminary proceedings. In *Grossnickle v. Grossnickle*, this Court held the only item remaining to be determined after the first appeal was the division of the community estate. 865 S.W.2d 211 (Tex.App.—Texarkana 1993, no writ).

Lee Ann Grossnickle contends that the appeal from the April 2, 1992 judgment was a limited appeal, thus temporary spousal support and attorney's fees set forth in the first judgment remain final. Pursuant to Rule 40(a)(4) of the Texas Rules of Appellate Procedure, Lee Ann Grossnickle gave timely notice of limitation of appeal, dated July 22, 1992, and limited her first appeal to the following:

1. Any and all issues relating to the division of the community property upon divorce, specifically including issues of valuation of the various assets; claims of an abuse of discretion in the ultimate division contained within the Decree of Divorce; newly discovered evidence, failure to consider pertinent evidence, improper admission and exclusion of pertinent evidence; and the denial of Respondent's right to trial by jury.
2. Any and all issues relating to the setting of child support, specifically including issues of net resources of the obligor and obligee and the factors which the court may consider in awarding support outside of the child support guidelines.
3. Any and all issues relating to specific terms and conditions of visitation/possession between the minor child and

her father arising by virtue of both the Decree of Divorce and any modification order entered by the trial court in the post-trial stages of the proceedings.

[41] An appellate court's jurisdiction is limited to the matters designated in the notice of limitation of appeal. *Baptist Memorial Hosp. Systems v. Bashara*, 685 S.W.2d 352, 354 (Tex.App.—San Antonio 1984), *aff'd*, 685 S.W.2d 307 (Tex.1985); *Anderson v. Anderson*, 618 S.W.2d 927, 930 (Tex.Civ. App.—Houston [1st Dist.] 1981, writ dism'd as moot); 6 McDONALD'S TEXAS CIVIL PRACTICE § 26:2 (rev.1992). Thus, the granting of the divorce was not pending on appeal.[11]

A severable portion of the case is not required to wait in limbo while the rest of the case is appealed, but becomes final because it is not subject to further appeal. In the case of *Garcia v. Employers Casualty Co.*, the court held that a portion of a suit against one defendant became final even though a limited appeal was taken appealing against another defendant. 519 S.W.2d 685, 687 (Tex.Civ. App.—Amarillo 1975, writ ref'd n.r.e.). This same principle would apply to any unappealed issues in a limited appeal case. Therefore, in the present case, the divorce itself became final because it was not appealed or designated as a part of the limited appeal.

[42–44] Temporary spousal support ends when the divorce is final. TEX. FAM.CODE ANN. § 3.59 (Vernon 1993). A trial court may properly award temporary spousal support pending an appeal of a divorce. *Matter of Marriage of Joiner*, 755 S.W.2d 496, 499 (Tex.App.—Amarillo 1988), *modified on reh'g on other grounds*, 766 S.W.2d 263 (Tex. App.—Amarillo 1988, no writ). In the present case, however, Lee Ann Grossnickle did not appeal the divorce itself; so she was not entitled to spousal support during the appeal on other issues.

Lee Ann Grossnickle did not seek in any way to appeal the award of attorney's fees made at the initial trial, nor were there any cross-points complaining about the attorney's fees. The granting of the attorney's fees was not tied specifically to the property division, the amount of child support, or the visitation and possession of the child.

The attorney's fees to which Lee Ann Grossnickle refers in the original divorce decree were set forth as follows:

> IT IS ORDERED AND DECREED that JAMES R. RODGERS shall have and recover judgment against RICHARD DEAN GROSSNICKLE for $20,000.00 for attorney's fees incurred in this cause, to be paid within ninety (90) days of the entry of this Decree.

[45] The question that arises is whether the attorney's fees are severable from the limited portion of the divorce that was appealed. The attorney's fees were not mentioned in the items set forth for the limited appeal or in the points of error on appeal. Only severable portions of a judgment are subject to limitation on appeal. TEX.R.APP. P. 40(a)(4); *Hernandez v. City of Fort Worth*, 617 S.W.2d 923, 924 (Tex.1981). This court has, in actions not involving the DTPA, held that claims for attorney's fees are severable. *Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 246 (Tex.App.—Texarkana 1992, writ denied). In general, Texas courts have confirmed this view. *Penick v. Penick*, 783 S.W.2d 194; *Leal v. Leal*, 628 S.W.2d 168, 171 (Tex.App.—San Antonio 1982, no writ) (community property settlement suit); *see also, Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 451 (Tex.App.—Texarkana 1993, writ denied) (where severance of attorney's fees was made on remand).

[46, 47] The award of attorney's fees in the original suit was clearly severable, was not a part of the issues designated for the limited appeal, and was not addressed by the court on appeal. Therefore, the first appeal in this case did not affect the $20,000 award for attorney's fees, and James R. Rodgers, Lee Ann Grossnickle's attorney, was entitled to collect upon this judgment. It is an acceptable practice to allow attorney's fees in a

11. The general language in our first opinion affirming the divorce is superfluous because the divorce itself was not before this Court, and this court was without jurisdiction to affirm what had already become final.

suit for divorce to be recovered directly by the attorney representing the spouse, regardless of whether the attorney was named as a party in the divorce suit. *Goldberg v. Goldberg*, 392 S.W.2d 168 (Tex.Civ.App.—Fort Worth 1965, no writ). Furthermore, such attorney's fees may be recovered by a spouse in a separate suit. *Petrovich v. Vastrain*, 730 S.W.2d 857 (Tex.App.—Fort Worth 1987, writ ref'd n.r.e.). No further action is required by this Court because the original judgment remains intact on this point, and such judgment would belong to the attorney to whom the specific award was made. Therefore, for the purposes of this appeal, this point of error is overruled.

Lee Ann Grossnickle argues that the trial court abused its discretion by denying her the use of the estate's assets pending this appeal and that this order was void.[12] She contends that the trial court entered a void judgment on January 24, 1995. The cited document is not a judgment, but an order of the trial court providing that the assets be turned over to her only when the judgment becomes final.[13] In effect, this is a preservation order. This order is governed by TEX. FAM.CODE ANN. § 3.58(h) (Vernon 1993), which provides that

> *Within 30 days after the date that an appeal is perfected*, on the motion of any party or on the court's own motion, after notice and hearing, *the court may make any order necessary for the preservation of the property* and for the protection of the parties during the pendency of the appeal as the court may deem necessary and equitable.[14]
>
> (Emphasis added.)

[48, 49] The appeal was perfected on November 18, 1994, when Lee Ann Grossnickle filed her appeal bond. A hearing was held within thirty days, on December 8, but even if that hearing covered this topic, that date is not relevant. Section 3.58(h) of the Family Code specifically states that the pertinent time is the date that the trial court makes the order. Temporary orders under this section may only be made within thirty days after perfection of the appeal. *Hare v. Hare*, 786 S.W.2d 747, 748 (Tex.App.—Houston [1st Dist.] 1990, no writ); *Mortgage Funding Corp. v. Schuble*, 737 S.W.2d 339, 340 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding). The portion of the order denying Lee Ann Grossnickle the use of estate assets pending appeal is set aside as void. This point of error is sustained.

Lee Ann Grossnickle next contends that the trial court erred by issuing an order limiting her freedom of speech in contravention of the First Amendment of the United States Constitution and Article I, § 6 of the Texas Constitution. Included in an order signed by the trial court on December 8, 1994 was the following provision:

> IT IS FURTHER ORDERED that the Respondent, LEE ANN GROSSNICKLE, shall refrain from any utterance, whether written or spoken, which in any manner reflects upon the integrity of this Court, or any officer of this Court, opposing counsel, or any Supreme Court Justice or Appellate Justice of this State, in any district or region, at any time.[15]

12. This action by the trial court is not analogous to a supersedeas bond because Richard Grossnickle had no right to execute a judgment and take the property. Instead, the property was under the control of the court. This is in the nature of an injunction without a bond, and this restriction was not placed upon Richard Grossnickle. Because of our ruling on this point, we do not discuss the appropriateness of such an order.

13. It can be argued that the trial court retained plenary power to make this order based on TEX.R. CIV. P. 329b(e). This plenary power, however, is limited by the more specific provisions of TEX. FAM.CODE ANN. § 3.58(h) (Vernon 1993), which provides time guidelines for preservation of property.

14. The trial court is in a better position than the appellate court to provide for the preservation of the property and the protection of the parties when needed, because the trial court can take testimony concerning the need for such orders; therefore, the system and parties would be better served if this statute had not cut off this authority after the appeal has been perfected for thirty days.

15. In his reply brief, Richard Grossnickle takes the position that after discussing the matter with the trial court the parties elected to have this injunction deleted; however, we do not find this deletion agreement in the record on the pages cited by Richard Grossnickle, and the hearing to which he refers predates the date of the order by approximately six weeks.

[50, 51] A major purpose of the freedom of speech provisions in our Constitutions is to protect the free discussion of governmental affairs, including public officials. As the Texas Supreme Court said in *Davenport v. Garcia*, the presumption in all cases under the freedom of speech provision of the Texas Constitution is that pre-speech sanctions or prior restraints are unconstitutional. 834 S.W.2d 4, 9 (Tex.1992). The Court stated further in that opinion that prior restraints are subject to judicial scrutiny with a heavy presumption against their constitutional validity. The so-called gag order has been permitted in limited circumstances where extrajudicial statements by participants in the trial were likely to interfere with the court's ability to conduct a fair and impartial trial. These types of orders have primarily been limited to criminal cases.

[52] In the present case, nothing in the record justifies the broad prohibition and interference with Lee Ann Grossnickle's constitutional right of free speech. This order is set aside, and this point of error is sustained.

[53] Lee Ann Grossnickle next contends that the trial court erred by not identifying and valuing Richard Grossnickle's good will in his business and dividing that value as part of the marital estate. Under the authority of *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972), good will is not a divisible portion of an individually-owned private professional practice. *See Guzman v. Guzman*, 843 S.W.2d 486 (Tex.1992). This point of error is overruled.

In her final point of error, Lee Ann Grossnickle contends that, in summary, the trial court erred by awarding a disproportionate amount of property to Richard Grossnickle. She grounds this argument on the previously discussed contentions that the court erred in its calculations or by setting values at particular dates.

We must now determine whether the points in which we have found error in specific parts of the division of the community estate materially affected the trial court's just and right division of the entire community estate and constitute an abuse of discretion.

The trial court erred in failing to consider three community bank accounts, which Richard Grossnickle admitted in his inventory to be in existence at the time of the divorce, totalling $25,449. This amount should have been considered as a part of the assets awarded to Richard Grossnickle.

The trial court improperly failed to consider the amounts expended from community property funds on another woman. Richard Grossnickle testified that this amount could not have been in excess of $1,280. Lee Ann Grossnickle testified that based on his use of the American Express credit card, the expenditures were in the amount of $12,847.

[54, 55] Taking the highest possible figure represented by the testimony, the errors above could result in a change to the community of $38,396 total. According to the findings of the trial court, the value of the net assets awarded to Richard Grossnickle was $628,739, and the value of the assets awarded to Lee Ann Grossnickle was $648,000. This amounts to a community property total of $1,276,739. At the most, these errors amount to three percent of the community estate. Reversal is not required unless the errors in valuation make the division so disproportionate as to constitute an abuse of discretion. Based upon the division of the entire community estate, we find that these errors do not constitute an abuse of discretion. This point of error is overruled.

The judgment of the trial court is affirmed as to the division of the property. The $28,000 in attorney's fees awarded in the first judgment remain unaffected by these proceedings; the order prohibiting Lee Ann Grossnickle access to the property awarded to her is set aside; and the order limiting Lee Ann Grossnickle's freedom of speech is set aside.

Justice STARR not participating.

04-26-96
4543.001
cc: HH
hhd Vamf

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

April 24, 1996

Mr. Luther H. Soules, III
Attorney at Lawl00 W. Houston St., # 1500
San Antonio, Texas-78205

Dear Mr. Soules:

I appreciate a copy of your letter dated 3-8-96 to Mr. Susman and Mr. Keltner concerning the purposed rule changes on discovery.

I am not sure if anyone has touched on the matter of the time lag of having to wait 31 days for a response say to written interrogatories or request for production, and then get nothing but a long list of objections. This of course causes a hearing before a Court to obtain relief and that might get set a couple of months after the 31 days. May I suggest that if objections that they MUST be filed within 15 days of the service upon the attorney, and he must get a hearing set within 30 days of that date before the Court.

It also seems that the Judges of our fair courts have run amoke handing out sanctions against an attorney for his doing his best for his client. It appears that the Supreme Court, who no doubt are learned in the English language, failed to distinguish been the word "sanctions" and "damages" in Rule 84 Tx. Appellate Rules. I was under the impression that ONLY the Legislature can enact a statute authorizing a cause of action for "damages." Furthermore, and heretofore, the Courts have held that there MUST be evidence of amount of damages to be recovered and there being an insufficient amount of damages the appellate court would render or remand. Under Rule 84 there needs to be some evidence in relationship to the amount of "damages," to be awarded.

I don't know if you chair or can get the following suggestion to the proper committee on Rule changes. We are seeing more and more Courts taking a decision under advisement and then sitting on it for months on end, and as long as a year or longer. It is my suggestion that once the court has held the hearing and then says it is going to take it under advisement that the COURT must render a decision within 30 days. It is my impression that rarely does a Court need longer, and we sure don't need to have an attorney being forced to urge and urge a Court to render a decision, and then maybe have to file a Writ of Mandamus--when the Rules could MAKE the court act. Just a suggestion.

Thanking you in advance for considering this letter, I remain,

Yours very truly,

Hugh Harrell

WHH:wh
cc; Ret.

3RD0284.1

12/4/96
4913.001
cc: HS
HHD, SCPC Agenda Subcom Staff J. Held
TRCP 21 173 177b 181 329b

MEMORANDUM

TO: Members of the Court Rules Committee

FROM: Patrick Hazel, Subcommittee Chair

DATE: December 3, 1996

SUBJECT: Rules 21, 173, 177b, 181, and 329b.

Three members (named below) of the Subcommittee on "Hearings on Appointment of Guardian ad Litem, Motion for New Trial/Appealabliity, and Three Day Notice of Motions" met by telephone conference on December 2, 1996.

A version making certain amendments to the above rules was first circulated for discussion. The results of our discussion are noted following each of the amendments.

In summary we recommend passage of the recommended amendments to Rules 21, 173, 177b, and 181. We do not recommend passage of the amendments to Rule 329b. This needs a lot more discussion and, perhaps, some sort of research to determine whether a large problem exists and, if so, what the best way to resolve it might be.

Subcommittee members who discussed the proposals:

J. Patrick Hazel

Janet Spielvogel

Bill Cox

THANKS

CONSIDERATIONS FOR AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE

RULE 329b. TIME FOR FILING MOTIONS

[paragraphs (a) through (h) - no changes.]

(i) If a motion for new trial is granted, any aggrieved party shall have 30 days from the date of the signing of the order granting the new trial, to perfect and begin prosecution of appeal pursuant to the Texas Rules of Appellate Procedure.

Once such an appeal is perfected the trial court's plenary power is stayed pending the finality of the appeal.

COMMENT: This proposed rule will be highly controversial. It would allow the appeal of the granting as well as the denying of a motion for new trial. I have not researched the rules to see if other changes would be necessary. The greatest problem I see is that of the trial court's plenary power over the case. Another problem could be that, while an accelerated appeal would be preferable, this probably needs to be provided by statute rather than by rule.

The three members of the subcommitte who discussed this by telephone conference on December 2nd were all quite skeptical of making the granting of a motion for new trial appealable. One member seemed to recall that at one time the first such granting was not appealable but a second granting was appealable. No one else recalled that the rules ever made such a provision. It may have simply been one trial judge's policy never to grant more than one new trial in a case. If a granting of a new trial were to be made appealable, the members of the subcommitte preferred making it so the second time but not the first.

Our real concern is the basis for such a change. We have heard that in certain parts of the State a lot of new trials are granted. This sounds like an abuse in a small number of courts rather than a systemic problem to be corrected by changing a rule. If this really is a problem in some places, should there be another remedy rather than making the granting of a new trial appealable?

1/17/97
4662.001
cc: LHS
orig: hnd gm

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ROBERT L. SCHWARZ
GARY GURWITZ
E.G. HALL
CHARLES C. MURRAY
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CHARLES W. HURY
FREDERICK J. BIEL
REX N. LEACH
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STEPHEN L. CRAIN
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VICKI M. SKAGGS
RANDY CRANE
STEPHEN C. HAYNES
DAN K. WORTHINGTON
VALORIE C. GLASS
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(210) 542-1850

January 14, 1997

HHD
Sent Copy
Sept
J Hall
TRCP 528

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rule 528

Dear Justice Phillips:

Enclosed herewith is a proposed rule change to Rule 528 which the Court Rules Committee has passed for approval to submission to the Supreme Court.

By copy of this letter, I am forwarding a copy of this rule to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: O. C. Hamilton, Jr.

OCH/sam

Enclosure

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Ms. Laurie Baxter (w/encl.)
State Bar of Texas Committees
P.O. Box 12487
Austin, Texas 78711

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:
RULE 528. VENUE CHANGED ON AFFIDAVIT

If any party to a suit before any justice shall make an affidavit supported by the affidavit of two other credible persons, citizens of the county, that they have good reason to believe, and do believe, that such party cannot have a fair and impartial trial before such justice or in such justice's precinct, the justice shall transfer such suit to the court of the nearest justice within the county not subject to the same or some other disqualification.

II. Proposed Rule:
RULE 528. VENUE CHANGED ON AFFIDAVIT

If any party to a suit before any justice shall make an affidavit supported by the affidavit of two other credible persons, citizens of the county, that they have good reason to believe, and do believe, that such party cannot have a fair and impartial trial before such justice or in such justice's precinct, the justice shall transfer such suit to the court of the nearest justice within the county not subject to the same or some other disqualification. A case cannot be transferred more than twice under this rule. Any affidavit filed pursuant to this rule must be filed at least 24 hours prior to docket call, and if the case is set the day following a day the court is not open, then it must be filed one full day prior when it is open.

III. **BRIEF STATEMENTS OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY THEM**

The Justices of the Peace and Constables Association is requesting that a limit of two transfers be placed on this rule because some defendants, in order to escape due process, are presenting these affidavits at trial time on repeat occasions. In all instances so far, the plaintiffs are simply giving up.

Respectfully submitted,

J. Shelby Sharpe (jm)

J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

Dated: November 6, 1996

MORRIS ATLAS
ROBERT L. SCHWARZ
GARY GURWITZ
E.G. HALL
CHARLES C. MURRAY
A. KIRBY CAVIN
MIKE MILLS
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VELMA GARZA
RANDY CRANE
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4543.001
cc: LHS
Orig. rec'd
5/30/96

May 28, 1996

HHD,
SCAC agenda
✓ Supc
J. Hecht.
TRCP 539

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Phillips:

Enclosed is an amendment to Rule 539 which has been approved by the Court Rules Committee.

The purpose of this rule change is to permit justice of the peace courts to hold trials sooner than 45 days as required by Rule 245.

By copy of this letter, I'm sending a copy of this proposed rule change to Luther Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: O. C. Hamilton, Jr.

OCH/sgt

Enclosure

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

cc: Ms. Laurie Baxter (w/encl.)
State Bar of Texas Committees
P.O. Box 12487
Austin, Texas 78711

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:
RULE 539. APPEARANCE NOTED

If the defendant appear, the same shall be noted on the docket, and the cause shall stand for trial in its order.

II. Proposed Rule:
RULE 539. APPEARANCE NOTED AND ASSIGNMENT OF CASE FOR TRIAL

If the defendant appears, the same shall be noted on the docket, and the cause shall stand for trial in its order. The court may set contested cases on written request of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Except as otherwise provided by rule or statute, non-contested cases may be tried or disposed of at any time, whether set or not, and may be set at any time for any other time.

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

III. **BRIEF STATEMENTS OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY THEM**

This proposed amendment is to cure a problem faced very often by the justice court related to litigation involving personal property. Those suits are governed by Rule 245, Texas Rules of Civil Procedure, which has a minimum of forty-five days notice requirement. Where a party is trying to recover personal effects such as clothing and medicine, this forty-five day minimum requirement can work an incredible hardship. I am informed that these kinds of matters regularly come before the justice courts. Accordingly the best way to cure this problem is to retitle Rule 539 and add all of the provisions of Rule 245 minus the forty-

five day requirement and a proviso for non-contested cases because there are other rules affecting them. See attachment from Judge Prindle.

One change in the language in the first sentence of Rule 539 was to correct the verb "appear" to agree with the singular subject defendant. Thus, you see an "s" underscored after that word.

Respectfully submitted,

J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

Dated: April 18, 1996

Comments on the proposed changes to Rule 539.

Background. In 1990, The Texas Supreme Court expanded the time for setting contested trials from ten days to forty-five days in Rule 245.

Justice Court impact. Rule 523 states that District and County Court rules apply in Justice Courts unless specifically addressed in the Justice Court Rules. There is no rule exempting Justice Courts from Rule 245.

Consequential problems. This rule change has caused administrative and litigation problems to litigants who use the Justice Courts. Two problems are specifically cited here. The first produces a scenario where one party alleges that another party is holding their personal property hostage over a dispute sometimes unrelated to the personal property itself. This happens frequently among roommates and boarders. This litigant has no remedial standing in Small Claims Court because it is clearly stated in §28.003 of the Government Code that judgments in that court are limited to money only. It is obvious to all that a roommate or boardee cannot wait 45 days for a hearing to determine superior right of possession on their clothing, furniture, medicine, etc. Most of these litigants are pro se and poor which means that remedies involving Writs of Sequestration are beyond their capabilities or even comprehension.

The second scenario involves cases where the Defendant is either moving out of state and/or has their home up for sale. Even if the Plaintiff prevails, he/she will be unable to collect on the judgment if it occurs after the sale of the home. This scenario happens less frequently than the first, but does happen never the less.

Solution. The proposed change in Rule 539 will cure this problem. I want to thank this August Committee for their prompt attention to this matter.

Judge Sandy Prindle
Tarrant County Justice of the Peace
JP Legislative Chairman for
Justices of the Peace and
Constables Association of Texas, Inc.

04-29-96
46462.001
cc: LHS

HHD

Vamf

TRCP 539

HHO, Sec Ogden, Sub C, J. Keller

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

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five day requirement and a proviso for non-contested cases because there are other rules affecting them. See attachment from Judge Prindle.

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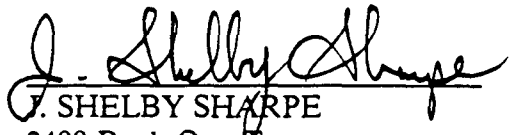
Respectfully submitted,



J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

Dated: April 18, 1996

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Judge Sandy Prindle
Tarrant County Justice of the Peace
JP Legislative Chairman for
Justices of the Peace and
Constables Association of Texas, Inc.

10-30-95
4543.001
cc: LHS
HHD
Vamf

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

General Comments re: proposed TRAP Rules

October 26, 1995

HHD
SAC Agenda (Marian)
Subc (Warren)
Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Chief Justices Linda Thomas, John Cayce, Bob Thomas, Ronald Walker and Alice Oliver-Parrott regarding the proposed TRAP 121, from four Harris County clerks regarding TRAP 57, and from Katherine L. Butler on behalf of the Houston Bar Association regarding proposed changes to the Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Appellate Practice Section

Houston Bar Association
1300 First City Tower 1001 Fannin Houston, Texas 77002-6708 (713)759-1133

October 20, 1995

The Honorable Nathan Hecht
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Justice Hecht:

As you know, the Houston Bar Association recently sponsored its first appellate bench/bar conference. Fifteen appellate judges and 91 appellate lawyers attended the event.

A primary topic for discussion at the conference was proposed changes to the Texas Rules of Appellate Procedure. After your keynote address providing an overview of the proposed changes, the proposed rules were then discussed in both a panel presentation and ten group discussions headed by Houston appellate judges.

I enclose a report that sets forth, on pages 1-3, the concerns that the attendees had about several of the proposed changes -- specifically

-- the proposed petition for review; and

-- the requirement that intermediate appellate courts conduct hearings before granting mandamus relief.

When we started the process of planning this conference, Chief Justice Paul Murphy stated that this conference offered a unique opportunity for appellate judges and lawyers to think about rules changes before they were actually implemented. It is in this spirit that we send you this report.

Thank you for your consideration.

Very truly yours,

Kathy Butler

Katherine L. Butler
Chair, HBA Appellate Section

3RD00299

REPORT FROM HBA APPELLATE BENCH/BAR CONFERENCE

The slew of proposed rule changes and the fruits of tort reform from the last legislative session generated lively discussion and comment at the Houston Bar Association's first Appellate Bench/Bar Conference, held on September 22 and 23.

Proposed Amendments to Texas Rules of Appellate Procedure

Several proposed amendments to the Texas Rules of Appellate Procedure sparked intense interest among conference attendees.

1. Change in Applications for Writ of Error

Attendees expressed concern over the supreme court's proposal to shift from the current application for writ of error process to a "certiorari" practice featuring shorter initial briefs, to be followed by full briefing on the merits only if writ is granted.

The debate centered on whether the supreme court should adopt wholesale changes that would replace the application for writ of error with a petition for review that could be no longer than 10 to 20 pages. Some agreed that the shorter application would facilitate review of the petition by justices, and that the proposed practice might lessen the expense of preparing the petition.

A more critical view drew broader support, however. One attendee remarked that the concern practitioners expressed in 1990, when a similar proposal was advanced, seems heightened five years later. Many asked if it is too late to communicate their concern to the Court.

Criticisms of the proposal fell into the following categories:

- the belief that the supreme court would continue to rely heavily on its briefing attorneys to analyze petitions for review;

- the possibility that shorter petitions would make decisions to grant or deny writs of error less consistent with the existence of error important to the jurisprudence of the state (and influenced more by the ability of advocates to reduce their arguments to soundbites);
- skepticism that the shorter brief would lead to overall reductions in costs. In most cases, it was argued, just as much time would be invested in analyzing and reviewing the record, and in editing the brief. In cases where writ is granted, all the parties would likely spend higher fees for an additional round of briefing; and
- concern that the proposal might be prematurely adopted, because it had not been included among the proposed amendments until very late in the process.

2. Other Changes to Rules of Appellate Procedure

There were areas of consensus among participants on other changes. Two proposed amendments received many favorable comments. Participants welcomed the replacement of the cost bond with a notice of appeal (even on a "pay as you go" basis for the preparation of the appellate record). Similarly, the proposal that the district clerk and the court reporter bear responsibility for transmitting the record to the appellate courts drew nearly universal support.

A critical consensus emerged from intermediate appellate judges and staff, with regard to an apparent oversight in the proposed mandamus rules. The representatives of the appellate courts vigorously asserted their belief that they should have the discretion to grant mandamus applications without being required to hear oral argument. As drafted, proposed rule 120 allows no discretion in this matter.

Many breakout sessions discussed the suggestion that appellate courts be empowered to suspend many of the appellate rules in the "interest of justice." Participants agreed that this should only rarely be exercised. If the rule is adopted, many participants hoped that it would be "fleshed out" with standards or guidelines that would ensure it will not be applied arbitrarily.

The elimination of the "writ of error" appeal also attracted comments. Several remarked that "it ain't broke, so don't fix it." There was concern that the writ of error appeal still serves a valuable function, by allowing what would otherwise be an out-of-time appeal, under certain circumstances. Participants feared that the amended rules would create a gap barring such appeals. Some suggested the amendment might even be unconstitutional.

The citation of unpublished opinions provided a final focus for intense discussion. A minority strongly favored this amendment, on the ground that unpublished opinions are widely available through online services, and there should be no prohibition on their use. A larger number of participants were reported to oppose the amendment, for the following reasons:

- Westlaw and Lexis remain prohibitively expensive for many practitioners (there may be a big-firm bias in favor of the amendment);
- although the rule cautions that unpublished opinions will continue to lack authoritative value, and may be used only for persuasive purposes, many trial courts may not appreciate the distinction; and
- many justices and attorneys reject the conventional wisdom that weaker opinions are designated "no pubs." Rather, it was argued, some cases are

simply not worthy of citation, either because the issues are well-settled or the parties' briefing was inadequate.

Overall, practitioners applauded the efforts of the supreme court and its advisory committee to simplify the rules and remove their remaining traps. As this report reflects, most amendments drew no comment. Conversation and debate centered on those proposed changes that were perceived to be detrimental to the worthy mission of simplifying appellate practice, in order that appeals might be decided on their merits rather than technicalities.

Tort Reform and Proposed Amendments to the Rules of Civil Procedure

Because of the breadth and depth of changes involving discovery rules, tort reform, and charge rules, general comments predominated over specific comments.

1. Discovery Rules

The discovery rules received a somewhat hostile reception from the appellate community. General criticisms included a concern that the changes would produce significant new gamesmanship and were a step backwards. Another general concern was that the rules would result in more appeals and mandamus proceedings in the short term and would result in more trials in the long term. A number of groups challenged the premise that discovery was not outcome determinative. To the extent that discovery is outcome determinative, they felt that the time periods were not adequate to take sufficient discovery to appropriately represent clients. Three specific time limits were identified as being ill-advised. The nine month discovery window was viewed as inappropriate for large counties. Groups expressed a concern that the period should be expanded to a minimum of 12 months, with no extension beyond 18 months. Concern also was expressed that the nine month period did not allow for adequate discovery and therefore would create malpractice exposure. The 50 hour time limit

on depositions was seen as resulting in gamesmanship, with some parties waiting until the end of the period to produce substantive information. The 30 day period between the cutoff for amended pleadings and the end of discovery was viewed as inadequate. One group unanimously recommended that if the pleadings were changed significantly, more discovery should be permitted.

A number of specific discovery changes were viewed positively. The proposal for preserving an assertion of privilege on documents through a withholding statement received wide approval. Limiting objections and freezing pleadings before the end of discovery were also very positively received. Most groups expressly recognized that the new discovery rules would save costs and would foster communication, agreement, and intelligent discovery plans.

2. Tort Reform

Overall, the tort reform changes were not met with much approval. While all the groups recognized that the significant changes and problems identified by speaker Rusty McMains would create a landslide of new appellate work, there was nevertheless a consensus that the changes would create problems for litigants at all levels. Changes in the evidentiary standards for gross negligence and punitives were of particular concern. Mixing the clear and convincing burden of proof with the preponderance of evidence burden was seen by many groups as very troublesome. The absence of significant input from trial and appellate lawyers in the legislative process was widely viewed as unfortunate.

3. Charge Rules

This topic received the least amount of comment. There was a consensus, however, that the changes in the charge rules were not very significant relative to the problems seen in current charge practice. Otherwise, the changes did not generate much in the way of negative or positive comments.

User Friendly Courts

Most of the comments addressing ways to make courts more user friendly focused on motion practice and whether courts of appeals should adopt local rules.

1. Motion Practice

The consensus seemed to be that the appellate courts should not require a motion to obtain an unopposed first extension of time to file a brief. Several participants suggested that state courts should follow the lead of the United States Court of Appeals for the Fifth Circuit and permit clerks to grant unopposed first extensions over the telephone with confirmation by letter. Participants also suggested that courts of appeals should be more flexible in rescheduling oral arguments to accommodate vacations and conflicts with trials or other appellate arguments. One suggestion was to use a vacation letter procedure like the one employed by the Harris County District Clerk.

Other comments addressing motion practice suggested that

- motions to dismiss based on purely procedural grounds should not be carried with the case, which requires parties to present full briefing on the merits even though the procedural motion could be dispositive;

- ex parte rulings on emergency motions should be kept to a minimum by requiring parties seeking such relief to identify and try to contact their opponents; and
- motions for rehearing no longer should be a prerequisite for pursuing an application for writ of error, or alternatively, the time for filing motions for rehearing should be extended to 30 days after an opinion and judgment issue.

2. **Local Rules for Courts of Appeals**

No clear consensus emerged from the debate over whether courts of appeals should publish local rules. One school of thought was that local rules are unnecessary; are likely to create conflicts with the Texas Rules of Appellate Procedure; and threaten to introduce new traps that could result in dismissal of appeals pursued by practitioners who appear infrequently in courts of appeals. A competing view was that courts of appeals tend to develop their own ways of doing things over time, and that litigants are entitled to notice of those circumstances in which a particular court adopts individual procedures that are not otherwise specified in the rules. One middle-of-the-road suggestion called on courts of appeal to publish written practice guidelines that do not rise to the level of "local rules" but nonetheless alert practitioners to idiosyncracies in court procedures.

A similar divergence of opinion was apparent in comments on the proposal to adopt a code of professional responsibility for appellate practitioners. One group thought such a code would be useful; another concluded that the existing Lawyers' Creed already covers this territory. The participants agreed, however, that stridency and personal attacks on opposing counsel in briefing interfere with advocacy and need to be curbed.

Other suggestions and concerns voiced by the participants covered a broad range of appellate practice. They included comments that

- the Fourteenth Court of Appeals should adopt an ADR program;
- staff and research attorneys should receive pay increases;
- clerks should be authorized to provide more information about the status of cases on appeal, particularly when a case has been pending before the court for a long time;
- oral argument for accelerated appeals should be scheduled more quickly; and
- docket equalization should be achieved by redrawing appellate court districts rather than by randomly selecting cases in one court of appeals for assignment to another court.

of participation is not the result of a voluntary withdrawal. When so excluded, the quorum can be broken. *See Duffy v. Loft*, 152 A. at 853; *Hexter v. Columbia Baking Co.*, 145 A. at 116; *Commonwealth v. Vandegrift*, 81 A. at 156.

In the case at bar, however, the summary judgment proof reflects that the Neals voluntarily left the meeting. We recognize that the Neals were not satisfied with the amount of stock they were allowed to vote, but the ownership of the stock is pending in another court. Any relief involving a calculation of the ownership of the stock must be resolved by that court.

[5] The Neal faction further contends that the January 13 meeting was invalid ab initio because it was conducted in bad faith. This issue was not presented to the trial court and cannot be considered on appeal as grounds for reversal. TEX.R.CIV.P. 166a(c). This point of error is overruled.

In their second point of error, the Neal faction contends that the trial court erred in granting the Morris faction more relief than they requested in their motion for summary judgment. The Morris faction requested a declaration that they were the officers and directors of ITC. In its final judgment, the district court declared

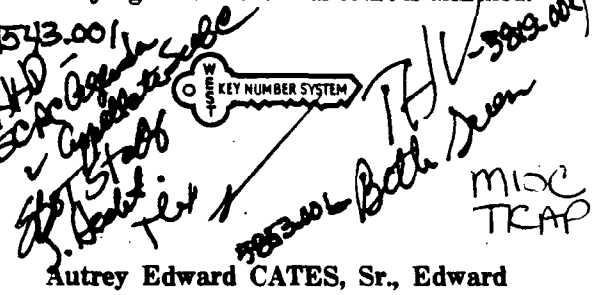
> that the actions taken at the special shareholders' meeting of January 13, 1994, were valid, and, therefore, Walker C. Morris and Charles O. Ekwurzel were elected the valid and legally authorized directors of ITC as of January 13, 1994, and shall continue as such until their successors are elected or appointed.

The Neal faction points out that the court went on to order the clerk to release to the Morris faction $41,466.31 deposited into the court's registry.

The judgment also released the bank that deposited the funds, East Texas National Bank, from any further liability for the funds. The Neal faction contends the Morris faction did not request such relief from the court. The Neal group points to *Mafrige v. Ross*, in which the court finds that if a judgment grants more relief than requested, it should be reversed and remanded. 866 S.W.2d 590, 592 (Tex.1993).

[6] In the present case, the funds were deposited into the registry of the court by the interpleader until the court could make the determination as to the proper party or parties to receive the funds. Once that determination was made, the order to the clerk to distribute those funds according to the determination was no more than a housekeeping measure which the court can initiate of its own volition. This point of error is overruled.

The judgment of the trial court is affirmed.



Autrey Edward CATES, Sr., Edward Cates, Jr., and Leroy Ward, Appellants

v.

CINCINNATI LIFE INSURANCE COMPANY, Northwestern Mutual Life Insurance Company, Mid-Continent Life Insurance Company, Central Life Assurance Company, Phoenix Mutual Life Insurance Company and Jackson National Life Insurance Company of Texas, Appellees.

No. 06-94-00129-CV.

Court of Appeals of Texas, Texarkana.

Sept. 21, 1995.

3RD00308

Buyer of life insurance policies, insured, and beneficiary brought action against insurance companies to recover for negligence and violations of Deceptive Trade Practices-Consumer Protection Act (DTPA) and Insurance Code in connection with fact that policies were not enforced. The 202nd Judicial District Court, Bowie County, Bill Peek, J., entered summary judgment in favor of insurers. Plaintiffs appealed. The Court of Ap-

peals, Grant, J., held that: (1) proper inquiry was whether agent was acting within scope of agency relationship at time of committing act, not whether insurers authorized specific wrongful act; (2) apparent or ostensible agency does not necessarily require false, deceptive, or misleading statements or representations by principal, but consists of lack of ordinary care by principal of allowing agent to be clothed with apparent authority; (3) fact that life insurer did not issue policies did not negate claims against it; and (4) absence of agency or employment relationship between agent and life insurer at time of agent's alleged representations to buyer, insured, and beneficiary would not negate prior conduct by insured clothing agent in apparent authority and would not preclude claims.

Reversed and remanded.

Bleil, J., concurred in judgment and filed opinion.

1. Appeal and Error ⇐854(1)

When court enters broad judgment not specifying grounds upon which judgment is granted, then all grounds will be considered to determine if any ground supports judgment.

2. Appeal and Error ⇐93

Denial of summary judgment is not appealable.

3. Appeal and Error ⇐856(1)

Since trial court granted summary judgment on specified grounds and effectively denied it on alternate grounds, Court of Appeals was confined to ruling on grounds specified by trial court for granting summary judgment.

4. Principal and Agent ⇐159(1)

Proper inquiry for purposes of respondeat superior is whether agent was acting within scope of agency relationship at time of committing act, not whether principal authorized specific wrongful act.

5. Principal and Agent ⇐99

Apparent or ostensible agency would not necessarily require false, deceptive, misleading statements or representations by principal; rather, it consists of lack of ordinary care by principal allowing agent to be clothed with apparent authority.

6. Consumer Protection ⇐6
Insurance ⇐92.1

Fact that life insurer did not issue policies to buyer, insured, or beneficiary did not negate possibility of conduct enticing them to give money to agent for purpose of purchasing policies and, therefore, did not negate claims for negligence and violation of Deceptive Trade Practices-Consumer Protection Act (DTPA) and Insurance Code. V.A.T.S. Insurance Code, art. 1.01 et seq.; V.T.C.A., Bus. & C. § 17.41 et seq.

7. Consumer Protection ⇐35
Insurance ⇐87, 92.1

Absence of agency or employment relationship between agent and life insurer at time of agent's alleged representations to buyer, insured, and beneficiary would not negate prior conduct by insurer clothing agent in apparent agency and would not preclude claims against insurer for negligence and violation of Deceptive Trade Practices-Consumer Protection Act (DTPA) and Insurance Code. V.A.T.S. Insurance Code, art. 1.01 et seq.; V.T.C.A., Bus. & C. § 17.41 et seq.

8. Judgment ⇐183

Plaintiff's theory of apparent agency did not need to be raised in complaint and could be raised in response to alleged principal's summary judgment motion, since alleged principal did not object to absence of theory in pleadings.

9. Appeal and Error ⇐193(1)

Defendants were barred on appeal from asserting failure of complaint to raise issue of apparent agency since defendants did not object to lack of pleadings when plaintiffs argued apparent agency both in response to motion for summary judgment and at hearing.

3RD00309

W. David Carter, Smith, Stroud, McClerkin, Dunn & Nutter, Texarkana, for Autrey Edward Cates, Sr., Edward Cates, Jr., and Leroy Ward.

Ralph K. Burgess, Patton, Haltom, Roberts, McWilliams & Greer LLP, Texarkana, for Mid–Continent Life Ins.

Jennifer Haltom Doan, Figari & Davenport, Dallas, for Northwestern Mutual Life.

Arthur M. Meyer, Jr., Brown McCarroll & Oaks Hartline, Dallas, for Jackson Nat. Life Ins.

Andrew G. Jubinsky, Figari & Davenport, Dallas, for Northwestern Mut. Life and Phoenix Mutual Life.

Michael F. Jones, Gooding & Dodson, Texarkana, for Cincinnati Life Ins.

Before CORNELIUS, C.J., and BLEIL and GRANT, JJ.

OPINION

GRANT, Justice.

Autrey Cates, Sr., Edward Cates, Jr., and Leroy Ward (the Cateses), the plaintiffs below, appeal the granting of motions for summary judgment and the entry of a take-nothing judgment against them in favor of the defendants: Cincinnati Life Insurance Company, Northwestern Mutual Insurance Company, Mid–Continent Life Insurance Company, Central Life Assurance Company, Phoenix Mutual Life Insurance Company, and Jackson National Life Insurance Company of Texas. The Cateses make the following contentions:

(1) The trial court erred in granting summary judgment for the insurance companies because there existed a genuine issue of material fact regarding the authority of Gale Butler to act on behalf of all defendants.

(2) The trial court erred in granting summary judgment for the insurance companies because there existed a genuine issue of material fact regarding the Cateses' causes of action for violation of the Texas DTPA and Insurance Code.

(3) The trial court erred in granting summary judgment for Mid–Continent Life because there existed a genuine issue of material fact concerning the existence of an agency relationship and issuance of policies.

(4) The trial court erred in ordering that the Cateses take nothing against all defendants because the Cateses' claims against all defendants were not addressed by the defendants' motions or the trial court's rulings.

In December of 1987, Gale Butler, an agent for each of the defendant insurance companies, approached Edward Cates, Jr. Edward Cates, Jr. purchased a number of life insurance policies on the life of Leroy Ward, an employee of Edward Cates, Jr. Each policy named Autrey Cates, Sr., Edward Cates, Jr.'s father, as the beneficiary.

These policies were bought by, and delivered to, Edward Cates, Jr. through Butler. Over the next three years, Edward Cates, Jr. made several premium payments by check and cash to Butler. During this entire time, Butler assured the Cateses he was using the money to keep the policies in force.

In October of 1991, Edward Cates, Jr. wrote each of the insurance companies, inquiring as to the status of the policies. The following month, Edward Cates, Jr. learned from the insurance companies that the policies were not in force. The Cateses then filed suit against the insurance companies and Butler, alleging violations of the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) and the Texas Insurance Code, as well as negligence by the defendants in failing to exercise reasonable care in the processing and handling of the insurance policies, applications, and premium payments. The Cateses further alleged each defendant insurer was negligent in failing to use ordinary care in the hiring and/or appointing of Butler as their agent, in failing to properly supervise and/or audit the practices and conduct of Butler, and in failing to use ordinary care to warn the Cateses that Butler, acting as an agent for each defendant insurer, was fraudulently misrepresenting coverage to the plaintiffs. The Cateses' cause of action against Butler was subsequently severed.

Mid–Continent Life, Jackson National Life, and Cincinnati Life each individually filed a motion for summary judgment. Three other insurance companies, North-

western Mutual Life, Central Life, and Phoenix Mutual Life (collectively referred to as the Northwestern insurance group) together filed an additional motion for summary judgment. The trial court granted all the motions for summary judgment.

The Northwestern insurance group has filed a number of cross-points seeking to have the summary judgment approved on appeal on additional grounds that were specifically denied by the trial court. Counsel has filed an able brief setting forth contentions as to why these cross-points should be considered by this Court.

In *Delaney v. University of Houston*, the Texas Supreme Court held that the court's practice was to limit its consideration to the grounds upon which a summary judgment was granted and affirmed. 835 S.W.2d 56, 58 (Tex.1992). The Texas Supreme Court later discussed at length the question of an appellate court affirming on alternate grounds not considered by the trial court, and the plurality concluded that the most judicious procedure was not to consider on appeal the alternate grounds upon which the summary judgment was not granted. *State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 383 (Tex.1993). The plurality opinion, the concurring opinion, and the dissenting opinion in *State Farm Fire & Casualty* all discuss judicial economy as a basis for their position. Judicial economy will be best served by having a hard-and-fast rule for all litigants and trial judges to follow. A rule providing that the appellate court will sometimes consider the alternate grounds and sometimes not will not serve the judicial system well. This procedure should be specifically set forth in the Rules of Appellate Procedure, then all parties in the trial court would know what to expect on appeal.

[1] When the court enters a broad judgment not specifying the grounds upon which the judgment is granted, then all grounds will be considered to determine if any ground supports the judgment. *Rogers v. Ricane*, 772 S.W.2d 76, 79 (Tex.1989). In the present case, the trial court denied the summary judgment to Northwestern, Central, Phoenix and Mid-Continent [1] on the other grounds; therefore, it is difficult to say that these grounds were not considered and were merely alternate grounds.

[2, 3] The denial of a summary judgment is not appealable. *Novak v. Stevens*, 596 S.W.2d 848 (Tex.1980). In effect, the trial court denied summary judgment on the alternate grounds in this case except for the order granting summary judgment for Jackson. Therefore, we are confined to ruling on the grounds specified by the trial court for the granting of the summary judgment except for Jackson in which the alternate grounds were not ruled on.

The basis of a motion for summary judgment is no genuine issue exists for any material fact and the movant is entitled to summary judgment as a matter of law. TEX. R.CIV.P. 166a(c). The movant for summary judgment has the burden of showing there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law; in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true, and every reasonable inference may be indulged in favor of the nonmovant and any doubts resolved in his or her favor. *Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex.1985).

Analysis

We shall analyze each order granting summary judgment to determine if the court's grounds left no material fact issues to be litigated by the parties. As we have discussed earlier, the judgment cannot be affirmed on grounds other than those specifically set forth when the judgment does specify the grounds upon which it was granted. The Cateses' points of error basically com

1. Mid-Continent has not sought to raise cross-points on appeal.

2. As stated in David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 35 So.Tex.L.R. 9, 58 (1994), "[I]t is to the movant's advantage to obtain a broad judgment that can be sustained on any theory presented to the trial court in the motion. Conversely, the losing nonmovant should seek to have the court specify the grounds upon which judgment was granted, if it was upon one of the several grounds."

plain that there were genuine issues of material fact and that the trial court ruling did not address all of the issues in the case.

Because there is some variation existing in the order granting summary judgment and in the summary judgment proof and allegations, we shall discuss the various defendants separately.

Jackson Life

[4] The trial court's order granting Jackson's motion for summary judgment was on the basis of the following two specified grounds:

1. As a matter of law, Gale A. Butler had no actual, apparent or implied authority on behalf of Defendant Jackson National to commit any of the actions or make any of the representations complained of by the Plaintiffs in this lawsuit, and, therefore, such action and representations are not imputed to Jackson National, and Jackson National is not liable to Plaintiffs for such action or representation;
2. As a matter of law, Defendant Jackson National did not make any false, deceptive or misleading statements or representations to the Plaintiffs or commit any actionable conduct under the Deceptive Trade Practices–Consumer Protection Act or the Texas Insurance Code, and, therefore, Defendant Jackson National is not liable to Plaintiffs for any claim asserted against Jackson National under the Texas Deceptive Trade Practices–Consumer Protection Act or the Texas Insurance Code.

The trial court based the first specified ground on *Celtic Life Ins. Co. v. Coats*, 36 Tex.Sup.Ct.J. 1259 (Sept. 10, 1993). In that opinion, the Texas Supreme Court found that because a jury had found an agent had no actual or implied authority to make misrepresentations, the insurance company could not be held liable for the misrepresentations of its agents. *Id.*

The Texas Supreme Court then reissued *Celtic Life Ins. Co. v. Coats*, withdrawing its prior opinion, finding that, in determining a principal's vicarious liability, the proper question is not whether the principal authorized the specific wrongful act, but rather, the proper inquiry is whether the agent was acting within the scope of the agent's relationship at the time of committing the act. 885 S.W.2d 96, 99 (Tex.1994).

In the case at bar, the proper inquiry was, therefore, whether Butler was acting within the scope of the agency relationship at the time of committing the act, not whether the principal authorized the specific wrongful act. The trial court erred in granting summary judgment on Jackson's behalf on the basis of Butler having no authority to commit acts complained of, which were the wrongful acts.

[5] The second ground for granting the summary judgment stated by the trial court does not appear to cover any acts by Gale Butler for which Jackson National Life might be liable under some type of agency theory. Under the second ground found by the trial court, apparent or ostensible agency does not necessarily require false, deceptive, or misleading statements or representations by the principal, but consists of a lack of ordinary care by a principal in allowing an agent to be clothed with apparent authority. *Bugh v. Word*, 424 S.W.2d 274 (Tex.Civ.App.—Austin 1968, writ ref'd n.r.e.). Possible negligence in allowing such conduct is not foreclosed by the specified grounds for summary judgment, nor does the ground preclude a finding of negligence by the company on the other bases alleged by the plaintiffs.

Jackson Life urges that, at all times relevant to the suit, the policies issued by Jackson Life were in effect, and thus the damages alleged by the Cateses as applied to Jackson Life were nonexistent. This was not one of the specified reasons for granting the summary judgment, but the order does not specifically deny the motion on this ground; therefore, we abate the appeal of Jackson Life and remand it to the trial court for the ruling on the remaining grounds.

Cincinnati 3RD00312

The order granting the summary judgment to Cincinnati contains the same specified grounds as the order in the Jackson Life case. Therefore, the discussion applied to

these specified grounds is applicable to Cincinnati. The other grounds were overruled by the trial court; therefore, the summary judgment on behalf of Cincinnati must be set aside.

Northwestern, Central, and Phoenix

The Northwestern insurance group obtained an order granting summary judgment on the same bases as Jackson and Cincinnati. Therefore, the discussion under Jackson will be applicable to Northwestern insurance group. There is one variation in the Northwestern insurance group order from that of Jackson and Cincinnati. The second specified ground not only includes the Northwestern insurance group, but also finds that Gale Butler did not make any false, deceptive, or misleading statements or representations to the plaintiffs or commit any actionable conduct under the DTPA or the Texas Insurance Code. We find no summary judgment proof, showing as a matter of law, that Gale Butler did not make any false, deceptive, or misleading statements or representations to the plaintiffs or commit any actionable conduct under the DTPA or the Insurance Code.

Because we are limited by the specific grounds found by the trial court, and the other grounds were overruled, the summary judgments for the Northwestern insurance group must be set aside.

Mid–Continent

[6, 7] In addition to the two specified findings made in the order for summary judgment for Jackson and Cincinnati, the trial court specified two additional grounds in the judgment for Mid–Continent:

> 3. As a matter of law, no policies of insurance were issued by Mid–Continent Life Insurance Company to any of the Plaintiffs.
>
> 4. As a matter of law, no agency or employment relationship existed between Gale Butler and Defendant Mid–Continent Life Insurance Company at the time of any representations by Gale Butler to Plaintiffs or any of them.

The determination that no policies were issued by Mid–Continent does not negate the possibility of conduct that enticed the plaintiffs to give money to Butler for the purpose of purchasing such policies. The determination that no agency or employment existed at the time the representations were made did not negate prior conduct by the principal that may have clothed Butler in an apparent agency. We find no summary judgment proof entitling Mid–Continent to a judgment on the issue of apparent agency.

[8] Mid–Continent argues that apparent agency is not a material fact issue because it was not pleaded by Cates. Apparent agent is an estoppel theory. Most of the cases requiring it to be affirmatively pleaded are in the context of affirmative defenses. *Nicholson v. Memorial Hospital System*, 722 S.W.2d 746, 749 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Southline Equipment v. National Marine Service, Inc.*, 598 S.W.2d 340, 342 (Tex.Civ.App.—Houston [14th Dist.] 1980, no writ); *Pharr v. Medaris Co.*, 345 S.W.2d 428, 432 (Tex.Civ.App.—Dallas 1961, no writ.).

[9] Although apparent agency was not specifically pleaded by Cates, it was set forth in the plaintiffs' response to the motion for summary judgment. In such a situation involving an affirmative defense, it has been held that raising the matter in the summary judgment documents is satisfactory if an objection is not made calling the trial court's attention to the absence of such a pleading. *See Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 494 (Tex.1991); *see also Hopkins v. Highlands Ins. Co.*, 838 S.W.2d 819, 822 (Tex.App.—El Paso 1992, no writ); *John Bezdek Ins. Assocs. v. American Indem. Co.*, 834 S.W.2d 401, 403 (Tex.App.—San Antonio 1992, no writ). Because the appellees in this case did not object to the lack of pleadings when appellants argued apparent agency both in the response to the motion for summary judgment and at the hearing, they are barred from asserting the absence of pleadings on appeal.

As to Mid–Continent's contention that apparent agency was not raised on appeal by either party, we find it was raised on pages five and six of appellants' brief.

The other grounds for summary judgment were specifically overruled.

The summary judgment as to Mid–Continent must be set aside.

We reverse the summary judgments as to Cincinnati Life Insurance Company, Northwestern Mutual Life Insurance Company, Mid–Continent Life Insurance Company, Central Life Assurance Company, and Phoenix Mutual Life Insurance Company and remand for a new trial, and we sever and abate the appeal of Jackson Life Insurance Company of Texas for thirty days and remand it to the trial court for the ruling on the remaining grounds, said ruling to be returned to this Court within thirty days.

ADDENDUM

Initially, the trial court did not rule on some of the grounds in Jackson Life's motion for summary judgment on this ground. In the original opinion, we severed and abated the Jackson Life appeal and remanded the matter to the trial court for a ruling on the remaining grounds. The trial court has now, in a supplemental order, denied the motion for summary judgment to Jackson Life on all the grounds not specifically granted in the original judgment. Therefore, for the reasons previously set forth, we do not find it proper to review grounds upon which a summary judgment has been denied. We now join Jackson Life back into the suit with the other defendants, and we reverse the summary judgment rendered by the trial court in favor of Jackson Life and remand the cause of action against Jackson Life, along with the causes of action against the other defendants for a new trial.

BLEIL, Justice, concurring.

As noted by the majority, the trial court, in deciding to grant the motions for summary judgment, relied on an opinion in *Celtic Life Insurance Company v. Coats*, which has now been withdrawn. I concur in the court's judgment, but write separately to make it clear that, upon remand, nothing will preclude reconsideration of the motions for summary judgment under current law.

I further decline to join that part of the court's opinion dealing with appellate review of summary judgments. I believe, as stated by Chief Justice Phillips, that an appellate court may affirm a summary judgment on any properly raised and preserved ground, even though not recited in the order granting summary judgment. *See State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 382 (Tex.1993) (Phillips, C.J., concurring).

Josephine MARTIN, Appellant,

v.

Dan BLACK; Mary Patricia Black; W.H. Black; Brazco Development, Inc.; Black Ranch Partnership; Dan P. and W.H. Black Partnership; James Alsup; and Lynch, Chappell & Alsup, P.C., Appellees.

No. 14–94–00531–CV.

Court of Appeals of Texas, Houston (14th Dist.).

Sept. 21, 1995.

Rehearing Overruled Nov. 2, 1995.

Civil action was brought arising from certain business dealings. The 269th District Court, Harris County, David West, J., granted defendant's motion to enforce term sheets as mediated settlement agreement, and plaintiff appealed. The Court of Appeals, Fowler, J., held that: (1) rules of civil procedure set forth procedures to enforce mediated settlement agreement; (2) fact issue existed as to parties intent to be bound by agreement; and (3) plaintiff timely requested jury trial.

Reversed.

3RD0314

1. Arbitration ⇐73.7(5, 7)

Where trial court ruled as matter of law that term sheets were enforceable as mediated settlement agreement, appellate court

We conclude that the requested discovery is relevant to Salazar's claim that TCC's operations in Ecuador were conducted through its alleged alter egos, CSTI and CPNV. Therefore, these matters are properly discoverable, unless appellees are entitled to prevail on their privilege claims.

[23, 24] Any party seeking to exclude documents from discovery must specifically plead the particular privilege claimed and provide evidence supporting that claim. *Loftin v. Martin*, 776 S.W.2d 145, 147–47 (Tex. 1989). The objecting party should provide evidence to the trial court in the form of affidavits or testimony establishing the claimed privilege. *State v. Lowry*, 802 S.W.2d 669 671 (Tex.1991). In some circumstances, the documents themselves may constitute sufficient proof. *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex.1986) (per curiam). If the court determines an *in camera* inspection is necessary, the objecting party has the burden to segregate the items which they allege are exempt from discovery and tender the documents to the court. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 n. 6 (Tex.1990); TEX.R. CIV. P. 166b(4).

[25, 26] Appellees provided no evidence to support their privilege and work product claims. They failed to establish that any of the documents contained confidential communications. *See* TEX.R. CIV. EVID. 503. Because appellees did not meet their burden to establish their claimed privilege, Salazar was not required to prove his claimed fraud exception. It is an abuse of discretion to deny discovery when no proof of the privilege is provided. *Weisel Enters.*, 718 S.W.2d at 58. In addition, Salazar's counsel requested appellees to produce the allegedly privileged documents for *in camera* inspection, and they did not do so. If the documents themselves are the only evidence substantiating the claim of privilege, the trial court has no choice but to review the allegedly privileged documents *in camera* when requested. The trial court's failure to conduct an *in camera* inspection under these circumstances constitutes an abuse of discretion. *Lowry*, 802 S.W.2d at 673–74.

We hold that the trial court abused its discretion in denying the requested relevant discovery without requiring the claimed privileges to be proved. Therefore, we sustain point of error three.

In conclusion, the trial court correctly determined that Texas law applies. The court below improperly denied appellant's requested discovery, however. In addition, appellees failed to establish their entitlement to judgment on all of appellant's claims as a matter of law. Because additional discovery will be completed as a result of our opinion, the entire judgment should be reversed out of fairness to appellant and in the interest of justice. *See* TEX.R.APP. P. 81(b). We reverse the summary judgment and remand this cause for proceedings consistent with this opinion.

GALIL MOVING & STORAGE, INC., Appellant,

v.

Arnold McGREGOR, Appellee.

No. 04–96–00245–CV.

Court of Appeals of Texas, San Antonio.

June 26, 1996.

Plaintiff sued moving and storage company. The Justice Court, Bexar County, Keith Baker, J., entered judgment for plaintiff and company appealed. The Court of Appeals held that judgment of small claims court could not be appealed by writ of error directly to Court of Appeals.

Appeal dismissed.

1. Certiorari ⇐14

Courts ⇐176.5

Final judgment from small claims court may be appealed, directly or by writ of cer-

tiorari, to county court or county court at law for trial de novo. V.T.C.A., Government Code § 28.052.

2. Courts ⇐247(2)

Justice court's judgment cannot be appealed by writ of error directly to Court of Appeals.

3. Courts ⇐247(2)

Judgment of small claims court could not be appealed by writ of error directly to Court of Appeals. V.T.C.A., Government Code § 28.052.

Scott W. Stover, Minter, Joseph & Thornhill, P.C., Austin, for appellant.

Arnold McGregor, San Antonio, pro se.

Before RICKHOFF, LÓPEZ and DUNCAN, JJ.

PER CURIAM.

DISMISSED FOR LACK OF JURISDICTION

Appellee, Arnold McGregor, obtained a $5,000 default judgment against appellant, Galil Moving & Storage, Inc. (Galil), in small claims court. Galil filed a writ of error in this court, and we dismiss the appeal for lack of jurisdiction.

[1] The final judgment of a small claims court may be appealed to the county court or county court at law in the same manner as appeals from the justice court to the county court. TEX.GOV'T CODE ANN. § 28.052 (Vernon 1988). The final judgment from a justice court may be appealed to the county court for trial de novo either (1) directly, TEX.CIV. PRAC. & REM.CODE ANN. § 51.001 (Vernon 1986); TEX.R.CIV.P. 574b; or (2) by writ of certiorari. TEX.CIV.PRAC. & REM.CODE ANN. § 51.002 (Vernon 1986); TEX.R.CIV.P. 575 and 591. Thus, a final judgment from the small claims court may be appealed, directly or by writ of certiorari, to the county court or county court at law for trial de novo.

[2] After trial de novo, the county court's final judgment may be appealed to the court of appeals directly or by writ of error. TEX. CIV.PRAC. & REM.ANN. § 51.012 (Vernon 1986); TEX.R.APP.P. 45; *see also Sablatura v. Ellis*, 753 S.W.2d 521, 521–22 (Tex.App.—Houston [1st Dist.] 1988, no writ). The justice court's judgment cannot be appealed by writ of error directly to the court of appeals. *Winrock Houston Assocs. Ltd. Partnership v. Bergstrom*, 879 S.W.2d 144, 151–52 (Tex. App.—Houston [14th Dist.] 1994, no writ) (noting a gap in the writ of error option).

Because Galil did not appeal to the county court, we ordered Galil to show cause why its writ of error to this court should not be dismissed for lack of jurisdiction. Galil responded that TEX.R.APP.P. 1(a) allows a statutory court, such as a small claims court, to appeal directly to the court of appeals by writ of error.

TEX.R.APP.P. 1(a) describes the scope of the rules of appellate procedure. It states, in part, that "[t]hese rules govern procedure in appeals to courts of appeals from district courts, constitutional county courts, county courts at law *and other statutory courts*." TEX.R.APP.P. 1(a) (emphasis added). TEX. R.APP.P. 45 addresses the requirements of a writ of error.

As Galil observed, the justice courts are created by the Texas constitution. TEX. CONST. art. 5, §§ 18–19. Small claims courts are created by statute and have concurrent jurisdiction with the justice courts in actions involving $5,000 or less. TEX.GOV'T CODE ANN. §§ 28.001, 28.003(a) (Vernon 1988 & Supp.1996).[1] While the two courts have different origins, we do not find this distinction valid for jurisdictional purposes.

[3] TEX.R.APP.P. 2(a) states that the rules of appellate procedure "shall not be construed to extend or limit the jurisdiction of the courts of appeals." Furthermore, the Government Code specifically directs that appeals from the small claims court be treated as appeals from the justice court. TEX.GOV'T CODE ANN. § 28.052(b) (Vernon 1988). We

1. The justices of the peace sit as judges of the small claims courts. TEX.GOV'T CODE ANN. § 28.002 (Vernon 1988).

cannot read the scope provision of TEX. R.APP.P. 1(a) as inconsistent with this directive. Thus, the judgment of a small claims court cannot be appealed by writ of error directly to the court of appeals. *See Bergstrom*, 879 S.W.2d at 151–52.

This appeal is dismissed for lack of jurisdiction.

TRUSSWAY, INC., et al., Appellants,

v.

Don A. WETZEL and Pamela G. Wetzel, Appellees.

No. 09-94-264 CV.

Court of Appeals of Texas, Beaumont.

Submitted Oct. 26, 1995.

Decided June 27, 1996.

Homeowners brought action against supplier of trusses and others for inadequate construction of their home. The 9th District Court, Montgomery County, B.F. Coker, J., entered judgment solely against supplier, and entered take-nothing judgment against supplier on contribution and indemnity claims against codefendants. After reaching settlement and release agreement with homeowners, supplier appealed district court's decision on cross-claims. The Court of Appeals, Nye, J., (Assigned), held that: (1) settlement and release agreement precluded supplier from appealing trial court's take nothing judgments, and (2) supplier could not bring statutory contribution claims against codefendants.

Affirmed.

1. Indemnity ⇐13.2(1)

Defendant that is party to settlement agreement cannot then seek indemnity from codefendants.

2. Appeal and Error ⇐161

Party cannot treat judgment as both right and wrong; one who accepts benefits of judgment is thereafter estopped from challenging that judgment on appeal.

3. Appeal and Error ⇐161

Litigant who voluntarily accepts judgment cannot then challenge it by appeal; he is estopped from doing so unless reversal of judgment could not possibly affect party's right to benefit accepted under judgment or unless economic circumstances are such party could not have acted voluntarily.

4. Appeal and Error ⇐161

Settlement and release agreement signed by supplier of trusses and homeowners in action brought by homeowners for inadequate construction of their house precluded supplier from appealing trial court's take nothing judgments against supplier on supplier's contribution and indemnity cross-claims against codefendants.

5. Contribution ⇐5(1)

Court looks to theories of liability adjudged against joint tortfeasors to determine which of several contribution schemes applies.

6. Contribution ⇐5(6.1)

Judgment entered in action brought by homeowners for inadequate construction of their house specifically held supplier of trusses solely liable to the exclusion of all other named defendants and thus supplier could not bring contribution claims against codefendants. V.T.C.A., Civil Practice & Remedies Code § 32.001 et seq.

7. Contribution ⇐5(5), 6

Party may seek contribution when judgment is entered finding that party to be joint tort-feasor, and when such party makes subsequent payment of disproportionate share of common liability.

03-26-96
4543.001
cc: [redacted]
hhd
Vamp

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

March 25, 1996

HHD
SCAd Agenda
Subc
Staff
TRAP 4, 74(a) & 91

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from the Chief Justice and Justices of the Ninth Court of Appeals regarding the current and proposed Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHIEF JUSTICE
RONALD L. WALKER

JUSTICES
DON BURGESS
EARL B. STOVER

Court of Appeals
State of Texas
Ninth District

CLERK
CAROL ANNE FLORES

OFFICE
SUITE 330
1001 PEARL ST.
BEAUMONT, TEXAS 77701
409/835-8402 Fax 409/835-8497

March 19, 1996

TO: ALL MEMBERS OF THE APPELLATE RULES SUBCOMMITTEE

RE: CURRENT TRAP 74(a), 74(q), 91
PROPOSED TRAP 4(e), 74(a), 91

Ladies and Gentlemen:

The current rules require copies of briefs, orders, opinions, etc. to "each of the parties to the trial court's final judgment." The proposed rules retain those requirements and adds the requirement that all papers are to be served on all parties to the trial court's judgment.

There is no distinction between the parties at trial and the appellate parties. For example, if a final judgment was a take-nothing in favor of 999 out of 1000 defendants, the remaining defendant perfected appeal and the plaintiff did not appeal the take-nothing in favor of the 999, a strict adherence to the rules would require an appeals court to send the required copies to those 999.

This is unnecessary and a waste of scarce time and scarcer resources. In these days of complex, multi-party litigation and docket equalization, the potential for "budget busting" looms over every court. Obviously someone has presented a good argument for keeping folks within the information loop who are no longer participating. While it is true that one cannot have enough information, there must be a balance struck between "need to know" and "nice to know", especially when cost is a consideration.

If this plea ultimately falls on deaf ears, then the rules should provide some mechanism to allow courts of appeal to defray the costs.

Ronald L. Walker
Chief Justice

Don Burgess
Justice

Earl Stover
Justice

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THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

December 8, 1995

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

TRAP 18

Dear Luke:

Enclosed are copies of letters from Fulbright & Jaworski, the HBA's Appellate Practice Section, the State Bar's Appellate Practice and Advocacy Section, and David Gunn regarding the Court's briefing practice and from Chief Justice Bob Thomas regarding Texas Rule of Appellate Procedure 18.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

Tenth Court of Appeals

November 21, 1995

Honorable Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendment to Rule 18 of the Texas Rules of Appellate Procedure

Dear Justice Hecht:

I am writing to add my voice to that of the Honorable Peggy Culp, Clerk of the Seventh District Court of Appeals, concerning the proposed amendment to Rule 18(c). Under the proposed rule, the financial burden of replacing lost or misplaced records is explicitly placed upon the individual clerk instead of the court as an institution. I believe that this is an unwarranted change in the rule.

Under the current rule, the "clerk shall be responsible for every record or other paper in a cause that is missing from his office." The rule does not place upon the individual clerk the financial obligation of replacing the record, but apparently acts to relieve the parties of the responsibility for the record once it is safely placed in the clerk's custody. This rule does not mandate that the clerk be individually responsible for the costs of the record if it becomes missing. The proposed rule, however, mandates that "[t]he cost of securing [an identical copy of a missing item] shall be borne by the clerk" if the clerk cannot establish any of the enumerated defenses. This additional language represents a clear change in the rules that control our operations.

This proposed change is unwarranted because it (1) creates a serious financial disincentive to accepting the position of clerk; (2) forces unnecessary changes in the internal procedures of each court; (3) interferes in the internal relationships in the courts of appeals; and (4) does not account for possible losses not attributable to human volition.

As you know, some records can be tremendously large, exceeding several thousand pages. The costs of such a record would be an extreme financial burden on the individual clerk in the event

Phone (817) 757-5200 Post Office Box 1606 Waco, Texas 76703-1606

that it should turn up missing. Any rational person, in evaluating the attractiveness of the clerk's position, would be required to take this possibility into account. Thus, this proposed rule creates a financial disincentive to accepting the appointment.

Secondly, the rule will create the need for tighter internal controls over the handling of records. Currently, records are distributed among the legal staff without formal safeguards or checks. If the clerk must be able to show that the record was misplaced by a member of the court, personally or by agency, the clerk must create a record-keeping system sufficient to allow for chambers-by-chambers tracking of all records within the court. Additionally, the rule will require more stringent safeguards over misfiling by any court personnel, both legal and clerical. These changes will further complicate the administrative practices of the appellate courts at a time when our resources are already strained by our case loads.

Thirdly, the rule will dictate to the courts of appeals what relationship they must establish with their clerk. The sanctions for losing records should be left to the individual courts, not imposed by rule from above.

Finally, the rule does not allow for exceptions in the event of destruction of the records by some non-human agency, for example, a fire in the courthouse. In such an instance, the clerk will be unable to produce a receipt for the records, show that "someone" took the records without the clerk's consent, or show that the documents are in the possession of one of the judges of the court. At the least, this proposed rule should be changed to take this possibility into account.

For these reasons, I believe that the current rule should be kept. The cost of replacing a lost record should be borne by the institution, rather than by the individual, with the sanctions for loss being left up to the individual courts.

I cannot emphasize how disconcerting this proposed rule change is to this court and, I would surmise, to the other courts of appeal. I respectfully request that serious consideration be given to these objections.

Sincerely,

Bob L. Thomas
Chief Justice

cc: Honorable William J. Cornelius
Chairman, Council of Chief Justices
of Courts of Appeals

11-16-95
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hhd
Vamf

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

TRAP 18c

November 15, 1995

HHD
SCAC Agenda
TRAP Sub C
Staff.

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Chief Justices and Clerks of various courts of appeals regarding proposed Texas Rule of Appellate Procedure 18(c). I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

PHONE
713-655-2800

FAX
713-650-8550

November 13, 1995

Honorable Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Re: Proposed amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

Please reference the letter of Peggy Culp, Clerk, Seventh Court of Appeals. The Fourteenth Court of Appeals agrees with the concern addressed by Mrs. Culp regarding the proposed TRAP 18(c).

I urge you to give this matter favorable consideration.

Sincerely,

Paul C. Murphy
Chief Justice

Mary Jane Smart
Clerk

CHARLES L. REYNOLDS
Chief Justice

CARLTON B. DODSON
Justice

JOHN T. BOYD
Justice

BRIAN QUINN
Justice

Court of Appeals

Seventh District of Texas
Potter County Courts Building
501 S. Fillmore, Suite 2-A
Amarillo, Texas 79101-2449

PEGGY CULP
Clerk

MAILING ADDRESS:
P.O. Box 9540
79105-9540

(806) 342-2650

FAX: (806) 342-2675

November 13, 1995

Honorable Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: Proposed amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

The proposed TRAP 18(c) provides the following:

> "The clerk is responsible for the safekeeping of the record and every other paper filed in a case. If the record or a part thereof, or any other paper, is missing, it is the responsibility of the clerk to secure an identical copy of the missing item, if one is available. The cost of securing that copy shall be borne by the clerk unless the clerk (l) can produce a receipt showing that someone withdrew the record or other paper, (2) can otherwise show by satisfactory evidence that someone took the record or paper from the clerk's custody without the clerk's consent, or (3) that the record or paper passed into the hands of one of the justices or judges of the court and has not been returned to the clerk's custody. If the clerk makes the showing required herein, the cost of replacement shall be borne by the court for which the clerk is employed, or, if the court orders, by the person who withdrew the record or paper."

Although the clerks of the courts have always been, and should be, responsible for the safekeeping of the court's records, this rule proposes that in some instances, personal financial responsibility be imposed upon the clerk for replacing lost records, even though the clerks may be without personal fault. Therefore, it seems appropriate to provide that the cost of replacing any lost record should be paid for from the court's operating funds unless fault can be placed upon a person making an unauthorized withdrawal of the record or paper. This may be accomplished by changing the third sentence of the proposed rule to read:

> The cost of securing that copy shall be borne by the court for which the clerk is employed, unless the court orders, upon a showing of satisfactory evidence, that the cost be paid by the person who took the record or paper without authorization and lost it.

It is respectfully requested that serious consideration be given to this or a similar, amendment to the proposed rule.

Respectfully yours,

Peggy Culp

Peggy Culp, Clerk

Court of Appeals

Twelfth Court of Appeals District

1517 WEST FRONT STREET
SUITE 354
TYLER, TEXAS 75702

TELEPHONE
(903) 593-8471

November 13, 1995

Honorable Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments to the TEXAS RULES OF APPELLATE PROCEDURE
Specifically, Rule 18(c)

Dear Justice Hecht:

I respectfully support the language proposed by Mrs. Peggy Culp for the third sentence of the proposed revision referenced above.

I agree that the clerks of the courts have always been, and should be, responsible for the safekeeping of the court's records. We do our very best, but it appears to me that it is physically impossible for the Clerk to personally "babysit" each and every single sheet of paper included in each and every single case on file in the court. If Rule 18(c) is allowed to be revised in such a manner that the Clerk is held personally responsible financially, then Clerks will have no time to do anything else but babysit the files.

The above is only one reason I am support Ms. Culp's proposed language for the rule revision. Unfortunately, there are instances in which even state employees become disgruntled. The Clerks of the Courts of Appeals will become an easy **"target,"** the **"sitting duck"** so to speak, of a disgruntled employee desiring to satisfy a little frustration without even drawing attention to himself. The proposed rule will hand out retaliation on a silver platter, with absolutely no accountability for anyone else's personal actions. The Rule would state that the Clerk will pay for everyone.

By necessity every judge, every staff attorney, in fact every single court employee has access to all case files in this Court, not to mention appellate attorneys who check out records. At present, our system of document accountability is working fine. However, if the proposed revision is adopted, I simply cannot stand guard at the file room door eight hours a day and still perform all of my other duties and responsibilities.

If Ms. Culp's proposed language, or at least something very similar, is not accepted and adopted, I feel that Clerks will have no choice but to make some demanding, unpopular, and somewhat unrealistic, changes regarding court members' and appellate attorneys' access to records.

I respectfully request that serious consideration be given to Ms. Culp's proposed language. Although I believe in personal accountability, I don't believe it is right for someone to be held personally financially responsible for something which they could never possibly obtain absolute control over.

Thank you for your time and consideration in this matter.

Respectfully yours,

Cathy S. Lusk

Cathy S. Lusk, Clerk

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

YVONNE PALMER, Clerk

Tarrant County Courthouse
100 W. Weatherford Street
Fort Worth, Texas 76196
817/884-1900
817/884-1932 - FAX

November 13, 1995

Mrs. Peggy Culp, Clerk
Court of Appeals
Seventh District of Texas
Potter County Courts Bldg.
501 S. Fillmore, Suite 2-A
Amarillo, TX 79101-2449

RE: RULE 18(c), TRAP

Dear Peggy:

As you and I talked over the phone, I am very concerned about the wording of this Rule. In our office we try very hard to keep track of all our records. We do have sign-out cards for any employee removing a file from the shelves, but with 31 employees it is not always possible to watch over each one. I wholeheartedly agree that any cost incurred for securing a copy of any missing record should be borne by the Court, not the clerk, unless otherwise directed by the Court.

Sincerely,

Yvonne Palmer

Yvonne Palmer, Clerk

Court of Appeals
Sixth Appellate District
State of Texas

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
CHARLES BLEIL
BEN Z. GRANT

CLERK
TIBBY THOMAS

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75502-5952
903/798-3046

November 13, 1995

Ms. Peggy Culp, Clerk
Seventh Court of Appeals
P. O. Box 9540
Amarillo, TX 79105-9540

Re: Proposed Rule Change for TRAP 18(C)

Dear Peggy:

Chief Justice Cornelius and I have reviewed your suggested amendment to the proposed rule change for Tex. R. App. Pr. 18(c). We support your amendment and agree the wording needs to be changed.

Sincerely,

Tibby Thomas

Tibby Thomas, Clerk

COURT OF APPEALS
FIRST DISTRICT
1307 SAN JACINTO, 10TH FLOOR
HOUSTON, TEXAS 77002

PHONE 713-655-2700
FAX 713-752-2304

November 13, 1995

Honorable Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Re: Proposed amendments to Texas Rules of Appellate Procedure
TRAP 18(c)

Dear Justice Hecht:

This is in reference to the letter dated November 13, 1995 to you from Ms. Peggy Culp, Clerk, Seventh Court of Appeals, Amarillo. The First Court of Appeals concurs with this proposed rule change. We request that serious consideration be given to this proposed change to TRAP 18(c).

Thank you for your attention to this matter.

Respectfully,

Hon. Alice Oliver-Parrott
Chief Justice

Margie Thompson
Clerk of Court

Court of Appeals
State of Texas
Ninth District

CHIEF JUSTICE
RONALD L. WALKER

JUSTICES
DON BURGESS
EARL B. STOVER

CLERK
CAROL ANNE FLORES

OFFICE
SUITE 330
1001 PEARL ST.
BEAUMONT, TEXAS 77701
409/835-8402 Fax 409/835-8497

November 13, 1995

Honorable Hathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: Proposed Amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht,

The Ninth Court of Appeals agrees with the position stated in the attached letter of the Seventh District Court of Appeals.

We also respectfully request that immediate consideration be given to amending the TRAP 18(c) proposed rule.

Respectfully,

Ronald L. Walker
Chief Justice

Carol Anne Flores
Clerk

encl.

COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT

EL PASO COUNTY COURTHOUSE, SUITE 1203
500 E. SAN ANTONIO STREET
EL PASO, TEXAS 79901-2421
(915) 546-2240 FAX (915) 546-2252

Chief Justice
Richard Barajas

Justices
Susan Larsen
Ann McClure
David W. Chew

Clerk
Barbara B. Dorris

Chief Deputy Clerk
Denise Pacheco

Staff Attorney
William M. Lockhart

November 13, 1995

Honorable Nathan J. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: Proposed amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

Please reference the letter of Peggy Culp, Clerk, Seventh District Court of Appeals dated November 13, 1995. This Court concurs with the concern addressed to you by Ms. Culp regarding the proposed TRAP 18(c). I urge you to give this matter favorable consideration.

Sincerely,

Richard Barajas

Richard Barajas

Barbara B. Dorris

Barbara B. Dorris

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more, even if the changes were not minor, Meier did have some opportunity to question Frith concerning the changes made to his testimony, and the Hearing Examiner clearly thought that these opportunities afforded Meier sufficient time to digest the new information and to cross-examine Frith prior to the hearing.[3] Meier argued extensively against Frith's analysis at the hearing, but the Hearing Examiner simply found Frith's expertise and conclusions to be credible and persuasive after an extensive hearing during which experts on both sides of the dispute presented market studies and comparative statistics. Under these circumstances, we cannot say that the Hearing Examiner's decision not to grant a continuance was an abuse of discretion. We overrule Meier's twelfth point of error.

We also overrule Meier's thirteenth point of error because we do not believe that the Hearing Examiner abused its discretion in denying Meier's motion to reopen the evidentiary hearing. The motion to reopen was based on hearsay, and Meier did not show that the issues that the new evidence was to reveal were relevant to the factors set out in section 4.06(c). Under these circumstances, the Hearing Examiner was at liberty to deny the motion and not to disturb the findings it had made after the conclusion of an extensive evidentiary hearing.

Finding no error, we affirm the Board's decision.

3. The motion for a continuance at issue here was made just before the evidentiary hearing was to begin and was actually the renewal of a motion that Meier had made five days prior to the hearing. The Hearing Examiner was shown the changes at the hearing on the first motion for continuance, and Frith was subsequently made available for deposition to discuss the changes.

Sylvia A. TREVINO and Oscar Trevino, Individually and as Next Friends of Oscar J. Trevino, Neil Lee Trevino, and Stephanie Ann Trevino, Minor Children, Relators,

v.

The Honorable Stanton B. PEMBERTON, Assigned Judge of the 39th District Court, Kent County, Texas, Respondent.

No. 07-96-0029-CV.

Court of Appeals of Texas, Amarillo.

March 13, 1996.

Litigants petitioned for mandamus relief against trial judge, seeking to command him to order court reporter to transcribe, free of cost, a statement of facts. The Court of Appeals, Quinn, J., held that, since litigants' affidavit of inability to pay costs of appeal was filed on October 17 before denial of their motion for new trial, affidavit's filing date was legally postponed until moment after the motion was overruled and that date was December 13 and therefore, litigants who sent notice of affidavit's filing to court reporter on December 14 timely notified reporter of the filing.

So ordered.

1. Evidence ⇐43(2, 3)

Appellate court may judicially notice its own records in the same or related proceeding involving the same or nearly the same parties.

2. Mandamus ⇐59

Litigants' petition for mandamus relief against trial judge, seeking to command him to order official court reporter to transcribe, free of cost, a statement of facts was the appropriate way to address dispute; however, the writ would issue only upon appellate court's concluding that trial court clearly

abused its discretion in upholding contest to litigants' affidavit of inability to pay costs of appeal.

3. **Appeal and Error ⇐946**

Abuse of discretion arises when trial judge acts without reference to applicable rules or guiding principles; decisions founded upon misinterpretation of such rules or guidelines exemplify abused discretion.

4. **Appeal and Error ⇐389(1)**

Notice may be given by simply informing court reporter of the filing of litigant's affidavit of inability to pay costs of appeal in a timely letter for purposes of appellate rule stating that litigant shall give notice of filing of the affidavit to the court reporter within two days after the filing or otherwise he shall not be entitled to prosecute appeal without paying costs. Rules App.Proc., Rule 40(a)(3)(B).

5. **Appeal and Error ⇐337(3)**

Term "prematurely filed documents" encompasses documents filed before entry of a final judgment or order overruling motion for new trial as that term is used in appellate rule stating that no appeal shall be held ineffective because "prematurely filed;" such documents will not be deemed filed until execution of final judgment or order overruling motion for new trial. Rules App.Proc., Rule 41(c).

See publication Words and Phrases for other judicial constructions and definitions.

6. **Appeal and Error ⇐389(1, 3)**

Since litigants' affidavit of inability to pay costs of appeal was filed on October 17 before denial of their motion for new trial, affidavit's filing date was legally postponed until the moment after their motion for new trial was overruled and that date was December 13 and therefore, litigants acted timely by sending court reporter notice of the filing of the affidavit on December 14; pertinent date from which notice to court reporter of the filing of the affidavit was to be given was not the date on which the affidavit was actually filed. Rules App.Proc., Rules 40(a)(3)(B), 41(c).

Appeal from Original Proceeding in Mandamus.

Law Offices of Timothy D. Yeats, Timothy D. Yeats, Big Spring, for appellant.

Castro & Davis, Isaac M. Castro, Jeffrey Davis, Hamlin, for appellee.

Before DODSON, BOYD and QUINN, JJ.

QUINN, Justice.

Sylvia A. Trevino and Oscar Trevino, individually and as next friends of Oscar J. Trevino, Neil Lee Trevino, and Stephanie Ann Trevino, (collectively referred to as the Trevinos) petitioned for mandamus relief against the Honorable Stanton B. Pemberton (Pemberton), sitting by assignment in the 39th Judicial District of Kent County, Texas. They ask us to command him to order Sherry Powell (Powell), official court reporter, to transcribe, free of cost, a statement of facts. We conditionally grant the request.

Facts

[1] Neither Pemberton, Powell, nor Kent County "contest the factual allegations set out in Paragraphs Nos. I through XI of Relators' Petition for Writ of Mandamus."[1] Those allegations, as coupled with the original and supplemental transcripts filed in appellate cause number 07–96–0017–CV, styled *Sylvia Trevino et al. v. Kent County d/b/a Kent County Nursing Home*, of which we take judicial notice, disclose the following.[2]

Powell, in her capacity as court reporter, recorded trial proceedings wherein the Trevinos were plaintiffs. The court eventually signed a judgment, on September 29, 1995, denying them relief. An "Affidavit of Inability to Give Security for Costs," signed and sworn to by Sylvia and Oscar Trevino, was

1. Powell and Kent County, Texas were joined as parties due to their "interest in the subject matter of th[e] action." Furthermore, in responding to the petition for mandamus, both denominate themselves as "real parties in interest."

2. An appellate court may judicially notice its own records in the same or related proceeding involving the same or nearly the same parties. *Turner v. State*, 733 S.W.2d 218, 221 (Tex.Crim.App. 1987). The pending mandamus and cause number 07–96–0017–CV are so related.

filed with the court clerk eighteen days later, that is, on October 17, 1995. Seven days later, on October 24, 1995, the Trevinos also filed with the clerk their motion for new trial. The transcript contains no order indicating that the court expressly overruled the motion. Rather, we conclude that it was denied by operation of law on December 13, 1995.

On the 14th of December, 1995, the Trevinos filed their notice of appeal. By letter of even date, they then informed Powell, for the first time, of their October 17th affidavit and requested that she transcribe the previously mentioned trial proceedings. She replied, via her own affidavit dated December 21, 1995, stating that

> I was notified by letter by attorney for appellant ... on December 15, 1995 [sic] to prepare a transcription of the Statement of Facts ... and deliver it to the appellant at no cost.
>
> As of this date [sic] I have not received a copy of the actual Affidavit ... and was not given the requisite notice pursuant to Rule 40 of the Texas Rules of Appellate Procedure.

Also filed, twelve days later, was her plea contesting the Trevinos' status as indigents. Therein, she contended that the Trevinos failed to timely notify her of their October 17th Affidavit. Since this purportedly contravened Texas Rule of Appellate Procedure 40, she believed that she had no duty to transcribe the trial free of charge.

Pemberton agreed with Powell and manifested same by order signed on January 11, 1996. Additionally, the sole reason given for rejecting the Trevinos' claim of impoverishment was their supposed failure to provide timely notification.

Application of Facts to Law

1. The Appropriate Remedy and Standard of Review

[2] We first note that petitioning for mandamus is the appropriate way to address the dispute at bar. *Allred v. Lowry*, 597 S.W.2d 353, 354 n. 2 (Tex.1980) (stating that mandamus is the proper remedy upon a trial judge's sustaining a contest to an affidavit of inability to pay costs); *accord Watson v. Hart*, 871 S.W.2d 914, 919 (Tex.App.—Austin 1994, no writ) (stating the same). However, the writ will issue only upon our concluding that the trial court clearly abused its discretion in upholding the contest. *Watson v. Hart*, 871 S.W.2d at 919.

[3] Next, we note that an abuse of discretion arises when the judge acts without reference to applicable rules or guiding principles. *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 597 (Tex.App.—Amarillo 1995, no writ) (involving review of a preliminary injunction). Additionally, decisions founded upon a misinterpretation of such rules or guidelines exemplifies abused discretion. *Id.*

2. Rules of Appellate Procedure Involved Herein

[4] The rules applicable to the pending controversy case are found in the Texas Rules of Appellate Procedure. The first allows an appellant to avoid paying the costs of an appeal by filing "his affidavit" disclosing his lack of financial resources. *Tex.R.App.P.* 40(a)(3)(A). This document must be given to the court clerk within thirty days after the judgment is signed. *Tex.R.App.P.* 41(a)(1). The deadline may be extended for sixty more days, however, if a litigant timely moves for new trial. *Id.* Rule of procedure also requires the appellant to notify the court reporter of the filing "within two days after" the affidavit is filed. *Tex.R.App.P.* 40(a)(3)(B).[3] Should he not do so, he loses his opportunity to proceed *in forma pauperis*. *Id.*

Facial application of the foregoing directives to the facts at hand tends to suggest that the trial court was correct. After all, the December 14th letter notifying Powell of the affidavit was sent more than two days after October 17th.

Yet, the Trevinos argue that more is involved. Indeed, they direct the court to Texas Rule of Appellate Procedure 41(c).

3. Notice may be given by simply informing the reporter of the filing in a timely letter. *See, e.g., Jones v. Stayman*, 747 S.W.2d 369, 370 (Tex. 1987) (wherein the appellant's attorney sent a letter rather than a copy of the affidavit).

According to that provision, a prematurely filed affidavit of indigency "*shall* be deemed to have been filed on the date of but subsequent to the time of signing of the judgment or the time of overruling of motion for new trial, if such a motion [was] filed." *Tex. R.App.P.* 41(c). Since their affidavit was allegedly premature, that is, filed before the court overruled their motion for new trial, they suggest that their duty to notify Powell did not arise until December 13th, the date on which the motion was overruled by operation of law. By sending Powell notice on December 14th and her admitting receipt thereof by December 15th, they conclude that they acted timely. We agree for the following reasons.

a. Prematurely Filed Document

Resolution of the current dispute depends upon the interpretation of the phrase "prematurely filed document." Though not defined by the rules of appellate procedure, we discern its meaning by digging at its historical root.

Once upon a time, one could not attempt to perfect his appeal until after the trial court entered either a final judgment *or an order overruling a motion for new trial*, if such a motion were filed. *E.g., Richards v. United States Cold Storage Co.*, 112 S.W.2d 445, 445–46 (Tex.Comm'n App.1938, opinion adopted). This spawned much concern since a cost bond or pauper's affidavit filed prior thereto were nullities. *See, e.g., Gilmore v. Ladell*, 34 S.W.2d 919, 919–20 (Tex.Civ.App.—Dallas 1930, writ ref'd) (holding appellant's attempt to perfect an appeal *in forma pauperis* for naught given that he filed his affidavit of indigency before the court entered an order denying new trial). To ameliorate the situation, the Texas Supreme Court long ago enacted the predecessor to Appellate Rule 41(c). Originally codified in Texas Rule of Civil Procedure 306c, the rule worked a legal fiction by postponing the effective date of a previously filed cost bond or pauper's affidavit to a time immediately after entry of judgment or order denying new trial. *See Tex. R.Civ.P.* 306c, *General Commentary* (Vernon 1977) (noting that the rule was later expanded to include prematurely filed "notices of appeal" and discussing the historical effect of filing such notices prematurely). In doing so, Rule 306c breathed life into appellate documents filed before entry of final judgment or order overruling new trial.

[5] Other than its relocation to the rules of appellate procedure, the substance of then Rule 306c has undergone little change. It still reads, for the most part, as it did when enacted to overcome the harshness of *Gilmore* and *Richards*. Given its origins and substantively unaltered wording, we must construe the term "prematurely filed documents" found in Rule 41(c) as encompassing documents filed before the entry of a final judgment or order overruling a motion for new trial. Furthermore, such documents will not be deemed filed until execution of a final judgment or an order overruling a motion for new trial. *Tex.R.App.P.* 41(c).

b. Time for Notice to Court Reporter

[6] Since the pauper's affidavit here at issue was filed before denial of the Trevinos' motion for new trial, its filing date was legally postponed until the moment after the motion was overruled, that is, December 13th. Rule 40(a)(3)(B), therefore, required them to notify the court reporter of the filing by the close of December 15th. Yet, the trial court concluded otherwise. In doing so, it misinterpreted Appellate Rules 40(a)(3)(B) and 41(c) and abused its discretion.

In deciding as we do, we reject the court's and court reporter's contention that the pertinent date from which notice was to be given was the date on which the affidavit was actually filed. The argument ignores the wording of Rule 41(c) which expressly "deemed" the affidavit here in question filed immediately after the request for new trial was overruled.

3RD00337

Nor can we accept the proposition that Rule 40(a)(3)(B) somehow supplants 41(c). The former involves the time within which one must notify the court reporter while the latter controls the date on which the duty to notify is triggered. Each is a unique rung in the appellate ladder, with one leading to, not replacing, the other.

Conclusion

We conditionally grant the writ of mandamus and trust that the Honorable Stanton B. Pemberton will vacate his order signed January 11, 1996, which relieved Sherry Powell from preparing and providing, without cost, the statement of facts requested by the Relators. If he fails to do so by March 21, 1996, the writ will issue.

PHUONG THAI THAN, Appellant,

v.

The STATE of Texas, State.

No. 2-95-035-CR.

Court of Appeals of Texas,
Fort Worth.

March 14, 1996.

State charged defendant with violating his probation, and filed petition to proceed to adjudication on prior charge of burglary of motor vehicle. The Criminal District Court No. 1, Tarrant County, Sharen Wilson, J., found defendant guilty of burglary of motor vehicle and sentenced defendant to ten years confinement in penitentiary. Defendant appealed his sentence. The Court of Appeals, Holman, J., held that defendant's conviction of burglary of a motor vehicle was properly classified as third-degree felony and, thus, ten-year sentence in penitentiary was appropriate, despite amendment to statute, effective after defendant committed burglary, which reclassified burglary of motor vehicle as misdemeanor requiring state jail sentence.

Affirmed.

Burglary ⇐2

Defendant's conviction of burglary of a motor vehicle was properly classified as third degree felony and, thus, ten-year sentence in penitentiary was appropriate, despite amendment to statute, effective after defendant committed burglary, which reclassified burglary of motor vehicle as misdemeanor requiring state jail sentence, where amendment specifically provided that crimes committed before effective date of amendment would be governed by penal code provisions in effect at time of offense. V.T.C.A., Penal Code § 30.04.

From Criminal District Court No. 1, Tarrant County; Sharen Wilson, Judge.

Gwinda L. Burns, Fort Worth, for Appellant.

Tim Curry, Criminal District Attorney; Betty Marshall and Charles M. Mallin, Assistant Chiefs of Appellate Section; Debra Ann Windsor, David Hagerman, Assistant Criminal District Attorneys, Fort Worth, for Appellee.

Before DAY, RICHARDS and HOLMAN, JJ.

OPINION

HOLMAN, Justice.

Phuong Thai Than was convicted of the May 29, 1993 burglary of a pickup truck and appeals his sentence of ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice. We affirm.

On June 1, 1993, appellant was charged with the third degree felony in an information and pled guilty on July 2, 1993. He waived a jury, and the court deferred adjudication of guilt and placed him on six years' probation. A condition of probation was that appellant would not violate any state or federal laws.

In October 1994, the State filed a Petition to Proceed to Adjudication, alleging that on July 26, 1994, appellant violated his probation by committing two crimes—kidnapping and burglary of a habitation. Appellant pled "not true" to those allegations

By written motion, appellant told the court that during his probation, the Legislature

Appellant, Guadalupe Lopez's, sole point of error is that the trial court erred in failing to grant her motion for directed verdict. Turning to the second issue in this case, we note that a challenge to the trial court's denial of a motion for directed verdict, such as that raised by Lopez, is tantamount to a challenge to the sufficiency of the evidence. *Madden v. State*, 799 S.W.2d 683, 686 (Tex.Crim.App. 1990), *cert. denied*, 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991). In examining the sufficiency of the evidence, we review the entire record in the light most favorable to the verdict and determine whether any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); *Little v. State*, 758 S.W.2d 551, 562 (Tex.Crim.App.) (quoting *Alexander v. State*, 740 S.W.2d 749, 757–58 (Tex.Crim.App. 1987)), *cert. denied*, 488 U.S. 934, 109 S.Ct. 328, 102 L.Ed.2d 346 (1988).

[2] The evidence in this case is amply sufficient to support the conviction of DWI. Lopez was seen driving the car and having the wreck. She was still sitting behind the wheel when the officer arrived. She was attempting to do something relating to the operation of her car. Whether she was trying to start the car, as the officer testified, or remove the key, as she testified, is not critical. She never at any time denied she was driving the car. She denied being intoxicated, gave her own version of how much she had to drink, and explained that she sustained a head injury in the accident. But the jury disbelieved Lopez and chose to believe that she was drunk for the reasons already mentioned.

[3] It is for the jury, as the trier of fact, to assess the credibility of witnesses and the weight to be given their testimony. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex.Crim.App.1991). Jurors are empowered "to draw reasonable inferences from basic facts to ultimate facts." *Kapuscinski v. State*, 878 S.W.2d 248, 249 (Tex.App.—San Antonio 1994, pet. ref'd) (quoting *Dumas v. State*, 812 S.W.2d 611, 615 (Tex.App.—Dallas 1991, pet. ref'd)). From the facts in this case, the jury could reasonably infer that Lopez had been driving the car. *See Pope v. State*, 802 S.W.2d 418, 420 (Tex.App.—Austin 1991, no pet.) (concluding that jury's decision resolving conflicting inferences, if any, must be given deference).

Viewing the evidence in a light most favorable to the jury verdict, a rational trier of fact could have found beyond a reasonable doubt that Lopez was driving her vehicle in a public place while intoxicated. Accordingly, Lopez's point of error is overruled and the judgment of the trial court is affirmed.

TRAP 53

In the Matter of L.B., a Juvenile.

No. 08–96–00242–CV.

Court of Appeals of Texas, El Paso.

Oct. 10, 1996.

- 4543.001
& 3819.004
0 100.160

Juvenile appealed from order of the County Court, Andrews County, Gary W. Gaston, J., modifying disposition and committing him to Texas Youth Commission until he was 18 years of age. On motion for extension of time in which to file statements of facts, the Court of Appeals, McClure, J., held that cassette copy of original tape recording of proceeding, rather than court reporter's transcription of recording, would serve as statement of facts on appeal.

Motion granted.

1. Infants ⇐246

On appeal from juvenile proceeding which was recorded by juvenile court judge by means of audiotape recording but which was not attended by court reporter, cassette copy of original tape recording, rather than court reporter's transcription of recording, would serve as statement of facts. V.T.C.A.,

3RD0338.1

Family Code § 54.09; Rules App.Proc., Rules 50(a), 53(f).

2. Infants ⇐246

In order for cassette copy of original tape recording of delinquency proceeding to serve as statement of facts on appeal, juvenile court or person with personal knowledge was required to certify in writing that original audiotapes had not been altered or modified, and juvenile court was required to make or cause to be made a clear and accurate copy of original audiotapes. V.T.C.A., Family Code § 54.09; Rules App.Proc., Rules 50(a), 53(f).

3. Infants ⇐246

Court reporter would be required to provide certified transcript of tape recording of disposition hearing to serve as aid to Court of Appeals on appeal in juvenile proceeding, where tape recording of disposition hearing was of questionable quality. V.T.C.A., Family Code § 54.09; Rules App. Proc., Rules 50(a), 53(f).

Lilly A. Plummer, Odessa, for Appellant.

James H. Densford, Andrews, for Appellee.

Before LARSEN, McCLURE and CHEW, JJ.

OPINION ON MOTIONS TO EXTEND TIME FOR FILING STATEMENT OF FACTS

McCLURE, Justice.

L.B., a juvenile, appeals from an order modifying disposition and committing him to the Texas Youth Commission until he is 18 years of age. Presently pending before the Court is a timely-filed amended motion for extension of time in which to file the statement of facts. The court reporter has also filed a motion requesting an extension of time to file the statement of facts. Both motions are granted with additional orders.

[1] We abated this appeal and directed the trial court to conduct an evidentiary hearing in connection with L.B.'s amended motion for extension of time in which to file the statement of facts. The juvenile court found that: (1) no court reporter attended the hearing in question, but the juvenile court judge taped the proceedings by means of an audiotape recorder; (2) the juvenile court has appointed a private court reporter to transcribe the audiotapes and file that transcription to serve as the statement of facts on appeal; (3) the audiotapes have been stored in a locked closet and have not been removed except for the occasion on which the tapes were copied for the court reporter; and (4) L.B. did not request that the hearing be recorded by stenographic notes nor did he object to its recording by means of an audiotape recorder. The issue before us is whether the original audiotapes or the court reporter's transcription shall serve as the statement of facts in this appeal.

The record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts. TEX.R.APP.P. 50(a); *Valenzuela v. State*, No. 08-95-00204-CR, — S.W.2d — (Tex.App.—El Paso June 13, 1996, no pet.)(not yet reported). The Rules of Appellate Procedure provide for preparation of the record on appeal by the clerk of the trial court and the court reporter who transcribed the proceeding. *Valenzuela*, slip op. at 3, — S.W.2d at —; *see generally* TEX.R.APP.P. 50, 51, and 53; TEX.R.APP.P. Appendix Rules 1–4. Except where electronically recorded statements of fact are specifically permitted by orders of the Supreme Court and Court of Criminal Appeals, the statement of facts is ordinarily considered to be a typewritten transcription of the court reporter's notes certified by the court reporter as a true and correct transcription of all portions of the evidence and other proceedings requested to be included in the statement of facts. *See* TEX.R.APP.P. 53(f); TEX.R.APP.P. Appendix 1(b) [1]; *see Valenzuela*, slip op. at 3–4, —

3RD0338.2

1. The Supreme Court of Texas has authorized courts in Bexar, Brazos, Dallas, Harris, Kleberg, Liberty, and Montgomery Counties, and the 39th District Court in Haskell, Throckmorton, Stonewall and Kent Counties, to make a record in civil proceedings by electronic tape recording. *See* AMENDED ORDER OF THE TEXAS SUPREME COURT, Jan. 23, 1989. The Rules governing the procedure for making a record of court proceedings by electronic recording in civil proceedings are located

S.W.2d at ———. This is not an ordinary case, however, because Section 54.09 of the Texas Family Code expressly permits the recording of judicial proceedings by electronic or mechanical means in lieu of stenographic notes:

> All judicial proceedings under this chapter except detention hearings shall be recorded by stenographic notes or by electronic, mechanical, or other appropriate means. Upon request of any party, a detention hearing shall be recorded.

TEX.FAM.CODE ANN. § 54.09 (Vernon 1996).

[2] Based upon the plain language of Section 54.09, we conclude that the juvenile court was authorized to record the disposition hearing by means of audiotape recording. This conclusion does not resolve the issue before us, however, because Section 54.09 does not make any provision for preparation of a statement of facts in the event of an appeal. Likewise, the Rules of Appellate Procedure do not address this matter.[2] Because no court reporter attended the judicial proceeding in question, and therefore, the transcribing court reporter cannot personally certify the transcription as required by Rule 53(f) and Appendix 1(b), we conclude that the statement of facts in this case shall consist of a cassette copy of the original tape recording. That cassette copy shall be prepared and certified in accordance with the following procedure:

1. The juvenile court or a person with personal knowledge shall certify in writing that the original audiotapes have not been altered or modified in any way since the conclusion of the disposition proceeding.

2. The juvenile court shall make or cause to be made a clear and accurate copy of the original audiotapes to serve as the statement of facts in this appeal. The copy shall be prepared in the form of a standard cassette recording. The cassette shall be labeled to reflect clearly the contents of the cassette and numbered if more than one cassette is required. The juvenile court shall certify in writing that the cassette copies submitted to this Court are true and correct copies of the original audiotapes and that they accurately reflect the disposition.

Both motions for extension of time to file the statement of facts are granted until October 25, 1996. The juvenile court is directed to forward the certified cassette copies to this Court by that date. The juvenile court is further directed to make or cause to be made an additional certified cassette copy of the original recordings and file the copy with the clerk of the juvenile court. The parties may review the certified cassette copy.

[3] In response to the undisputed assertion of L.B.'s appellate counsel that the tape recordings are of questionable quality, we also find that it is necessary for the court reporter to provide a certified transcription of the recording to serve, not in lieu of the recorded statement of facts, but as an aid to this Court. The transcription shall be prepared and certified in accordance with the following orders:

1. Ronald A. Mullen, the certified court reporter who has been appointed by the juvenile court to transcribe the tapes, shall prepare the transcription of the audiotape recordings to serve as an aid to this Court on appeal. The transcription shall be prepared in the manner of an ordinary statement of facts, including a proper index. *See* TEX. R.APP.P. Appendix 1(b).

2. The juvenile court shall review the transcription prepared by Mr. Mullen and shall certify in writing that it is true and accurate and that it correctly reflects what transpired at the disposition hearing. The transcription is due to be filed with this Court no later than October 25, 1996. A copy of the certified transcription shall be filed with the clerk of the juvenile court and maintained for the use of the parties in connection with this appeal.

3. If any exhibits were admitted at the disposition hearing, Mr. Mullen shall prepare an Exhibits Volume in accordance with TEX. R.APP.P. Appendix 1(b). The juvenile court

3RD0338.3

in West's Texas Rules of Court (West Pamph. 1996).

2. We urge the Texas Supreme Court of Texas to adopt rules providing for the preparation of the statement of facts in these types of appeals.

shall also certify in writing that the Exhibits Volume is true and accurate and that it correctly reflects what the exhibits admitted at the disposition hearing.

In the event a dispute arises regarding these orders or the accuracy of the statement of facts, they shall be presented to this Court by motion in accordance with the applicable rules of appellate procedure.

T. SOTO, Appellant,

v.

M. SOTO, Appellee.

No. 08-95-00222-CV.

Court of Appeals of Texas, El Paso.

Oct. 17, 1996.

Rehearing Overruled Nov. 27, 1996.

Former wife commenced postdivorce partition suit, alleging that she owned interest as tenant in common in parcels of real property which remained undivided under divorce decree, awarding former husband all property which he possessed. The 243rd District Court, El Paso County, Phillip Martinez, J., following bench trial, entered judgment in favor of husband,and wife appealed. The Court of Appeals, McClure, J., held that: (1) divorce decree awarding husband all real and personal property in his possession was ambiguous as matter of law; (2) wife was divested of title to parcel by divorce decree, following finding that husband possessed disputed real estate; and (3) any error in finding that wife's suit was barred by statute of limitations or under doctrine of laches was harmless.

Affirmed.

1. Husband and Wife ⇐272(4)
Partition ⇐13

Community property which is not divided upon divorce is held by former spouses as tenants in common and partition is appropriate remedy to effectuate postdivorce division.

2. Divorce ⇐255
Husband and Wife ⇐272(4)

Partition is inappropriate remedy to effectuate postdivorce division of community property if decree purporting to divide entire community estate is unambiguous and neither party directly appeals.

3. Divorce ⇐169

Divorce decree that is not consent or agreed judgment is interpreted under rules relating to construction of judgments rather than rules relating to construction of contracts.

4. Judgment ⇐524

Judgment can generally be construed in same manner as other written instruments with view toward harmonizing and giving effect to all that court has written.

5. Judgment ⇐524

Intent of parties is immaterial when construing judgment that is neither a consent nor agreed judgment.

6. Husband and Wife ⇐278(1), 279(2)

Divorcing couples may enter into agreements to facilitate property division; agreements are contracts and their legal force and meaning are governed by contract of law. V.T.C.A., Family Code § 3.631(a).

7. Divorce ⇐255

Divorce decree that incorporates agreement to facilitate property division between divorcing couples becomes consent judgment, subject to same degree of finality and binding force as judgment rendered in adversary proceeding. V.T.C.A., Family Code § 3.631(a).

8. Divorce ⇐255

3RD0338.4

Res judicata and collateral estoppel apply to divorce decree which incorporates agreement of divorcing couple to facilitate

pellant's points of error pertaining to the court's valuation of the cash and life insurance accounts are overruled.

Household Items

[22] The parties had entered into an agreed division of their household possessions. The agreed division placed the total value at $30,646, with items worth $16,912 going to Berkebile and items worth $13,734 going to Pelzig. The trial court found that "[t]he [p]arties had agreed that the agreed division of personal property between them was fair and equitable." Pelzig now argues that, although the exact division of personal items was agreed to, she did not consider the overall division "fair and equitable," since Berkebile's items were of greater value. Pelzig argues that she should have been compensated for the $3178 shortfall in personal items out of other property in the community estate. Berkebile argues that the trial court, after reviewing all the evidence, found that the division of personal property was fair and equitable, and the trial court is entitled to sufficient deference to allow its finding to stand.

The trial court found that "[t]*he* [p]*arties had agreed* that the agreed division ... was fair and equitable" (Emphasis added). The evidence in this case shows only that the parties agreed to the division of personal property, not that they agreed that the division was fair and equitable. Rather, the inequality of the personal property division is reflected twice in the record, once in Pelzig's oral testimony and again in an exhibit admitted into evidence that itemizes the personal property division.

[23] However, the trial court awarded Pelzig a greater share of the remaining community property than was awarded to Berkebile. Nowhere does the trial court indicate an intention to divide the property according to a set percentage, such as fifty percent to each. Pelzig has failed to demonstrate how the trial court's determination of the agreed division of household items as "fair and equitable" has impacted the ultimate division of community property or harmed her in any way. Under these circumstances, no reversible error has been committed. Appellant's seventh point of error is overruled.

We remand this case with instructions to the trial court to make a new division consistent with this opinion. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex.1985).

WEST KEY NUMBER SYSTEM

TRAP 53(h)

4543.001

Emma Marlene BAKER and William Baker, Appellants,

v.

TRAND, INC. and James Claude Tindle, Appellees.

No. 10–96–064–CV.

Court of Appeals of Texas, Waco.

Oct. 23, 1996.

Automobile driver and passenger brought negligence action against driver of 18–wheel tractor trailer to recover for injuries they suffered in collision. The 40th District Court, Ellis County, Gene Knize, J., entered judgment for defendant. Plaintiffs appealed, and requested leave to supplement statement of facts. The Court of Appeals held that delay caused by defendant's rebriefing to take into account facts plaintiff sought to add to record would not be unreasonable.

Motion granted.

3RD00339

1. Appeal and Error ⇐642

Court of Appeals is to liberally construe rule governing amendment of record so that its decisions are based on substance rather than procedure; "liberal construction" requires that word omitted be interpreted literally to mean missing without any consideration of scienter involved, rather, fault is more properly considered when determining

if delay inherent in supplementing record is unreasonable. Rules App.Proc., Rule 55(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Appeal and Error ⇐654

Delay in bringing appeal caused by defendants re-briefing its arguments to take into account new portions of record plaintiff sought to add to record by amendment was not unreasonable delay, as would warrant denial of plaintiff's motion to amend record. Rules App.Proc., Rule 55(b).

Robert Charles Lyon & Sandi Pearson Fudge, Robert Lyon & Associates, Rowlette, Clay Jenkins, Jenkins & Jenkins, Waxahachie, for appellant.

Charles T. Frazier, Jr. & Gregory J. Lensing, Cowles & Thompson, P.C., Dallas, for appellee.

Before DAVIS, C.J., and CUMMINGS and VANCE, JJ.

OPINION ON THE BAKERS' MOTION FOR LEAVE TO SUPPLEMENT THE STATEMENT OF FACTS

PER CURIAM.

Emma Baker and her husband, William, sued Trand, Inc. and James Tindle (collectively "Trand") for personal injuries sustained as a result of a collision between Emma's car and a Trand 18-wheel tractor-trailer driven by Tindle. The jury found that Emma's negligence was the only proximate cause of the wreck, and the court rendered a take-nothing judgment against the Bakers. They directed the court reporter to prepare a statement of facts for use in this appeal, but specifically instructed him to leave out certain portions of the testimony and exhibits. They now seek to have those portions of the testimony transcribed and a complete exhibit volume prepared for inclusion in the record before us. Because the burden of showing that granting the motion will result in "unreasonable delay" is on the resisting party and Trand has failed to meet that burden, we grant the Bakers' motion.

Over a four day period of time in October 1995, the parties seated a jury, presented evidence from at least ten witnesses, and received the jury's verdict.[1] On the record before us, at least two of the witnesses, Dr. Charles Banta and Ollie Chappel, testified by videotape. After perfecting their appeal, the Bakers requested that the reporter prepare a statement of facts, but specifically told him that he "may omit ... from the statement of facts: (1) The testimony of Dr. Charles Banta, Stephen Strawn, Dr. Dale Funderburk and Ollie Chappel." They also listed some sixty-two of their own and "All Defendants' " exhibits for omission.

In their brief, the Bakers raise five points of error, dealing with complaints regarding the court's refusal to submit an instruction on negligence *per se* and a negligent hiring claim, the legal and factual sufficiency of the evidence supporting the jury's finding on negligence, and the court's action sustaining a hearsay objection raised by Trand. In its appellees' brief, Trand argues that the Bakers' failure to bring forward a complete statement of facts is fatal to each of their points of error. Trand filed its brief on August 28, 1996.

3RD00340

1. We say "at least ten witnesses" because the court reporter failed to include an index to the volumes of the statement of facts submitted to this court, thus we have no way of knowing, absent a page-by-page examination of the statement of facts, how many witnesses actually testified at trial. We recognize that there are no official rules promulgated by the Supreme Court governing the form of the statement of facts in a civil case as allowed by the Rules of Appellate Procedure. TEX.R.APP. P. 53(h). However, the Court of Criminal Appeals has issued rules setting the form that should be followed in a criminal case, including a requirement that a master witness index be placed in the front of the first volume and each volume have a sub-index listing the witness whose testimony is presented in that volume. *Id.* APPENDIX FOR CRIMINAL CASES R. 1(b)(4). The cautious civil practitioner would be well advised to ensure that the civil records presented to this court comply with all provisions of the appendix as well. *Id.* Additionally, by this order, we specifically request that the court reporters of our district comply with the provisions of the appendix regardless of the civil or criminal nature of the appeal. *Id.* (particularly rules 1(b)(3), (b)(4), and (b)(6)).

In response to Trand's brief, the Bakers requested leave from this court to supplement the statement of facts with the missing testimony. TEX.R.APP. P. 55(b). In opposition, Trand argues that (1) the testimony is not "omitted" within the meaning of the rule because the Bakers made an intentional choice to instruct the reporter to leave that evidence out of the record and (2) allowing supplementation will "unreasonably delay" this appeal because it will have to rewrite its appellee's brief in light of the new portions of the record.

[1, 2] We are to liberally construe Rule 55(b) so that our decisions are based on substance rather than procedure. *Crown Life Ins. v. Estate of Gonzalez*, 820 S.W.2d 121, 122 (Tex.1991). In our view, a liberal construction of Rule 55(b) requires that the word "omitted" be interpreted literally to mean "missing" without any consideration of the scienter involved. *Id.* Rather, fault is more properly considered when determining if the delay inherent in supplementing the record is "unreasonable." Nothing in *Crown Life* suggests otherwise. Secondly, we believe that *Crown Life* requires that we make an affirmative finding of *unreasonable* delay. *Id.* at 121. Trand's concern about the time spent in re-briefing its arguments does not rise to a level which would support such a finding.

Therefore, we grant the Baker's motion to supplement the record. The supplemental statement of facts is due within twenty-one days of the date of this order.

courts" in the 1987 amendment to art. 44.29(b). Accordingly, the legislature's omission of the words "trial courts" in the 1987 amendment effectively excluded them from art 44.29(b).

As the Grimes County District Attorney notes in its brief, the Court of Appeals sought to legislate "public policy" rather than interpret the law as required by Art. 2, Sec. 1 of the Texas Constitution. The plain meaning of Art. 44.29 of the Code of Criminal Procedure should be given effect. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Cr.App.1991). Therefore, we hold that a trial court cannot grant a new trial as to the punishment phase of a trial only.

Accordingly, the judgment of the court of appeals is reversed and the cause remanded to the trial court for proceedings consistent with our opinion.

4543.001

KEY NUMBER SYSTEM

TRAP 54

Stella KNIGHT, Individually and as Representative of the Estate of Joseph Knight, Brent Knight, Emma Knight, and Joseph Knight, Jr., Appellants,

v.

SAM HOUSTON MEMORIAL HOSPITAL, West University Healthcare Group, Ltd., West Houston Healthcare, Ltd., Columbia Hospital Corporation, Columbia Corporation of Houston, Columbia Hospital Corporation of West Houston, Hei Health Services Corporation, Hei Corporation, Howard Sussman, M.D., Hollis Oxspring, M.D., Houston Anesthesia Services, P.A., Salah El Hafi, M.D., Cardiology Clinic, P.A., and Katherine Ann Blades, CRNA, Appellees.

No. 01-95-00386-CV.

Court of Appeals of Texas, Houston (1st Dist.).

Aug. 10, 1995.

Rehearing Overruled Sept. 21, 1995.

Joint motions were filed to dismiss appeal taken from judgment of the Probate Court Number 3, Harris County, Jim Scanlan, J. The Court of Appeals, Taft, J., held that failure of appellants to timely file transcript or motion for extension of time to file transcript precluded appellate review.

Granted.

Oliver-Parrott, C.J., concurred and filed opinion.

1. Appeal and Error ⇐627.2

Untimely filed transcript presented nothing for appellate review and required dismissal of appeal, notwithstanding grant of appellee's motion for leave to file supplemental transcript and injury to district court clerk; appellant was responsible for filing timely transcript or motion for extension of time to file transcript. Rules App.Proc., Rule 54(a, c).

2. Appeal and Error ⇐627

Court of Appeals has no authority to consider late transcript in absence of timely and sufficient motion for extension of time in which to file transcript. Rules App.Proc., Rule 54(a).

3. Appeal and Error ⇐628(1)

Granting appellee's motion for leave to file supplemental transcript did not relieve appellants of their responsibility for either filing timely transcript or motion for extension of time to file transcript. Rules App. Proc., Rule 51(a).

4. Appeal and Error ⇐628(2)

Injury to district court clerk, which was alleged to have caused transcript to be untimely filed did not relieve appellants of burden of timely filing a transcript. Rules App. Proc., Rule 54(c).

3RD00342

I. Nelson Heggen, Houston, for appellants.

William A. Sherwood Houston, Lauren L. Beck, Houston, Mike Neeley, Austin, William

N. Wilson, II, Houston, David A. Livingston, Houston, Andrea F. Lopes, Houston, William N. Wilson, Houston, Kevin Oncken, Austin, Rick Callaway, Houston, Richard A. Sheehy, Houston, for appellees.

Before OLIVER-PARROTT, C.J., and O'CONNOR and TAFT, JJ.

OPINION

TAFT, Justice.

The appellees have filed a joint motion to dismiss this appeal. For the following reasons, we grant the motion and dismiss.

[1] The trial court signed the final judgment on February 3, 1995. No motion for new trial or motion to modify the judgment was filed. *See* TEX.R.APP.P. 54(a). Thus, the transcript was due to be filed within 60 days after the judgment was signed. *Id.* The sixtieth day after the judgment was signed was April 4, 1995. The appellant filed the transcript on April 6, 1995. The appellant did not file a motion for extension of time to file the transcript. *See* TEX.R.APP.P. 54(c).

[2] We have no authority to consider a late transcript. *B.D. Click Co. v. Safari Drilling Corp.*, 638 S.W.2d 860, 862 (Tex. 1982); *Migura v. Migura*, 730 S.W.2d 18, 19 (Tex.App.—Corpus Christi 1987, no writ); TEX.R.APP.P. 54(a). Thus, when an appellant does not timely file the transcript or file a timely and sufficient motion for extension of time in which to file the transcript, we have no authority to consider the transcript. *B.D. Click Co.*, 638 S.W.2d at 862; *Migura*, 730 S.W.2d at 19; TEX.R.APP.P. 54(a).

The transcript we received on April 6, 1995, is not timely, and thus we have no authority to consider it. Because we are without authority to consider the transcript, we have nothing to review, and we must dismiss the appeal. *Migura*, 730 S.W.2d at 19.

The appellants contend that (1) our granting of a motion for extension of time filed by one of the appellees made it unnecessary for the appellants to ask for an extension of time to file the transcript, and (2) an injury in the district clerk's office caused the transcript to be filed late. Neither of these arguments have merit.

1. The appellee's motion for extension of time

One of the appellees asked for an extension of time to file some court documents that were not included in the appellants' request to prepare the transcript. None of the documents in the appellee's request constitute material that must be included in the *original* transcript.[1] *See* TEX.R.APP.P. 51(a) (listing the documents that must be included in the transcript). As a result, we construed the appellee's request as a motion for leave to file a *supplemental* transcript. The documents the appellee sought to file would constitute a proper *supplemental* transcript, but, because they do not include the material referenced in rule 51(a), would not by themselves constitute a proper original transcript. We therefore ordered that "appellee's motion for leave to file supplemental transcript in the ... cause" was "GRANTED."

[3] This action is of no aid to the appellants. Even after the supplemental transcript was filed, we still had before us no transcript as that term is defined in rule 51(a). Without such a transcript, we must dismiss the appeal. *Migura*, 730 S.W.2d at 19.

The appellants argue that it would be inequitable to dismiss their appeal when we granted the appellee's request. We disagree. The rationale of the appellants' argument was rejected by the Dallas Court in *Inman's Corp. v. Transamerica Commercial Fin. Corp.*, 825 S.W.2d 473 (Tex.App.—Dallas 1991, no writ):

> In the context of the appellate record, the appellate rules support the premise that each appellant must independently insure that the appellate record upon which it

1. None of the appellees has perfected an appeal.

relies is timely filed in the appellate court. Rule 50(d) provides: "The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal." In an adversarial system, a party is ill-advised to assume that an action taken by another party will inure to its benefit.

Id. at 477 (citations omitted).

We agree with this reasoning. Our granting of the appellee's motion did not give license to the appellants to either (a) fail to timely file the original transcript, or (b) fail to file a timely and sufficient motion for extension of time to file the original transcript.

2. The injury in the district clerk's office

The appellants also state that, unknown to them at the time, the clerk responsible for preparing the transcript suffered a broken arm and was unable to work for a month.[2] According to the appellants, this "result[ed] in the transcript being filed on April 6" rather than April 4.

[4] The district clerk's injury does not relieve the appellants of their burden to timely file a transcript. The injury may explain why the transcript was not filed by the original due-date, but it does not excuse the appellants from filing a motion for extension of time to extend the due date. *Nix v. Fraze*, 752 S.W.2d 118, 121 (Tex.App.—Dallas 1988, no writ).

In *Nix*, the appellant argued that his failure to timely file the transcript was due to a delay by the district clerk. 752 S.W.2d at 120. The Dallas Court held that the issue was not why the district clerk did not have the transcript prepared by the original due-date, but whether, once the date passed, the appellant filed a timely motion for extension of time. *Id.* at 121. The court, citing TEX.R.CIV.P. 21c, the predecessor to TEX.R.APP.P. 54(c), wrote:

> Even if the District Clerk fails to transmit the record within the proper time period ... the primary responsibility to place the record before this Court nonetheless remains with the appellant. In this regard, he must secure from the appellate court an extension of time in which to file his transcript. *See* TEX.R.CIV.P. 21c; [*State v.*] *Segree*, 694 S.W.2d [383] at 384. [Tex. App.—Corpus Christi 1985] Thereafter, with an extension of time granted, an appellant may then pursue remedies to compel the District Clerk to transmit the record as the rules require. Nix failed to request an extension of time pursuant to Rule 21c. It is this failure that rendered the filing of the transcript untimely.
>
> ....
>
> We conclude that it was Nix's failure to request an extension of time, as was his responsibility, that resulted in the dismissal of his appeal.

Id. at 121.

We agree with this logic. When the April 4 deadline passed without the transcript being filed, the appellants should have filed a timely motion for extension of time to file the transcript. *Nix*, 752 S.W.2d at 121; *see Moore v. Wallace*, 663 S.W.2d 903, 904 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). The question is not why the transcript was not filed by the original due-date, but whether, once the date passed, the appellants filed a timely motion for extension of time. *Nix*, 752 S.W.2d at 121; *see Moore*, 663 S.W.2d at 904. They did not. The failure to file such a motion cannot be excused by relying on an event in the district clerk's office that delayed the time of filing past the original due-date. *Nix*, 752 S.W.2d at 121; *see Moore*, 663 S.W.2d at 904.

We grant the appellees' motion to dismiss and dismiss the appeal.

3RD00344

OLIVER-PARROTT, C.J., concurs.

2. The appellants have provided an affidavit from the clerk in which he states that he broke his wrist in a fall.

OLIVER-PARROTT, Chief Justice, concurring.

I reluctantly agree that, under the current state of the law, this appeal must be dismissed. I write separately to express my opinion that the rules concerning filing the transcript are unjust and should be changed.

Texas Rule of Appellate Procedure 51(c), entitled "Duty of Clerk," puts the burden on the clerk of the trial court to prepare and "immediately transmit" the transcript to the court of appeals. Yet, as the Dallas Court correctly pointed out in *Nix*, "*the appellant* still has the burden of seeing that all of the time limitations are met." *Nix v. Fraze*, 752 S.W.2d 118, 120 (Tex.App.—Dallas 1988, no writ) (emphasis added). I find these two principles contradictory, and would place the burden of filing the record entirely on the party responsible for its preparation: the clerk of the trial court.

With these comments on what I perceive to be an unfair anomaly in the law, I concur in the decision to grant the appellees' motion to dismiss this appeal.

D.L. JONES, Appellant

v.

The STATE of Texas, Appellee.

No. 01-93-00505-CR.

Court of Appeals of Texas, Houston (1st Dist.).

Aug. 10, 1995.

Rehearing Overruled Oct. 12, 1995.

Defendant was convicted in the 177th District Court, Harris County, Robert E. Montgomery, J., of engaging in organized criminal activity. Defendant appealed. The Court of Appeals, Wilson, J., held that: (1) evidence was sufficient to support conviction for engaging in organized criminal activity, and (2) false statements in search warrant affidavit were not made intentionally, knowingly, or with reckless disregard for the truth.

Affirmed.

1. Criminal Law ⇐1159.2(7)

In reviewing legal sufficiency of the evidence, appellate court must view evidence in light most favorable to the verdict to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

2. Criminal Law ⇐742(1)

Trier of fact is sole judge of credibility of witnesses and may choose to believe or disbelieve all or any part of witness's testimony.

3. Criminal Law ⇐562

In a jury trial, evidence is measured against the jury charge.

4. Racketeer Influenced and Corrupt Organizations ⇐123

Jury charge mandating guilty verdict for engaging in organized criminal activity if jury found defendant acted in combination with three or more of the 15 persons named in charge did not require state to prove participation of all persons listed in charge in a combination with defendant. V.T.C.A., Penal Code § 71.02(a)(1).

5. Criminal Law ⇐394.6(5)

At hearing on motion to suppress, trial court is sole trier of fact and judge of credibility of witnesses as well as the weight to be given their testimony.

6. Criminal Law ⇐1158(4) 3RD00345

On appellate review, evidence presented at suppression hearing is viewed in the light

7/24/96
4545.001
cc: LHS
orig hhd sent

CHARLES A. SPAIN, JR.
Court of Appeals for the First District of Texas
1307 San Jacinto Street, 10th Floor
Houston, Texas 77002-7006

Research Attorney
Telephone: (713) 655-2742

HHD
SCAC agenda
v Appellate Subc

TRAP 55

July 24, 1996

The Honorable Nathan Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: Proposed Texas Rule of Appellate Procedure 55

Dear Justice Hecht:

I wanted to share my concerns about the proposed new Texas Rule of Appellate Procedure 55, which the Attorney General has proposed in order to "solve" problems the administrative bar is having in Administrative Procedure Act suits for judicial review in Travis County.

The underlying history of the controversy is summarized in *Texas Health Enterprises, Inc. v. Texas Department of Health*, No. 3-95-709-CV (Tex. App.—Austin June 26 1996, n.w.h.). Boiled down to the essentials, the problem is that attorneys sometimes fail to (1) file all the essential portions of the administrative record with the district clerk and/or (2) get the administrative record admitted into evidence. *See* Administrative Procedure Act, Tex. Gov't Code Ann. § 2001.175(b), (d) (Vernon 1996). Inevitably, the case goes to the Austin Court of Appeals without the agency's final decision or order (or in some cases, the motion for rehearing before the agency) being in the record.[1] Proposed Rule 55 tries to circumvent this problem by seemingly allowing "supplementation" of the appellate record with documents that were never admitted into evidence at trial.

I personally believe it would greatly simplify administrative law practice to repeal the APA section 2001.175(d)'s requirement that the administrative record be offered and admitted into evidence at trial, thus allowing the administrative record simply to be filed with the district clerk. To accomplish this, the administrative bar should either go to the legislature and seek a change in the APA or ask the supreme court to deem APA section 2001.175(d) repealed pursuant to Tex. Gov't Code Ann. § 22.004(c) (Vernon 1988). Unless section 2001.175(d) is repealed, however, the promulgation of proposed Rule 55 appears to accomplish nothing.[2]

---

[1] Under the Local Rules of the Travis County District Courts (chapter 13, I believe), the parties in a suit for judicial review file a quasi-appellate brief to which the key documents from the administrative action are usually attached as exhibits. The problem, however, is that documents attached to briefs and pleadings are still not in evidence simply by virtue of their being attachments to documents that are properly filed. *See, e.g., Atchison v. Weingarten Realty Management Co.*, 916 S.W.2d 74, 76-77 (Tex. App.—Houston [1st Dist.] 1996, no writ).

[2] To the extent that the missing portion of the administrative record was properly admitted into evidence below, proposed Rule 55 is no more liberal in allowing supplementation of the transcript than is proposed Rule 51(f).

In my opinion, proposed Rule 55 takes what appears to be an *unprecedented* step in appellate procedure—the rule would seemingly allow the court of appeals to consider a document, *e.g.*, the final agency decision or order, that was never even filed with the district clerk as part of the administrative record, much less admitted into evidence at trial. Thus, the court of appeals could reverse the trial court based on a document that was never before the trial court. Is this radical departure from standard appellate practice really necessary or desirable? And if the Court makes an exception for administrative law appeals from the general rules about the scope of appellate review, why not also except other important appeals such as child custody matters?

I believe the Court could resolve most of the problems with suits for judicial review by deeming APA section 2001.175(d) repealed and promulgating a new Texas Rule of Civil Procedure or Texas Rule of Civil Evidence that addresses how (and in what form) the administrative record should be filed in the *trial court*.[3] This would obviate the need for a special appellate rule like proposed Rule 55 and would also benefit lawyers who try the occasional administrative law case held outside of Travis County.

I appreciate your continuing receptiveness to suggestions concerning the rules.

Respectfully,

ccs: The Honorable Sarah B. Duncan
Mr. Michael Prince
Mr. Luther H. Soules III

[3] Any such rule should require the administrative record to be submitted bound, paginated, indexed, and certified by the agency custodian of records, much like an appellate transcript. The rule could provide that an administrative record certified by the agency custodian of records and filed with the district clerk is prima facie evidence of the agency's actions. If this were done, I believe we would have far fewer appeals from suits for judicial review that are decided on procedural, rather than substantive, grounds.

10-30-95
4543.001
cc: LHS
hd

TRAP 57

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

October 26, 1995

HHD
SCAC Agenda (various)
SubCo (various)
✓ Staff
Sssss!
Thx

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Chief Justices Linda Thomas, John Cayce, Bob Thomas, Ronald Walker and Alice Oliver-Parrott regarding the proposed TRAP 121, from four Harris County clerks regarding TRAP 57, and from Katherine L. Butler on behalf of the Houston Bar Association regarding proposed changes to the Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

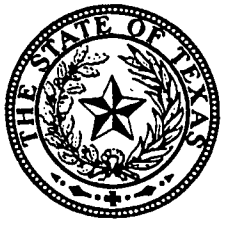
Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.



Mr. Luther Soules, Esq.
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Re: Proposed Amendments to Texas Rule of Appellate Procedure 57

Dear Mr. Soules,

We have reviewed the proposed amendments to the Texas Rules of Appellate Procedure and would like to offer an alternative to Rule 57.

The current draft of proposed Rule 57 requires the appellate clerk to mail a docketing statement to the appellant. The appellant is required to complete the document and return it to the appellate clerk. We believe that there are three problems with the current draft rule:

> First: The docketing statement is never filed with the trial court clerk. The trial court clerk needs much of the information in the docketing statement to identify what judgment the appellant is appealing. This information is vital to the preparation of the transcript.
>
> Second: The appellate court must expend time and money to mail the statement to the appellant, even though the rule states exactly what information appellant is required to provide. This is a waste of judicial resources.
>
> Third: Mailing the docketing statement to the appellant and awaiting its return needlessly delay the receipt of critical information from at least two to six weeks. During this time, the appellate court may be asked to rule on presubmission motions. The docketing information would be useful in such a situation.

We believe that the enclosed alternative draft of Rule 57 is preferable to the current draft for the following reasons:

1. It would require the appellant to file the docketing statement at the time the appellant files the notice of appeal.

2. It provides that copies of the docketing statement would be filed with *both* the trial court clerk *and* the appellate court clerk.

3. It would allow the court of appeals to request additional information from the appellant, should the court so desire.

4. It would require the appellant to provide the name of the judge who signed the judgment or other appealable order (Rule (a)(4) for civil appeals) or the name of the judge who imposed or suspended the sentence in open court (Rule (b)(4) for criminal appeals). This information is important because the judge who tried the case is not necessarily the judge who signed the order or judgment or who imposed sentence.

Thank you for soliciting input on the proposed amendments. We feel that our proposal will make our jobs easier to accomplish.

Respectfully,

Margie Thompson
Clerk, First Court of Appeals

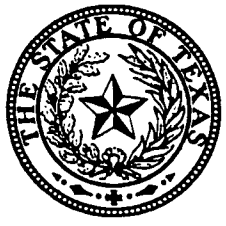
Beverly Kaufmann
Harris County Clerk

Mary Jane Smart
Clerk, Fourteenth Court of Appeals

Charles Bacarisse
Harris County District Clerk

Enclosure: Rule 57

cc: The Honorable Nathan Hecht, Justice
Honorable Clarence A. Guittard



Honorable Clarence A. Guittard
Guittard & Hyden, P.C.
4849 Greenville Avenue, Suite 680
Dallas, Texas 75206

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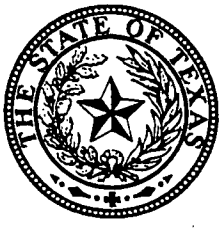
Harris County District Clerk

Enclosure: Rule 57

cc: The Honorable Nathan Hecht, Justice
Mr. Luther Soules, Esq.



The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

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Margie Thompson
Clerk, First Court of Appeals

Beverly Kaufmann
Harris County Clerk

Mary Jane Smart
Clerk, Fourteenth Court of Appeals

Charles Bacarisse
Harris County District Clerk

Enclosure: Rule 57

cc: Mr. Luther Soules, Esq
Honorable Clarence A. Guittard

HOUSTON TRIAL AND APPELLATE

COURT CLERK'S PROPOSAL

TRAP 57. DOCKETING ~~THE APPEAL~~ STATEMENT

~~(a) Docket Numbers. Each case filed in a court of appeals shall be assigned a docket number that consists of four parts separated by hyphens: (1) the number of the supreme judicial district, (2) the last two digits of the year in which the case is filed, (3) the number which is assigned to the case, and (4) the designation "CV" for civil cases or "CR" for criminal cases. Each case filed in the court of appeals shall be docketed in the order of filing. A motion relating to an appeal perfected but not yet filed shall be docketed likewise and shall be assigned a number, which shall be also assigned to the appeal when filed.~~

(a) In civil cases, the appellant shall file at the time the appellant perfects the appeal a docketing statement with both the trial and appellate clerks, which shall include the following information:

(1) If the appellant filing the statement is represented by an attorney, the name of the appellant filing the statement and the name, address, telephone number, telecopier number, and State Bar of Texas identification number of the appellant's attorney in charge and of one other attorney to receive copies of papers, if so designated by the attorney in charge;

(2) If the appellant filing the statement is not represented by an attorney, the name, address, and telephone number of the appellant;

(3) The date the notice of appeal was filed in the trial court, and if by mail, the date of mailing;

(4) The name and county of the trial court, the name of the judge who tried the case (and if different, the name of the judge who signed the judgment or other appealable order), and the date the judge signed the judgment or other appealable order;

(5) The date of filing of any motion for new trial, motion to modify the judgment, request for findings of fact, motion to reinstate, or any other filing that could affect the time for perfecting the appeal;

(6) The names of all other parties to the trial court's judgment, and the names, addresses, telephone number, and telecopier number of their attorneys in charge in the trial court;

(7) The name, address, and telephone number of any other party to the trial court's judgment, not represented by an attorney, and if the address and telephone number is not known, a statement that the appellant has made a diligent inquiry, but has not been able to discover the address and telephone number;

(8) The general nature of the suit (personal injury, breach of contract, temporary injunction, etc.);

(9) Whether the appeal should be advanced for submission or is accelerated pursuant to Rule 42 or other rules or statutes;

(10) Whether a statement of facts has been or will be requested, and if the trial was electronically recorded, that it was so recorded;

(11) The name of the court reporter or recorder;

(12) Whether appellant intends to seek temporary or ancillary relief pending the appeal;

(13) The date of filing of any affidavit of inability to pay the costs of appeal, the date of notice of the affidavit, the date of filing of the contest, and the date of any order overruling the contest;

(14) Whether a supersedeas bond has or will be filed.

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

(b) In criminal cases, the appellant shall file at the time the appellant perfects the appeal a docketing statement with both the trial and appellate clerks, which shall include the following information:

(1) If the party appealing is represented by an attorney, the name of the appealing party and the name, address, telephone number, telecopier number, and State Bar of Texas identification number of the appealing party's attorney and whether the attorney is appointed or retained;

(2) If the party appealing is not represented by an attorney, the name, address, and telephone number of the party;

(3) The date the notice of appeal was filed in the trial court, and if by mail, the date of mailing;

(4) The name and county of the trial court, the name of the judge who tried the case (and if different, the name of the judge who imposed or suspended the sentence in open court and signed the judgment or other appealable order), and the date the judge signed the judgment or other appealable order;

(5) The date that sentence was imposed or suspended in open court, or the date that the judge signed the judgment or other appealable order;

(6) The date of filing of any motion for new trial, motion in arrest of judgment, or any other filing that could affect the time for perfecting the appeal;

(7) The offense charged, the date of the offense, the plea entered by the defendant, whether the trial was jury or nonjury, the punishment assessed, and whether the appeal is from a pretrial order;

(8) Whether the appeal involves the validity of any statute, ordinance, or rule;

(9) Whether a statement of facts has been or will be requested, and if the trial was electrically recorded, that it was so recorded;

(10) The name of the court reporter or recorder;

(11) The date of filing of any affidavit of inability to pay the costs of appeal, the date of notice of the affidavit, and the date of any order overruling the contest;

(12) Any other information required by the appellate court.

(c) The court of appeals may require the appellant to provide additional information by sending the appellant a request for that information. Within ten days after receiving the request, the appellant shall file the information with the clerk of the appellate court.

(d) Any party may file a statement supplementing or correcting the docketing statement.

(e) The docketing statement is for administrative purposes and does not affect the jurisdiction of the appellate court.

Notes and Comments

Comment to 1995 change: Paragraph (a) of this rule has been included in Rule 56(a), paragraph (b) is deleted and the entire rule was rewritten.

10/31/96
4513.001
cc: LHS
orig: hhd

LAW OFFICES OF
Sharpe & Tillman
A PROFESSIONAL CORPORATION

J. Shelby Sharpe
Stan Tillman

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500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102
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HHP, Scott Hemphill, Judge Hecht

October 29, 1996

TRAP 84
TRAP 182(b)

Mr. Lee Parsley
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Re: Revisions to Rules 84 and 182(b)

Dear Lee:

Enclosed you will find revisions to Rules 84 and 182(b) which have been circulated among the members of the Subcommittee on Frivolous Appeals. Any suggestions made by subcommittee members have been incorporated into the proposed revisions.

Very truly yours,

J. Shelby Sharpe

JSS:jm

cc: O.C. Hamilton, Jr.
Luther H. Soules, III

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF APPELLATE PROCEDURE

I. Exact Wording of Existing Rule:
RULE 84. DAMAGES FOR DELAY IN CIVIL CASES

In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount not to exceed ten percent of the amount of damages awarded to such appellee as damages against such appellant. If there is no amount awarded to the prevailing appellee as money damages, then the court may award, as part of its judgment, each prevailing appellee an amount no to exceed ten times the total taxable costs as damages against such appellant.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for appellate review.

II. New Rule:
RULE 84. FRIVOLOUS APPEAL; REMEDIES

(a) **Certification to Court.** The signing of a brief on behalf of an appellant or petitioner required by the Texas Rules of Appellate Procedure constitutes a certificate by the signatory that to the signatory's best knowledge after reviewing the record of the case and the applicable law that:

(1) each point of error is warranted by existing law or by a logical argument for the extension, modification, or reversal of existing law or the establishment of new law; and
(2) the signatory has filed or made a good faith effort to file the necessary record for the court to decide each point of error asserted.

(b) **Violation.** This rule is violated if the certification is untrue. The signatory who violates this rule may be required to pay damages and/or be subject to sanction.

(c) **Procedure.** Any appellee or respondent who believes subdivision (a) has been violated shall file a motion specifying each alleged violation and serve a copy on the signatory of the brief or petition believed to be in violation of the rule. The court on its own initiative may invoke this rule by giving written notice to the signatory of the brief or petition believed to violate subdivision (a) which shall specify each alleged violation of the rule. The signatory shall have fifteen days from receipt of the motion or notice to file a written

response. The court shall thereafter rule on the motion or notice after reviewing the brief or petition, the record, and any response of the signatory.

(d) **Order.** The court shall sign an appropriate order. If the court finds that this rule has been violated, the court's order shall specify the particular violation(s) found, findings to support the violation(s), state the amount of damages, if any, as may be appropriate to each injured party and/or assess any sanctions deemed appropriate. Any order of sanction shall specify to whom any sanction is to be paid.

(e) **Remedies.** When damages are awarded the court should consider reasonable and necessary attorneys fees and reasonable and necessary costs in addition to such other economic damage found by the court to have resulted from the violation. In making a determination for sanctions, the court shall take into account the severity of the violation, whether bad faith was involved, and whether or not the offending party has a history of previously violating the rule.

III. Brief Statement of Reasons for New Rule:

Existing Rule 84, T.R.A.P., has several major deficiencies. Its title does not accurately describe the objective of the rule. The rule also fails to clearly define for the courts and counsel conduct which constitutes a frivolous appeal. It is very inadequate in providing for damages to fit the consequences of a frivolous appeal. And, finally, due process protections are totally absent.

The proposed new rule has a more descriptive title. Subdivisions (a) and (b) clearly set out what is required of those who would seek appellate court review. Subdivisions (c) and (d) provide due process protections for a signatory who becomes a subject of enforcement of the rule. Subdivision (d) also provides the court with the opportunity to have a sanction payable either to a party or the registry of the court because of economic harm to the judicial system or both. The order may be reviewable by the supreme court. Subdivision (e) is strictly for guidance in justly addressing a violation of the rule.

Respectfully submitted,

J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
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Dated: October 22, 1996

12/16/96

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December 12, 1996

HHP
Unread.

TRAP
84
121
182

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rule 121(a)(2)(B) and Appellate Rules 84 and 182(b)

Dear Justice Phillips:

The Court Rules Committee has approved suggested changes to Rules 121(a)(2)(B), Texas Rules of Civil Procedure and Appellate Rules 84 and 182(B), copies of which I am enclosing herewith for the Supreme Court's consideration.

Sincerely,

By: O C Hamilton

O. C. Hamilton, Jr.

OCH/sam

Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
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STATE BAR OF TEXAS

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(1) each point of error is warranted by existing law or by a logical argument for the extension, modification, or reversal of existing law or the establishment of new law; and
(2) the signatory has filed or made a good faith effort to file the necessary record for the court to decide each point of error asserted.

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response. The court shall thereafter rule on the motion or notice after reviewing the brief or petition, the record, and any response of the signatory.

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Existing Rule 84, T.R.A.P., has several major deficiencies. Its title does not accurately describe the objective of the rule. The rule also fails to clearly define for the courts and counsel conduct which constitutes a frivolous appeal. It is very inadequate in providing for damages to fit the consequences of a frivolous appeal. And, finally, due process protections are totally absent.

The proposed new rule has a more descriptive title. Subdivisions (a) and (b) clearly set out what is required of those who would seek appellate court review. Subdivisions (c) and (d) provide due process protections for a signatory who becomes a subject of enforcement of the rule. Subdivision (d) also provides the court with the opportunity to have a sanction payable either to a party or the registry of the court because of economic harm to the judicial system or both. The order may be reviewable by the supreme court. Subdivision (e) is strictly for guidance in justly addressing a violation of the rule.

Respectfully submitted,

J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

Dated: October 22, 1996

payment of taxes.[5] *R Communications, Inc. v. Sharp*, 875 S.W.2d at 318.

Less drastic alternatives also were available to Harris County in this case. First, the State could have achieved its goal by requiring prepayment without forfeiture. Appellees paid their taxes promptly once an agreement was reached. Both parties apparently recognized that the assessments were too high, they entered into negotiations, and once they reached an agreement, appellees promptly paid. The forfeiture provision seemed to have no impact on the decision to pay and thus served no purpose. In addition, the statute already contains less drastic alternatives. As appellees point out, stiff penalties and interest are imposed on taxpayers who do not pay their taxes by the delinquency date. *See* TEX.TAX CODE ANN. § 33.01. A taxpayer thus has great incentive to make a timely payment, as borne out by appellees' own prompt payment after the settlement agreement.

In sum, *Texas Association of Business*, *Flag-Redfern*, and *R Communications* reflect a persistence on the part of the Supreme Court to void provisions that condition judicial relief on prepayment of sums the taxpayer claims not to owe. For appellees to have complied with 42.08 and obtain a final hearing in court, they would had to have paid taxes they claimed not to owe. Thus, the forfeiture element of the statute is unconstitutional as applied to them.

Harris County alleges that 42.08 is different from the provisions in the cases discussed above because sometimes taxpayers can meet the requirements of 42.08(b)(1) and obtain judicial relief without having to pay amounts that are in dispute. *See* TEX.TAX CODE ANN. 42.08(b)(1) (requiring the taxpayer to pay either the amount of tax assessed the prior year or the amount of tax not in dispute for the current year, whichever is greater, and providing for judicial review if the taxpayer substantially complies with § 42.08(b)). However, this case does not present that situation—appellees had to pay disputed amounts—and we decline to opine whether conditioning judicial review on payment of only undisputed amounts is constitutional.[6]

In conclusion, we hold only that the forfeiture element of section 42.08(b) is unconstitutional *as applied to appellees* because it required them to pay disputed amounts before being able to obtain judicial relief.

Harris County's point of error number one is overruled and we affirm the judgment of the trial court.

5. Declaratory relief was not available to appellees, whose suit contesting the amount of taxes they allegedly owed did not fall within the subject matter of declaratory judgments. *See* TEX. CIV PRAC. & REM.CODE ANN. § 37.004.

6. One court of appeals has held the forfeiture provision unconstitutional on its face. *W.V. Grant Evangelistic Association, Inc. v. Dallas Central Appraisal District*, 900 S.W.2d 789, 792 (Tex.App.—Dallas 1995), writ granted.

KEY NUMBER SYSTEM

Luis CAMPOS, Appellant,

v.

INVESTMENT MANAGEMENT PROPERTIES, INC., Appellee.

TRAP 84

KMB 3819.1
MJS
HHD(SUMMARY
4543.1

No. 04-95-00238-CV.

Court of Appeals of Texas, San Antonio.

Jan. 31, 1996.

Rehearing Overruled Feb. 23, 1996.

Tenant filed suit for conversion and negligence against landlord based on landlord's actions in executing writ of possession. The 150th District Court, Bexar County, David Peeples, J., granted landlord's motion for summary judgment. Tenant appealed. The Court of Appeals, Stone, J., held that: (1) landlord was legally authorized to remove property from premises under writ, and thus did not convert tenant's property; (2) land-

lord's removal of property did not breach any duty owed to tenant; and (3) sanctions against tenant were warranted because his appeal was for delay tactics only and was without merit.

Affirmed, and sanctions imposed.

Green, J., filed concurring opinion.

1. **Judgment ⇐185(1)**

Pleadings, even if sworn to, are not proof for summary judgment purposes.

2. **Appeal and Error ⇐934(1)**

In deciding whether disputed material fact issue precludes summary judgment, reviewing court will take as true all evidence favoring nonmovant, every reasonable inference from evidence will be indulged in favor of nonmovant, and any doubts will be resolved in its favor.

3. **Appeal and Error ⇐852**

If trial court did not enumerate grounds upon which summary judgment is based, then judgment will be affirmed if any of theories advanced in movant's motion are meritorious.

4. **Trover and Conversion ⇐4**

"Conversion" is wrongful exercise of dominion and control by person over property of another.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Trover and Conversion ⇐4**

Conversion is complete when person unlawfully and wrongfully exercises dominion and control over property of another to exclusion of possessory rights of owner or of another person entitled to possession.

6. **Landlord and Tenant ⇐161(1)**

Landlord did not convert tenant's property by removing tenant's property from premises and placing them on lawn in front of building because landlord was legally authorized to remove property pursuant to writ of possession. V.T.C.A., Property Code § 24.0061.

7. **Appeal and Error ⇐170(1)**

Tenant's claim that landlord converted his cars by wrongful taking of vehicles from adjacent lot owned by landlord, while executing writ of possession, was improperly raised for first time on appeal and was not properly before Court of Appeals. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

8. **Negligence ⇐1**

Negligence consists of legal duty owed by one person to another, breach of that duty, and damages proximately resulting from that breach.

9. **Landlord and Tenant ⇐161(1)**

Landlord's removal of tenant's property and placement of that property on front lawn of building, conducted pursuant to writ of possession, did not breach any duty owed to defendant under property code where there was no precipitation at time property was removed from premises. V.T.C.A., Property Code § 24.0061.

10. **Landlord and Tenant ⇐161(2)**

Landlord which removed tenant's property and placed property on front lawn pursuant to valid writ of possession had no duty to care for property once it was removed from premises.

11. **Costs ⇐260(4)**

Award of damages against appellant for bringing frivolous appeal will be imposed only if record clearly shows appellant has no reasonable expectation of reversal, and appellant has not pursued appeal in good faith. Rules App.Proc., Rule 84.

12. **Costs ⇐260(4)**

To justify sanctions for bringing frivolous appeal, Court of Appeals must determine that appeal was taken for delay only and without sufficient cause. Rules App. Proc., Rule 84.

13. **Costs ⇐260(4)**

In determining whether sanctions should be imposed for bringing frivolous appeal, Court of Appeals must review case from appellant's point of view at time appeal was taken, and decide whether he had any rea-

sonable grounds to believe case would be reversed. Rules App.Proc., Rule 84.

14. Costs ⇐260(5)

Tenant's appeal from summary judgment entered in favor of landlord on plaintiff's suit for conversion and negligence was for delay tactics only and was without merit, and thus sanctions for bringing frivolous appeal were warranted. Rules App.Proc., Rule 84.

Appeal from 150th District Court, Bexar County; David Peeples, Judge.

John D. Wennermark, Wennermark & Moseley, P.L.L.C., San Antonio, for appellant.

Gay Gueringer, Richie & Gueringer, P.C., San Antonio, for appellee.

LÓPEZ, STONE and GREEN, JJ.

OPINION

STONE, Justice.

This is an appeal from a suit for conversion and negligence. The appellant, Luis Campos, complains on appeal that the trial court erred in granting appellee's motion for summary judgment because 1) there is a fact issue as to the conversion cause of action; 2) he has established all the essential elements in his negligence cause of action; and 3) his claims are not precluded by res judicata, claim preclusion and/or merger. We disagree with appellant's first two points of error and do not reach the third point. Accordingly, we affirm the trial court's judgment. We further find the appeal was taken solely for delay and with no reasonable expectation of reversal; therefore, we impose sanctions pursuant to TEX.R.APP.P. 84.

On December 29, 1992 a judgment was entered in favor of appellee, Investment Management Properties, Inc., for possession of the premises known as 339 Bangor Street, San Antonio, Bexar County, Texas. On appeal, this court affirmed the lower court's decision. Appellee obtained a Writ of Possession which was carried out on May 3, 1993 by two deputy sheriffs who took possession of and delivered the premises to appellee. Under the sheriffs' supervision, appellee removed appellant's property from the premises and placed it on the front lawn. Appellee's summary judgment affidavits claim it was not raining, sleeting, or snowing at the time the property was removed.

[1] Appellant filed suit for conversion and negligence based on appellee's actions in executing the writ of possession. Appellee filed a motion for summary judgment. Appellant did not file his response until the *sixth* day prior to the date of hearing rather than the seventh day as required by TEX.R.CIV.P. 166a. Appellant did not obtain leave from the court to file his late response. The trial judge made a handwritten notation at the bottom of the summary judgment which showed the late-filed response was not considered. Thus, the only summary judgment evidence before this Court is the summary judgment proof attached to appellee's motion for summary judgment. It is clear that pleadings, even if sworn to, are not proof for summary judgment purposes. *Hidalgo v. Surety Sav. and Loan Ass'n*, 462 S.W.2d 540, 546 (Tex.1971).

STANDARD OF REVIEW

[2, 3] The party moving for summary judgment has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972). In deciding whether a disputed material fact issue precludes summary judgment, the reviewing court will take as true all evidence favoring the non-movant. *Nixon*, 690 S.W.2d at 548–49; *Montgomery v. Kennedy*, 669 S.W.2d 309, 311 (Tex.1984). Every reasonable inference from the evidence will be indulged in favor of the non-movant, and any doubts will be resolved in its favor. *Nixon*, 690 S.W.2d at 549; *Montgomery*, 669 S.W.2d at 311. If the trial court does not enumerate the grounds upon which summary judgment is based, then the judgment will be affirmed if any of the theories advanced in the movant's motion are meritorious. *See*

Rogers v. Ricane Enter., Inc., 772 S.W.2d 76, 79 (Tex.1989).

CONVERSION

In his first point of error, appellant says that a fact issue was created because 1) his belongings were removed from the property and left out in the rain to ruin, and 2) his cars were towed from an adjacent property. Appellant claims his personal property was damaged by being left in the rain. Appellee's summary judgment affidavits state that it was not raining when the articles were removed.

[4, 5] Conversion is the wrongful exercise of dominion and control by a person over the property of another. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 446 (Tex.1971); *Killian v. Trans Union Leasing Corp.*, 657 S.W.2d 189, 192 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.). Conversion is complete when a person unlawfully and wrongfully exercises dominion and control over the property of another to the exclusion of the possessory rights of the owner or of another person entitled to possession. *See Killian* at 192; *McVea v. Verkins*, 587 S.W.2d 526, 530–31 (Tex.Civ.App.—Corpus Christi 1979, no writ).

[6] Appellee did not "convert" the appellant's property because to constitute conversion, there must be a *wrongful* assumption of dominion and control over the property. In this case, appellee was legally authorized to remove the property from the premises. The summary judgment proof shows that the writ of possession was carried out in compliance with TEX.PROP.CODE ANN. § 24.0061 (Vernon Supp.1995). Since there was no wrongful assumption, appellant's property was not converted.

[7] The writ issued in this case authorized "possession of [property located at: 339 Bangor, San Antonio, Bexar County, Texas], which means the rental unit and any outside area of facility that the tenant is entitled to use under the lease or that is held out for the use of tenants generally." Appellant argues that vehicles were towed from an adjacent lot not owned by appellee, thus implying a "wrongful" taking of the cars. In his original petition, appellant did not allege that the cars were on an adjacent lot, and his late-filed response to appellee's motion for summary judgment was not considered by the trial court. Nor did appellant allege the vehicles were on property that appellant had no right to use. "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R.CIV.P. 166a(c). This fact issue was improperly raised for the first time on appeal. The only evidence properly before this Court is the summary judgment proof attached to appellee's motion for summary judgment. Appellant's point of error number one is overruled.

NEGLIGENCE

[8] Appellant complains in his second point of error that the trial court erred in granting appellee's Motion for Summary Judgment because appellant established all the elements of negligence. Negligence consists of three essential elements: (1) a legal duty owed by one person to another; (2) breach of that duty; and (3) damages proximately resulting from that breach. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). Appellant claims appellee's duty was established in two ways.

[9] Appellant says the first duty is established by TEX.PROP.CODE ANN. § 24.0061(c)(3) (Vernon Supp.1995), which reads as follows:

> (c) The writ of possession shall order the officer executing the writ to deliver possession of the premises to the landlord and to:
>
> (3) place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location, but not blocking a public sidewalk, passageway, or street and *not while it is raining, sleeting, or snowing.*

Id. (emphasis supplied). Appellant misstated the Property Code when he recited in his brief that the Code "specifically prohibits a party from *leaving* items in the rain, etc., *or when a party knows it will rain.*" (emphasis supplied). Appellant argues that because ap-

pellee left his property on the lawn and it was subsequently destroyed by rain, appellee violated TEX.PROP.CODE ANN. § 24.0061. This is not a correct interpretation of the statute. The statute says that the property may not be *removed* while it is raining. The statute does not impose a duty on the landlord or its agent to stand guard over the property until it is retrieved by the owner. Likewise, we reject appellant's arguments that the "spirit" of the statute required appellee to protect the property after proper execution of a writ in compliance with section 24.0061. Appellant cites no authority to support this interpretation, nor has the Court found any authority.

Once again, the affidavits of the appellee's agents stating there was no precipitation at the time the items were removed is the only summary judgment evidence before this court. This conduct complies with the Property Code, thus, appellee did not breach any duty owed to appellant under the Code.

Appellant further asserts that when one removes items from a house there is a duty to ensure the items are not damaged. This duty is not created by the Property Code, however, and the authority cited by appellant to support this contention is not on point. Appellant claims "it is well settled" that the landlord has a duty to safely care for removed property when a Writ of Possession is issued. The authority cited by appellant is distinguishable from the instant case. *See Johnson v. Lane*, 524 S.W.2d 361, 364 (Tex. App.—Dallas 1975, no writ) (landlord took possession of tenant's property as a lien for unpaid rent); *Panhandle & Santa Fe R.R. Co. v. Hogan*, 388 S.W.2d 320 (Tex.App.—Amarillo 1965, writ ref'd n.r.e.) (tenant abandoned premises); *Alsbury v. Linville*, 214 S.W. 492 (Tex.Civ.App.—El Paso 1919, writ dismissed woj) (action against a railroad for conversion of rock, sand, and gravel stored on a premises adjoining a railroad right of way). These cases are of little relevance to the case at hand.

[10] Further, appellant argues appellee's act of purchasing a tarpaulin and ropes to cover appellant's property created a duty to act with reasonable care. He cites cases which rule that a person who voluntarily undertakes an affirmative course of action affecting the interests of another must act with reasonable care. He also cites case law that says a person may not leave a party in worse position then before starting the services. Appellant concludes he was left in a worse position with the articles on the lawn covered by a tarp than he would have been had the articles never been removed from the premises and placed on the lawn. Again, appellant's reasoning is skewed. Undoubtedly appellant would have been in a better position if the property had remained inside the premises. However, appellant's property was removed to the lawn under a valid Writ of Possession. The removal of the property—with or without use of ropes and a tarp—was proper. Appellant's argument lacks merit and in no way establishes a duty for appellee to care for the items once they were removed from the property.

Appellant did not establish any duty which appellee owed to appellant. Without a duty there can be no cause of action for negligence. Appellee has successfully defeated at least one element of appellant's cause of action for negligence in its motion for summary judgment. Appellant's second point of error is overruled.

RES JUDICATA

In his third point of error, appellant argues that the trial court erred in granting appellee's Motion for Summary Judgment because appellant is not relitigating issues and thus is not precluded by res judicata, claim preclusion and/or merger. We need not address this point because appellant's only other two points of error are overruled on the merits.

SANCTIONS FOR FILING A FRIVOLOUS APPEAL

In a cross point, appellee asks this court to sanction appellant pursuant to TEX.R.APP.P. 84, arguing that appellant has filed a frivolous appeal. Appellee contends this appeal is completely without merit, and that appellant's arguments are not supported by case law. Further, appellee contends that when appellant does cite case law it does not support his arguments for reversal but merely

goes to elements of the causes of action alleged and standards of law not applicable to the appeal. Appellee also contends that appellant affirmatively misstated the requirements of TEX.PROP.CODE ANN. § 24.0061 (Vernon Supp.1995). We agree with appellee's contentions.

[11-13] This Court may assess damages against appellant for bringing a frivolous appeal. TEX.R.APP.P. 84. An award of damages under Rule 84 will be imposed only if the record clearly shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith. *Finch v. Finch*, 825 S.W.2d 218, 226 (Tex.App.—Houston [1st Dist.] 1992, no writ). To justify sanctions, we must determine that the appeal was taken for delay only and without sufficient cause. *Jones v. Colley*, 820 S.W.2d 863, 867 (Tex.App.—Texarkana 1991, writ denied); *Eustice v. Grandy's*, 827 S.W.2d 12, 15 (Tex.App.—Dallas 1992, no writ). In making these findings, this Court must review the case from appellant's point of view at the time the appeal was taken, and decide whether he had any reasonable grounds to believe the case would be reversed. *Hicks v. Western Funding*, 809 S.W.2d 787, 788 (Tex.App.—Houston [1st Dist.] 1991, writ denied); *Carlyle Real Estate Ltd. Partnership-X v. Leibman*, 782 S.W.2d 230, 234 (Tex.App.—Houston [1st Dist.] 1989, no writ).

Appellant contends sanctions should not be imposed against him because he reasonably expected the judgment would be reversed "[p]rimarily because Appellant's cause of action for conversion of the vehicles, which was never mentioned in Appellee's Brief, is conclusively established." As discussed above, the issue of the vehicles was raised for the first time on appeal, and is not properly before this Court. We further note that appellant's petition gave no indication that appellant claimed the vehicles were located anywhere other than the premises at 339 Bangor. Even in his appellate brief, appellant does not clearly describe such a complaint. The only reference to the vehicles in the brief is appellant's statement that "automobiles owned by [appellant] and not on the premises were towed away." Under such a record, appellee had no duty to address this issue either in its summary judgment motion or in its appellate brief.

[14] We have reviewed the record and relevant law, and have determined that appellant had no reasonable basis to believe that this case would be reversed on appeal. We find that appellant's appeal is for delay tactics only and is without merit. *See Kimmell v. Leoffler*, 791 S.W.2d 648, 654 (Tex. App.—San Antonio 1990, writ denied). Accordingly, we assess the maximum damages authorized, ten (10) times the total taxable costs, against appellant. Such damages are to earn interest at a rate of ten percent (10%) per annum from the date of this Court's judgment until paid in full.

The judgment of the trial court is affirmed. Damages are assessed in favor of the appellee and against appellant at ten (10) times the total taxable costs of the appeal. Such damages are to earn interest at the rate of ten percent (10%) per annum from the date of this Court's judgment until paid in full.

GREEN, Justice, concurring.

I fully join in the majority opinion, but I write separately to highlight what I believe to be a problem posing ever increasing harm to the orderly administration of justice in this court and, most likely, in all other appellate courts in this state—frivolous appeals.

In my brief year on this court I have come to realize that far too many practitioners are failing to give due regard to the burdens they face when seeking to overturn a trial court judgment, whether in civil or criminal cases. The decision to appeal should not be taken lightly; it involves the careful consideration of a number of factors. A bad result below, by itself, is simply not a reason to appeal—not every case is properly appealable.

It seems to me, though, that some civil cases are appealed not because they involve arguable reversible error, but because of "appellate economics." Litigation is enormously expensive and, after a huge investment in the trial of a case, the cost of an appeal may be minor by comparison—so why not appeal? On the criminal side of the docket, while the deprivation of liberty would suggest that ap-

pellants have more leeway on appeal, there are still too many cases that fail to rise to minimum levels of legitimacy.

The decision to appeal should not be driven by comparative economies or wishful thinking; rather, it should be based on professional judgment made after careful review of the record for preserved error and after applying applicable standards of appellate review. It is not a mechanical exercise, but requires the dutiful application of lawyering skills.[1]

The practice of "let's just throw as much mud as we can up on the wall and see if any of it sticks" must be discouraged. Because where there is no legitimate basis for appeal, the result most often occurring is that nothing "sticks"—and the lawyer not only loses his client's appeal, but his credibility and reputation with the court suffer.

The legal profession has been roundly criticized by the non-lawyer public over the years for failing to take action against lawyers who make frivolous filings.[2] And there is universal complaint that the justice system moves too slowly. The State Bar certainly has a role in policing its ranks of unethical lawyers. But I believe the courts also have a responsibility, both to the profession and the taxpaying public, to challenge any action that impedes the efficient and orderly flow of legitimate court business. And that includes taking steps to reduce the number of frivolous appeals.

Judicial resources around the state are already severely strained. About fifteen years ago, before criminal appellate jurisdiction was added to the courts of civil appeals, each of the three justices on this court disposed of an average of 35 cases per year.[3] The court was expanded to seven justices in 1981 when criminal jurisdiction was added but, even so, today we will dispose of an average of well over 100 cases per year per justice. And annual filings in this court continue to increase. The Fourth Court of Appeals this year is responsible for roughly thirty-five percent more cases than just five years ago.

There are, obviously, very serious negative side effects to all of this, not the least of which is that we are afforded much less time to devote to each case. Appellate litigants are entitled to deliberate and studied consideration of their appeals by the elected members of this court. Frivolous appeals divert scarce resources away from those more deserving cases involving legitimate appellate issues. As our caseload continues to mount, it is a problem we can no longer afford to ignore. While at present we are limited in our authority to deal with the problem, we must not be hesitant to use the tools that we have.[4]

When they are identified, frivolous appeals should be promptly disposed of and the lawyers and parties who file them should be sanctioned in accordance with the applicable rules and regulations.[5] In time, those who would continue to abuse the judicial system will learn that they do so at their own peril.

1. *See* Paul W. Nye, Chief Justice (Ret.), *The Decision to Appeal, in* APPELLATE PRACTICE INSTITUTE: FOR LAWYERS AND LEGAL ASSISTANTS, at W-3, W-5 (State Bar of Texas Professional Development Series) (1995).

2. Every lawyer in this state is on notice as to what is meant by a frivolous filing. *See* TEX.DISCIPLINARY R.PROF.CONDUCT 3.01 & cmts. (1990), *reprinted in* TEX.GOV'T CODE ANN., tit. 2, subtit G app. A (Vernon Supp.1996) (STATE BAR RULES art. X, § 9).

3. Texas Judicial Council and Office of Court Administration Annual Report (1979).

4. There is no authority in the Texas Rules of Appellate Procedure that corresponds with the trial court's ability to sanction attorneys for frivolous filings. *See* TEX.R.CIV.P. 13. Oddly enough, TEX.R.APP.P. 84 authorizes limited sanctions only against the offending party *and not the attorney* when of course it is the attorney who is in the best position to know whether or not an appeal is meritless. Perhaps this is an area in which the supreme court, through its rule making power, can expand to the appeals courts the same or similar rule authority it has granted to the trial courts to police their dockets.

5. Judges are required by the Code of Judicial Conduct to take "appropriate action" when learning of disciplinary rules violations by lawyers. TEX.CODE JUD.CONDUCT, Canon 3, pt. D(2) (1994), *reprinted in* TEX.GOV'T CODE ANN. tit. 2, subtit. G app. B (Vernon Supp.1996). "Appropriate action" is left undefined.

This case is a particularly egregious example of a frivolous appeal. As stated in the majority opinion, the appeal was brought with no reasonable expectation of reversal, the motivation therefore apparently being for delay or harassment only. But what is worse is that the appellant's attorney, in a futile attempt to enhance his cause, compounded his transgression by flagrantly misrepresenting the law to the court in his brief on appeal.

As indicated in the majority opinion, appellant's lawsuit complains of rain damage to personal property that was removed from his home and left in the front yard pursuant to a writ of possession following a forcible entry and detainer action. Appellant relies on Texas Property Code section 24.0061 in support of his claim that appellee was negligent when exercising control over his property. In his brief, appellant asserts that section 24.0061 "*specifically* prohibits a party from leaving items in the rain, etc., *or when the party knows it will rain.*" (emphasis added) But that is not what the statute says. Section 24.0061 actually states that a landlord may move a tenant's property to a "nearby location, but not ... while it is raining, sleeting, or snowing." TEX.PROP.CODE ANN. § 24.0061(c)(3) (Vernon Supp.1996).

The statute clearly does not place a weather forecasting burden on those who would remove a tenant's property. But, having changed the law more to his liking, appellant proceeded to argue that appellee breached its duty to appellant and that "it was foreseeable for a reasonable, prudent person that in May and in particular that day, if one listened to weather reports, that there was tendency (sic) for rain and precautions should have been made."

The embellishment of the statutory language was a material misrepresentation of law to this court clearly calculated to induce a reversal of this summary judgment appeal. This is conduct beyond the pale of any legitimate advocacy and is a violation of the disciplinary rules.[6] Moreover, I can think of few examples of conduct by a lawyer more offensive to the court, or more damaging to his client's interests.

Even though the lawyer is responsible for advising his client and for writing the brief on appeal, the consequences of filing a frivolous appeal must rest at least in part with the client because, ultimately, the decision to appeal is the client's. But the consequences for the misrepresentation of the facts or the law before this court should fall exclusively upon the lawyer, who is an officer of the court. Under our current appellate rules, we are authorized to sanction only the client in the former instance. In the latter instance, apart from the appellate rules, we retain the inherent power to discipline misconduct before this court when reasonably necessary and to the extent deemed appropriate. *Public Util. Com'n of Texas v. Cofer*, 754 S.W.2d 121, 124 (Tex.1988) ("We recognize that a court has inherent powers it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in preservation of its independence and integrity."); *Kutch v. Del Mar College*, 831 S.W.2d 506, 509 (Tex. App.—Corpus Christi 1992, no writ) (Texas courts have certain inherent powers, "including the power to sanction for bad faith abuse of the judicial process.").

The court refrains in this instance from exercising its inherent disciplinary powers but chooses instead to invoke the maximum sanctions authorized by the appellate rules. I concur.

Jene Elizabeth BROWN, Appellant,

v.

David Allen BROWN, Appellee.

No. 08-95-00044-CV.

pcp 3819.001

Court of Appeals of Texas, El Paso.

Feb. 1, 1996.

3RD00373

After divorce proceeding was instituted, bifurcated trial was held in which child custo-

6. TEX.DISCIPLINARY R.PROF.CONDUCT 3.03(a)(1) (1990).

4543.001
cc: LHS
Mhel
Vanf

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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October 18, 1995

HD
SCAC Agenda
Appellate Section Staff
SBOT

TRAP 120 & 121

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Chief Justice Paul Murphy regarding Rule 121 of the proposed new rules of procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

PHONE 713-655-2800
FACSIMILE 713-650-8550

October 13, 1995

Justice Nathan L. Hecht
The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Nathan,

As you know, in September we had the first Appellate Bench Bar Conference sponsored by the Houston Bar Association and the Appellate Section of the HBA. As might be expected, a good deal of the discussion at the conference focused on the proposed new rules of procedure.

After speeches and panel discussions on the proposed rules, the participants met in small discussion groups. Overall the conference participants applauded the efforts of the supreme court and its advisory committee to simplify appellate practice and eliminate procedural traps. The group, nonetheless, had constructive ideas about some areas of the rules.

I want to focus on an addition to proposed Rule 121--Original Proceedings, an addition endorsed by every discussion group at the conference.

The participants felt that intermediate appellate courts should have the option, which the supreme court now has and would continue to have under the proposed rule, to grant mandamus without oral argument. If the real parties in interest have responded and if the court feels oral argument would not greatly aid the court in making its determination, I do not believe granting relief without oral argument would be inequitable.

Intermediate courts, of course, have the option in civil appeals to issue opinions without oral argument under Rule 75(f). Considering our growing docket (We have filed more than 1200 cases already this year.), we must carefully budget the time available for submission with oral argument.

With her permission, I enclose a copy of a letter from Kathleen Beirne detailing other areas of concern in proposed Rule 120. I appreciate your consideration of these suggestions about oral argument.

It was good to see you at the conference and I look forward to seeing you again soon.

Sincerely,

3RD00375

Paul C. Murphy

cc: all Chief Justices
R.L.H.

KATHLEEN WALSH BEIRNE
ATTORNEY AT LAW
BOARD CERTIFIED - CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

10878 WESTHEIMER, NO. 396
HOUSTON, TEXAS 77042

TELEPHONE: (713) 952-5510
TELECOPIER: (713) 785-9726

September 30, 1995

PERSONAL & CONFIDENTIAL

The Honorable Paul C. Murphy,
Chief Justice
Fourteenth Court of Appeals
1307 San Jacinto Street
Houston, Texas 77002

Re: ***Oral argument and related provisions for original proceedings under the Proposed Amendments to the Texas Rules of Appellate Procedure; follow up on HBA Bench Bar Conference***

Dear Justice Murphy:

As a speaker-participant at the HBA's First Appellate Bench Bar conference, I sincerely appreciated your attending the conference, despite your birthday, and your enthusiastic participation in the breakout sessions and as a speaker. I overheard many favorable comments about your suggestions for practice before the Fourteenth Court and wanted to be sure to pass these on to you. This letter follows up on our discussion of perceived problems in the proposed amendments to the Texas Rules of Appellate Procedure for original proceedings, which Professor Elaine Carlson and I discussed at the conference.

I note at the outset that I am writing only in my individual capacity, and not on behalf of Professor Carlson or the HBA Appellate Section.

Mandatory Oral Argument Issue

As we discussed on the telephone earlier this week, I have not forgotten our mutual concerns that the proposed rule amendments do not remove the requirement that the a court of appeals set and conduct oral argument in all original proceedings that the court considers meritorious. I thank you, Karen Vowell, and Debra Selden, for taking the time to explain the subtleties of this issue. I completely agree that mandatory oral argument is not the best use of the court's or the parties' time. I am unfortunately not a member of any

of the committees that assist the supreme court with the rules, but sincerely support efforts to direct the court's attention to the concerns raised by the provision.

The provision at issue is a subsection of proposed TRAP 120 (c), **Action on Petition**, which is derived from existing TRAP 120 (d). Subsection (2) of proposed TRAP 120 (c) is titled **Other Original Proceedings**, and is derived from existing TRAP 121 (c). Proposed TRAP 120 (c) (2)[1] states in part:

> If the court is of the tentative opinion that relator is entitled to the relief sought, or that a serious question concerning such relief requires further consideration, ***the court will schedule oral argument on the petition. Otherwise, the petition will be denied.*** Before setting oral argument . . . [provisions relating to the new informal conferences follow]. (emphasis added)

Proposed TRAP 120 (c) (2) is followed by a third subsection, (3), **In the Supreme Court**, which is derived from existing TRAP 122. This subsection removes the requirement of oral argument in the supreme court, by the following language:

> (3) **In the Supreme Court.** In cases over which the Supreme Court has original jurisdiction to issue writs of mandamus, prohibition, or injunction, and in which the ***order of a lower court complained of is in conflict with an opinion of the Supreme Court or is contrary to the Constitution, a statute, or a rule of civil or appellate procedure,*** the Supreme Court may, after respondents has [*sic*] had an opportunity to file an answer as provided by paragraph (f), ***grant*** leave to file [*sic*] ***the relief sought without hearing argument.***[2] (emphasis added)

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[1] The pertinent subsection, proposed rule, TRAP 120 (c) (2), appears on page 150 of the March 21, 1995 Report of the Supreme Court Advisory Committee. (This is the red-lined version of the rules distributed at the bench bar conference.)

[2] This proposed rule appears on page 151 of the March 21, 1995 Report of the Supreme Court Advisory Committee. Note: The words "leave to file," which I did not

As I understand your concerns, you would appreciate a provision that would also authorize a court of appeals to grant relief without hearing oral argument, presumably under circumstances similar to the bolded language in the preceding paragraph.

As we discussed earlier in the week, I took the liberty of bringing up the issue of mandatory oral argument with Professor Elaine Carlson, who has kindly permitted to pass on her thoughts and recommendations about bringing this issue to the attention of the Supreme Court Advisory Committee. As you know, Professor Carlson teaches Texas procedure, in addition to other subjects at South Texas College of Law. She has been a member of the Supreme Court Advisory Committee for several years. I had the distinct pleasure of getting to know this delightful, intelligent woman better, as we worked on our presentation at the bench bar conference.

I spoke with Professor Carlson, on a preliminary basis, to try to determine whether the committee deliberately included mandatory oral argument for the court of appeals, debate, or simply carried the provision forward into the new proposed rule, perhaps by oversight. Professor Carlson could not recall specific debate focused on this provision. While she did not rule out the possibility that the committee deliberately provided for mandatory oral argument in the court of appeals, she tended to believe that the committee may have simply overlooked the apparent conflict in the supreme court and appellate court provisions for oral argument. As you know, the committee was attempting to craft a single rule, proposed TRAP 120, from three existing rules, TRAPS 120, 121, and 122. Moreover, the committee focused extensively on the new provisions for informal conferences.

Professor Carlson spoke up right away, however, to report that at least one other member of the Supreme Court Advisory Committee seems to be aware of, and perhaps troubled by, the mandatory oral argument requirement for the courts of appeals. Luke Soules was a participant in Professor Carlson's Friday morning breakout session at the bench bar conference. She reported that while the group was discussing the pros and cons of the proposed informal conferences, Mr. Soules noted that the court of appeals would still be required to hold oral arguments in "meritorious" cases, even if the court conducted the informal conference.

Professor Carlson agrees that your proposal to free appellate courts of mandatory oral argument makes "procedural sense" and is encouraged that at least one other member

emphasize, were probably included in error.

of the committee, Mr. Soules, appreciates the redundancy of oral argument when the court has already decided to grant relief. She recommends that you direct your comments to Justice Nathan Hecht, in his capacity as chair of the Supreme Court Advisory Committee. Since Luke Soules is a member of the committee and apparently familiar with the issue, Professor Carlson suggests that you write to both Justice Hecht and Luke Soules. Since the rules have been submitted to the court, which has begun to review them, in sequence, your letter should arrive fairly soon.

Professor Carlson stressed that your comments would definitely be addressed. The operating procedures of the committee require that all comments and suggestions be brought forward for discussion. She also agreed to speak up in support your proposal to permit disposition without oral argument when the committee discusses it.

Professor Carlson recommends that you emphasize practical concerns that focus on judicial economy. In addition to your own court's scheduling difficulties and the delay to the parties, Professor Carlson suggested some additional reasons in support of eliminating oral argument held simply as a matter of formality. These include the trend toward eliminating oral hearings as a matter of course on motions in the trial courts, with the encouragement of proof by affidavit. Summary judgments are a good analogy. In summary judgments, as in original proceedings, there is no need for a hearing to resolve fact issues, since relief is improper if the facts are in dispute. Deciding the case based on the petition and answer when the issues are clear should help the courts, the litigants, and the trial judge, since it stops the delay caused by the original proceeding and saves time and additional expense. To the extent the court of appeals might be wrong in determining that a supreme court decision or statute controlled disposition of the proceeding, the parties can always seek rehearing or alternative relief in the supreme court.

In my personal view, the mandatory oral-submission provision, as drafted, can be construed as potentially curtailing a party's rights. As you know, the mandatory oral argument provision of the proposed rule reads as follows:

> If the court is of the tentative opinion that relator is entitled to the relief sought, or that a serious question concerning such relief requires further consideration, the court will schedule oral argument on the petition. Otherwise, the petition will be denied.

This language envisions only two possibilities: 1) the court of appeals is ***tentatively convinced*** it will rule in favor of the relator, or; 2) the court of appeals ***needs clarification*** before ruling in favor of the relator. "*Otherwise,*" *i.e.*, if neither (1) nor (2) apply, "the

petition will be denied." Denial should occur then, in any case that does not fall into category (1) or (2). Under the strict language of the rule, if a court of appeals is ***conclusively*** (rather than "tentatively") ***convinced*** it will rule in favor of the relator, it should ***deny*** the petition! This can hardly be the intent of the rule, but the drafting permits this argument. It is entirely conceivable, however, that this interpretation of the rule will appear soon as the "compelling reason" to support a petition brought first in the supreme court, rather than the court of appeals, by a party who wants to prevent the delay and expense of unnecessary oral argument when the issues are clear.

Courts do not deny petitions in meritorious cases, however, as we both know. Instead, these cases are set for oral arguments that frequently waste the appellate court's and the trial court's time, and strain the parties' resources. This necessarily affects their rights.

A possible revision of proposed TRAP 120 (c), to eliminate this confusion and the mandatory oral argument provision, could be the following:

> (c) **Action on Petition.** If the court concludes, after there has been an opportunity for the respondents[3] to answer as provided by paragraph (f), that the order complained of conflicts with an opinion of the Supreme Court or is contrary to the Constitution, a statute, or a rule of civil or appellate procedure, the court may grant the relief requested without hearing oral argument. If the court is of the tentative opinion that the relator is entitled the relief requested, or that a serious question concerning such relief requires further consideration, the court will schedule oral argument on the petition. Otherwise, the petition will be denied. Before setting oral argument . . . [provisions relating to the new informal conferences follow].

This proposal eliminates the "In the Supreme Court" provision quoted in the middle of page 2 of this letter. This is not a bad idea at all, in my view. The jurisdictional

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[3] This proposed version corrects the grammatical error in the proposed version of the rule: "respondents has [*sic*] had an opportunity . . .." Note that the plural is correct for the noun "respondents," since the trial judge is still considered an additional "respondent" under the proposed amendments, although not named in the style. *See* Proposed TRAP 120 (a) (1) (A) (ii), page 145 of the March 21, 1995 Report of the Supreme Court Advisory Committee.

provisions of the rule are superfluous, since the court cannot act unless it has jurisdiction. I explain other reasons for eliminating paragraph (c) (3) below.

Other Provisions of Proposed TRAP 120

My focus on the oral argument issue resulted in further scrutiny of proposed TRAP 120. Perhaps because it is drawn from so many rule provisions, the resulting proposal is very unclear and you may feel it appropriate to bring the following concerns to the attention of the committee as well.

As I note in footnote 2, on page 2 above, the words "leave to file" should probably be deleted from the final version of the rule, since they pertain to the motion for leave, which the proposed rules eliminate. There is also a grammatical error, since the subject "respondents" does not agree with its verb "has had."[4]

In addition, the three proposed subsections of proposed TRAP 120 (c) are confusing. Subsection (c) (1),[5] which governs habeas corpus, seems to apply to both courts of appeal and the supreme court, by the generic reference to "the court." Subsection (c) (2), which governs "other original proceedings," also refers generically to "the court." But subsection (c) (3), titled "In the Supreme Court,"[6] refers only to the supreme court, but specifically excludes habeas corpus proceedings. As you know, the only purpose of this rule is to permit disposition without oral argument under the instances cited in the rule. If the committee adopts your suggestions, and inserts a "disposition-without-oral-argument" in subsection (c) (2), proposed subsection (c) (3) can be eliminated entirely, as I have done in my suggested revision of subsection (c) (2), which appears on page 5 of this letter. By eliminating a special reference to the supreme court, the generic meaning of "courts" could

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[4] This proposed rule appears on page 151 of the March 21, 1995 Report of the Supreme Court Advisory Committee, and is quoted in the middle of page 2 of this letter. As noted in the preceding footnote, the combination of proposed subsections (2) and (3), which appears at the top of this page, corrects both of this error and the "leave to file" error noted in the previous sentence in the text.

[5] This proposed rule appears on page 150 of the March 21, 1995 Report of the Supreme Court Advisory Committee.

[6] This proposed rule appears on page 151 of the March 21, 1995 Report of the Supreme Court Advisory Committee. The text also appears on page 2 of this letter.

be retained throughout the rule, and thus prevent confusion about whether a specific provision of the rule applies to the courts of appeal or the supreme court.

Proposed TRAP 120 (g) **Order of the Court,**[7] needs clarification also. On its face, it appears to apply only to habeas corpus proceedings and is in fact derived from current TRAP 120 (g), which addresses only habeas. Yet this is the only provision in the proposed rules that describes the type of final order (as opposed to stay orders, etc.) the parties to an original proceeding can expect to be issued.

I also feel that the first sentence of the rule needs to recognize the possibility that oral argument may or may not occur [except in habeas corpus proceedings, in which it appears that oral argument is mandatory, *see* Proposed TRAP 120 (c) (1).][8] In addition, proposed subsection (g) should be amended to clarify that the last sentence applies only to habeas proceedings.

Finally, as clarified in the hypotheticals and questions in Professor Carlson's and my handout on the new rules, the provisions for damages could give rise to several problems – and even more mandamuses (mandami?). See Professor Carlson's and my "Practical Problems" presented at the HBA Appellate Bench Bar Conference last weekend, Hypothetical 1, Questions 5-7 (pages 14-15) and Hypothetical 2, Question 9 (page 15) and Hypotheticals 3, Question 10 (d) (page 16), and the proposed accompanying answers. I enclose an additional copy of these in case you have filed them elsewhere.

I obviously got a little carried away with this, but the form of the proposed rules is still very fresh in my mind after the conference. More importantly, I realize, first hand, how difficult it can be to wrestle with muddy language in the rules, and how long it can take to effect a change. Since the court and the committee seem to realize the vastness of the proposed changes and appear to be actively soliciting comments and input, perhaps something can be done at this point in time. Many of the proposed provisions relating to mandamus, while well intentioned and clearly the result of significant effort and consensus building, may create additional, unforeseen problems. My only goal is to prevent these if at all possible.

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[7] This proposed rule appears on page 154 of the March 21, 1995 Report of the Supreme Court Advisory Committee.

[8] This proposed rule appears on page 150 of the March 21, 1995 Report of the Supreme Court Advisory Committee.

I appreciate your patience with my digressions and thank you for taking the time to review this. Please let me know if I can help you further in this regard.

In particular, if you would like to have this letter on diskette so that portions of it can be inserted into your own letter to the committee, please have your secretary let me know. This version is in WordPerfect® 6.1. If you wish a diskette, I would save my version in reformatted courier font to enhance your system's ability to read my copy.

Congratulations again on the birth of that very special grandson. This little guy can be absolutely certain that his grandpa will never forget his birthday.

Yours sincerely,

Kathleen Walsh Beirne

10-30-95
4543.001
cc LHS
Whd
Vamp

THE SUPREME COURT OF TEXAS

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TRAP 121

October 26, 1995

HHD
SCAC Agenda (various)
✓ SubCo (various)
Staff
Soo1
Fly

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed are copies of letters from Chief Justices Linda Thomas, John Cayce, Bob Thomas, Ronald Walker and Alice Oliver-Parrott regarding the proposed TRAP 121, from four Harris County clerks regarding TRAP 57, and from Katherine L. Butler on behalf of the Houston Bar Association regarding proposed changes to the Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

3RD00384

Court of Appeals
First Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

October 24, 1995

Justice Nathan L. Hecht
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I have received copies of letters by Chief Justices Murphy and Thomas concerning Rule 121. I agree with them 100%

Thank you.

Sincerely,

Alice Oliver-Parrott

AO-P/op

CHIEF JUSTICE
RONALD L. WALKER

Court of Appeals
State of Texas
Ninth District

OFFICE
SUITE 332
COUNTY COURTHOUSE
BEAUMONT, TEXAS 77701
409/835-8405

October 23, 1995

Justice Nathan L. Hecht
The Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: CHANGES TO TRAP 121

Dear Justice Hecht:

I support change of Rule 121 to allow option of granting mandamus relief without oral argument.

Respectfully,

Ronald L. Walker

RLW/je

Court of Appeals
Fifth District of Texas at Dallas

GEORGE L. ALLEN SR. COURTS BUILDING
600 COMMERCE STREET
DALLAS, TEXAS 75202-4658

LINDA THOMAS
CHIEF JUSTICE

TELEPHONE - (214) 653-6535
FACSIMILE - (214) 745-1083

October 18, 1995

Justice Nathan L. Hecht
The Supreme Court of Texas
P O Box 12248
Austin TX 78711

Re: Changes to TRAP 121

Dear Nathan,

Paul Murphy sent me a copy of his recent correspondence concerning proposed changes to Rule 121. I have nothing to add concerning the need for this change. I did, however, want to write to let you know that I wholeheartedly support Paul's request that Rule 121 be changed to allow us the option of granting mandamus relief without oral argument.

Thank you for your consideration.

Sincerely,

Linda

Linda Thomas

LBT/mc

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

YVONNE PALMER, Clerk

Tarrant County Courthouse
100 W. Weatherford Street
Fort Worth, Texas 76196
817/884-1900
817/884-1932 - FAX

October 18, 1995

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht,

For the reasons stated in his letter to you dated October 13, 1995, regarding proposed TRAP 120, I concur with Judge Murphy's suggestion that the proposed rule be revised to permit courts of appeals to grant mandamus without oral argument. Please call me if I can be of any further assistance.

Sincerely,

John Cayce

JC/lh

cc: All Chief Justices, Courts of Appeals

Tenth Court of Appeals

October 25, 1995

Honorable Nathan L. Hecht
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: Changes to Rule 121, TRAP

Dear Justice Hecht:

I have received a copy of Chief Justice Paul Murphy's letter to you of October 13, 1995, regarding the above rule. I support Chief Justice Murphy's request that Rule 121 be changed to allow us the option of granting mandamus relief without oral argument.

Thank you for your consideration in this matter.

Sincerely,

Bob L. Thomas
Chief Justice

3RD00389

Phone (817) 757-5200 Post Office Box 1606 Waco, Texas 76703-1606

12/16/96

MORRIS ATLAS
ROBERT L. SCHWARZ
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STEPHEN L. CRAIN
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VICKI M. SKAGGS
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BROWNSVILLE, TEXAS 78521-2266
(210) 542-1850

December 12, 1996

HHP
Issued.

TRAP
84
121
182

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rule 121(a)(2)(B) and Appellate Rules 84 and 182(b)

Dear Justice Phillips:

The Court Rules Committee has approved suggested changes to Rules 121(a)(2)(B), Texas Rules of Civil Procedure and Appellate Rules 84 and 182(B), copies of which I am enclosing herewith for the Supreme Court's consideration.

Sincerely,

By: O C Hamilton

O. C. Hamilton, Jr.

OCH/sam

Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

cc: Ms. Vicki Wilhelm (w/encl.)
State Bar of Texas Committees
P.O. Box 12487
Austin, Texas 78711

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULES OR CHANGE OF EXISTING RULE

TEXAS RULES OF APPELLATE PROCEDURE

I. Exact wording existing Rule:

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) No change.
(1) No change.
(2) No change.
(A) No change.

(B) If any judge, court, tribunal or other respondent in the discharge of duties of a public character is named as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding. The petition shall state the address of each respondent and real party in interest.

II. Proposed Rule:

(B) If any judge, court, tribunal or other ~~respondent~~ official, in the discharge of duties of a public character, is named as respondent in a proceeding, the petition shall ~~disclose~~ state the name and address of the respondent and the real party in interest, if any, or the party whose interest would be directly affected by the proceeding, provided, however, the style of the proceeding shall not include the name of the respondent, but instead shall include the name of respondent's office or the court in which the judge or justice presides. ~~The petition shall state the address of each respondent and real party in interest.~~

III. Purpose of Proposed Change:

To remove the personal stigma attached to naming the judge or other official in the style of the case.

3RD00392

4543.001
CC (HS)
Dug: RLQ
5/29/96

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✓ Agenda
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J. Hudd

CONFIDENTIAL FAX

COVER SHEET

TRAP
130
132
134

TO: Luther H. Soules, III

FAX NUMBER: 210/224-7073

FROM: Mike Prince

DATE: May 29, 1996

NUMBER OF PAGES (including this sheet):

MEMO: Please see attached.

PLEASE NOTIFY US IMMEDIATELY IF NOT PROPERLY RECEIVED

BY CALLING: 214/855-3320

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ROBERT H. PEES
RICHARD A. ROMAN
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SHARON J. SHUMWAY
MICHAEL A. SWARTZENDRUBER
GREGG L. THOMSEN
J. STUART TONKINSON
WILLIAM REID WITTLIFF

OF COUNSEL
DIANE W. BRICKER
WILLIAM D. UNDERWOOD

May 29, 1996

WRITER'S DIRECT DIAL NUMBER
855-3027

VIA TELECOPY

Mr. Luther H. Soules, III
Soules & Wallace
Frost Bank Tower, 15th Floor
100 West Houston Street
San Antonio, TX 78205-1457

Re: Section Nine of the Proposed Changes to Texas Rules of Appellate Procedure

Dear Luke:

Following the most recent Supreme Court Advisory Committee meeting, I took some of the proposed TRAP changes and circulated them by some of our firm's lawyers who do a lot of appellate work. Marvin Sloman, one of our named partners whom you may know, is one of these. The others were Jeff Levinger, Rebecca Adams and Ken Carroll.

Enclosed is a summary of their respective comments on the proposed section 9 changes. In general, all thought the proposed changes were an improvement over the present practice. The enclosed are problems they spotted. I hope this is of use and, in the interest of time, I am sending the comments to Lee Parsley as well.

Please call if you have any questions.

Very truly yours,

Mike Prince

Mike Prince

MP/tm
Encl.

cc (w/encl.): Lee Parsley (via telecopy)

Rule 130:

As written, it is very unclear what the second sentence of Rule 130(b)(2) means.

In the first line of 130(b)(4) "*i.e.*" should be changed to "*e.g.*"

In addition to the appendix provided in Rule 130(b)(9), the court and counsel would be greatly aided by a discretionary, separate appendix comparable to the optional contents provided in Local Rule 30.1.5 of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit limits optional contents to 40 pages unless the number is enlarged by the court. This permits documents (and even testimony) central to understanding of the case to be before the reader of the petition for review. For instance in a contract case a copy of the contract would be no doubt included. The use of optional appendix pages to accompany a reply brief (discussed below) would also help the court to receive a more accurate picture of the case.

Rule 130(d) appears to be unnecessarily complicated. It would seem preferable that any points raised (or desired to be preserved) of the nature described in this Rule should be asserted in the initial petition for review or in the response. And it seems most undesirable that a party be permitted to raise questions such as these for the first time in a reply or a motion for rehearing: the court should be aware that such questions exist when it considers a petition or a case on the merits, and beyond that it seems inconsistent with the concept that matters even such as these should be preserved by mention or they would be waived.

Proposed Rule 130(e) seems unduly restrictive. The court would benefit by a more focused case if a reply brief could be filed by the petitioner pointing out errors or misconceptions in the respondent's response. And, given the normal concept of the right to open and close, the right to a reply unrestricted in scope by the petitioner seems fair. Also, if the rule is not changed in the manner we suggest, it appears that the word "less" should be changed to "more."

Rule 132:

The foregoing comments concerning a reply seem especially apt with respect to a reply in the process of briefing the case on the merits. Accordingly Rule 132(c) seems unduly restricted.

Rule 134:

The first sentence of Rule 134(a) on its face appears to contemplate that a petition for review will be granted only to reverse the case or to correct error. Of course the court accepts cases for review now when it wants to consider and write on an issue. The first sentence of proposed Rule 134(a) could more appropriately be worded, "If the Supreme Court determines to grant the petition, it will do so with the docket notation "'Granted'."

HHD, 5th Appellate Court, Appellate Staff, 5001

PAMELA STANTON BARON
ATTORNEY AT LAW

2403 INDIAN TRAIL
AUSTIN, TEXAS 78703
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TELECOPIER: 512/479-8070

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CIVIL APPELLATE LAW,
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11-28-95
4543.001
cc: LHS
hhd
Vance

TELECOPIER TRANSMITTAL SHEET

Date: November 27, 1995

Send to:

Luke Soules 210/224-7073

No. of Pages (Including transmittal sheet): 5

Sender: Pamela Stanton Baron

Sender's Phone Number: (512) 479-8480

Sender's Fax Number: (512) 479-8070

Comments/Notes:

Original will not be sent.

If you do not receive all pages or if you receive illegible pages, please contact Pamela Stanton Baron at (512) 479-8480.

PAMELA STANTON BARON
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CIVIL APPELLATE LAW,
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SPECIALIZATION

November 27, 1995

BY TELECOPIER
Mr. Luther Soules III
Soules & Wallace
100 West Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Dear Luke:

I thought you would be interested in the enclosed letter which I delivered last week to all nine Texas Supreme Court justices and their staff attorneys. The letter discusses the Court's proposal to move to a petition for review system similar to the certiorari practice in the United States Supreme Court. Because I see a number of problems with the change, I have suggested an alternative to the Court's proposal. I encourage you to comment on both the original proposal and my suggested alternative.

My understanding is that the Court is moving rapidly on the certiorari proposal and will likely consider it next week. While it is preferable to send comments to all nine justices, I would recommend addressing them at a minimum to Justices Hecht and Cornyn, who are the most interested in the proposal.

Please call me if you would like to discuss this further.

Sincerely,

Pamela Stanton Baron

Enclosure

PAMELA STANTON BARON
ATTORNEY AT LAW

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BOARD CERTIFIED,
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November 21, 1995

BY MESSENGER
The Honorable Nathan L. Hecht
Supreme Court of Texas
209 West 14th Street
Austin, Texas 78701

Dear Justice Hecht:

This letter proposes an alternative to the Court's proposal to adopt a petition for review practice similar to the certiorari system employed by the United States Supreme Court. As the Court's proposal has been described to the appellate bar, the petition for review, limited to ten pages in length, would replace the application for writ of error. The petition would be distributed to and reviewed by all nine justices prior to determining whether to hear a case. The Court's staff would no longer summarize the briefs in an application memorandum.

The Appellate Bar's Concerns

The appellate bar has expressed very mixed reactions to the Court's proposal. In its November 6 letter to the Court, the Appellate Practice Section of the Houston Bar Association raised serious concerns as to the advisability of the petition for review proposal. Similar sentiments were expressed at the State Bar's recent Advanced Civil Appellate Practice Course, a seminar attracting more than 200 attorneys. After a debate of the proposal, a "straw vote" showed significant opposition to its adoption.

Appellate practitioners are concerned that the new practice will place undue emphasis on "selling" the case — through oversimplification or even distortion of the issues, the record, and the cases in the shortened filing — rather than presenting the case fully and accurately. In granting cases based on these "marketing" materials, without the benefit of a full brief, the Court necessarily risks granting bad cases, with a concomitant increase in the number of improvident grants. Certainly, appellate practitioners uniformly endorse review of the briefs by the justices directly, rather than indirectly by reading internal summaries of the briefs. Yet practitioners are understandably concerned that, over time, this practice will break down, resulting in

the justices reading internal summaries of the petition for review, which is itself a summary. Additionally, the new, shortened brief would impair the Court's ability to resolve cases expeditiously by per curiam opinion.

A Proposed Alternative

Recognizing both the need to achieve efficiency by eliminating internal memoranda as well as the concerns of the appellate bar, I would like to propose a compromise for the Court's consideration. The compromise would retain the application for writ of error but greatly constrict its contents. The application would be "front-end loaded," with the first seven to ten pages resembling a petition for certiorari:

(1) a brief statement of the case, not to exceed one-half page;

(2) a list of the issues presented;

(3) an explanation of the importance of these issues to the jurisprudence of the State, about two to three pages in length;

(4) a statement of jurisdiction, limited to one sentence unless jurisdiction is ordinarily final in the court of appeals and requires explanation;

(5) a summary of the critical facts, not to exceed two pages; and

(6) a summary of the argument, not to exceed three pages.

The remainder of the application would be devoted to an expanded presentation of the facts and an in-depth discussion of the law. The contents of the reply would be similarly restricted. Both the application and reply would be limited to fifty pages.

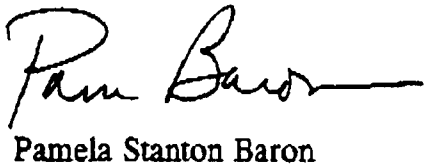
I believe this proposal would satisfy the Court's objectives in moving to a certiorari process, while avoiding the problems that process creates. The compromise permits initial review of the application by the justices without the need for an internal memorandum. Many cases could be resolved — either by a clear grant or a clear deny — by reviewing only the first seven to ten pages. In cases where the proper disposition is less obvious, justices will be able to look to the remainder of the application or refer the case to the Court's staff to prepare a memorandum objectively evaluating the

record, the case law, and the parties' arguments. After this further review, the Court could then vote whether to grant or deny the application. The compromise also removes impediments to prompt resolution of cases by per curiam opinion. A ten-page petition for review would not provide sufficient information on which to base a per curiam opinion; requesting further briefing would significantly delay this efficient means of resolving cases. Permitting full briefing in the application not only would expedite the Court's disposition of cases, it would also guard against over-marketing in the first seven to ten pages that will be the focus of the Court's review — the claims must be substantiated in the full briefing that follows.

I also believe this compromise would allay concerns expressed by the appellate bar. I am sending copies of this letter to appellate groups and practitioners, encouraging them to express their views on this proposal.

Justice Hecht, I hope that you will seriously consider this alternative proposal. Please feel free to call me if you would like to discuss the proposal further.

Sincerely,



Pamela Stanton Baron

4543.00
cc: LHS
HHD

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
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November 29, 1995

HHD,
State Agencies
Appellate Subs
Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Charles Lord regarding the format and length of Applications and Reply Briefs.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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CHARLES B. "CHUCK" LORD
Board Certified Civil Appellate Law
Texas Board of Legal Specialization

November 28, 1995

The Honorable Thomas R. Phillips
The Honorable Nathan L. Hecht
The Honorable John Cornyn
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78701

Dear Justices Phillips, Hecht and Cornyn:

I understand the Court is considering changes in the format and length of Applications and Reply Briefs. I have read Pam Baron's letter of November 21 to Justice Hecht and write to express my support for her proposed alternative. I am concerned that the page limitation will not be adequate for those Applications the Court should grant.

If it is the Court's goal to read every Application, Pam's proposal makes that possible. Any member of the Court may, without a mind numbing commitment, read a prepared summary of any case, but more importantly this alternative preserves a more in depth and readily available analysis in those cases deserving such treatment. If the briefing rules are to be changed, I hope you will consider Pam's proposal.

Wishing you all a very Merry Christmas and Happy New Year, I remain,

Yours very truly,

Chas B. Lord

Charles B. Lord

12-21-95
4543.001
cc: ~~LHS~~
hhd
Vamf

THE SUPREME COURT OF TEXAS

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December 20, 1995

HHD, Same Agenda ✓ Appellate Section Staff.

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Douglas Alexander regarding the Court's briefing practice.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

BROWN McCARROLL & OAKS HARTLINE

Attorneys

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December 13, 1995

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Justice Nathan L. Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

This letter is written in support of the proposed alternative to the petition for review practice being considered by the Court.

Seven to ten pages is more than adequate to cover the most essential elements of a petition for review or response — statement of the case, issues presented, importance of the issues to the jurisprudence of the State, statement of jurisdiction, summary of critical facts, and summary of argument. In most cases, the petition could properly be considered and disposed of upon review of those seven to ten pages, without more. However, it has been my experience that certain cases deserve more extensive analysis. For example, an opposing party's petition for review may have considerable superficial appeal, which can be rebutted only through a systematic piercing of the authorities underlying the argument — a process which may necessitate considerably more than ten pages. Conversely, the position advanced by one's own client may have little superficial appeal but, through a process of developing the arguments and authorities, may well be demonstrated to be worthy of review — a process which, again, may require considerably more than ten pages.

The principal attraction of the alternative proposal, as I see it, is that it gives the Court all of the advantages of an abbreviated petition, without a significant disadvantage. In most cases, the Court need read no further than the first seven to ten pages, permitting the petition to be decided on the briefs without the need for an intervening memorandum by a briefing attorney. However, in those cases that merit further scrutiny, the Court would already have before it the necessary briefing without the need of inviting the parties to provide it — a procedure that would itself inevitably engender undesirable external speculation as to the internal decision-making processes and leanings of the Court.

Very truly yours,

Douglas W. Alexander

3RD00405

cc: Chief Justice Thomas R. Phillips
Justice Raul A. Gonzalez
Justice Jack Hightower
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen
Justice James A. Baker

01-4-96
4543-001
cc: LHS
hhd
Vamf

THE SUPREME COURT OF TEXAS

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January 3, 1996

HHP, SCAC Agenda ✓ Appellate Section Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Jimmy Vaught regarding the Court's briefing practices. I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

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JAMES A. VAUGHT
BOARD CERTIFIED, CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

December 26, 1995

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Changes in Supreme Court Briefing Practices -- "Petition for Review"

Dear Judge Hecht:

For the past 4-5 months, I have listened to the various discussions and debates concerning the Court's proposed petition for review practice. I have read Pam Baron's proposed alternative in her letter of November 21, 1995 and the endorsements of Pam's proposed alternative by the Appellate Practice and Advocacy Section of the State Bar of Texas and the Appellate Practice Section of the Houston Bar Association.

I generally endorse Pam's proposed alternative to the petition for review practice. However, I have an additional proposal which I believe may satisfy the concerns of the Court and the Appellate Bar. Simply stated, my proposal would combine the proposed petition for review with Pam's alternative.[1]

In each case, the petitioner would file a short "petition for review" which would be distributed to and reviewed by all nine justices prior to determining whether to hear a case. The respondent would likewise be permitted to file a short response to the petition for review. In addition, the petitioner would also file a limited number of copies of an application for writ of error or supporting brief which would resemble the application for writ of error proposed by Pam. In other words, the petition for review would essentially be incorporated into the first 10-15 pages of the application for writ of error or supporting brief The respondent would likewise be permitted to file a limited number of copies of a response to petitioner's application for writ of error or supporting brief. The briefs would be limited to fifty pages. I propose that the number of copies of the application for writ of error or

[1]Although this proposal is not particularly innovative, I am not aware that it has been previously discussed.

supporting brief initially filed with the Court be limited to three or four and that the copies of the application or brief accompany the record to the office of the Justice assigned to that case. If an application or petition is granted, a complete set of the application for writ of error or supporting brief and the response (if any) would be filed with the Court.

Although the petition for review would be essentially repeated in the application for writ of error/supporting brief, this proposal would provide practitioners direct access to the members of the Court through the petition for review while retaining the Court's access to an expanded presentation of the facts and an in-depth discussion of the law in the application for writ of error/supporting brief. In addition, it would reduce the risk of an increase in the number of improvident grants.

Concerning per curiam opinions, the Justice (and his/her staff) assigned to the particular case could review the application for writ of error/supporting brief to determine whether a per curiam opinion should be considered. Obviously, each Justice would have access to copies of the application for writ of error/supporting brief. Thus, this proposal would preserve the ability of the Court to resolve cases expeditiously by per curiam opinion.

Please feel free to call me if I may be of assistance to the Court.

Best Regards,

Jimmy Vaught

cc: Hon. Thomas R. Phillips
Hon. Raul A. Gonzalez
Hon. Jack Hightower
Hon. John Cornyn
Hon. Craig Enoch
Hon. Rose Spector
Hon. Priscilla Owen
Hon. James A. Baker
Hon. Greg Abbott
Mr. Lee Parsley
Ms. Pam Baron
Ms. Katherine L. Butler
Mr. Kevin Dubose

04-29-96
4543.001
cc: LHS
hhd
Vamf

M E M O R A N D U M

To: Lee Parsley, Esq.

From: Clarence A. Guittard

Subject: Petition for Review

Date: April 26, 1996

HHD
Scan agenda
Date
already sent to them & Heard by Guittard

This is in response to your memorandum of April 16, with the "sort-a-final" draft of the proposed rules concerning the petition for review in the Supreme Court. I will not re-urge the suggestions in my memorandum of January 3, 1996, although I am of opinion that some of them are pertinent to the present draft.

* * * * *

130(b). It is redundant to provide that the petition "shall . . . contain the following:" and also to provide in the numbered subparagraphs that a list or table of contents, etc. "shall be included." "Shall . . . contain" in the opening sentence provides the verb for the first sentence in each subparagraph except **(5) and (7).** I suggest deleting "shall be included" in **(1), (2), and (3)** and also "shall be made" in **(4) and (6).** To preserve the parallel structure, I suggest that **(5)** begin: "An argument, which may address. . . ." Also, for the same reason, **(8)** may be revised to read: "A prayer stating clearly the relief sought." Similarly, **(9)** may read: "An appendix containing a copy. . . ." I have not attempted to make **(5)** parallel.

Alternatively, the verbs in the subparagraphs may be retained and the opening sentence of **(b)** revised or, perhaps, deleted.

Similar redundancies appear in **132(a).**

* * * * *

In **130(c)(4)** "Statement of jurisdiction" maybe taken as an affirmative statement, though the respondent may wish to contest the jurisdiction of the Supreme Court. I suggest "a statement concerning jurisdiction."

* * * * *

In **130(c)** no provision is made for the response to include a ground for affirmance briefed but not considered by the court of appeals. Subparagraph **(3)** provides only that the response may assert "grounds for affirmance that were considered by the court of appeals but were not the grounds on which the court of appeals relied." Although **(d)** provides that a ground not considered by the court of appeals may be included in respondent's brief on the merits, it seems that **132(b)** allows such a brief only if the Court has requested briefs. Subparagraph **(d)** also provides that such a ground may be presented "through reliance on the respondent's brief

in the court of appeals," but it is difficult to see how a ground in such a brief would come to the Supreme Court's attention unless stated in the issues allowed by (c)(3).

It seems to me that "considered, but not relied on" in (c)(3)(ii) raises other problems:

(1) It may be difficult to determine whether grounds were "considered by the court of appeals but were not the ground on which the court of appeals relied." A ground may have been considered but not mentioned in the opinion.

(2) Even if a ground is mentioned in the opinion of the court of appeals, it may be difficult to determine whether the court "relied" on it, since appellate opinions are not always entirely clear. For instance, if an alternative ground is stated, the opinion may be uncertain as to whether, or to what extent, the court "relied" on the alternative ground.

(3) It seems to me that the material question is not what the court relied on, but what issues were decided by the court. Parties rely on issues raised in their briefs, but the court decides those issues. There is no need to remand to the court of appeals for consideration of an issue that the court has already decided.

(4) If the court disposes of the case by a memorandum opinion, as authorized by TRAP 90(a), it may not state expressly the ground on which it relied in deciding an issue, but may state merely what its decision was.

I see no reason why any ground for affirmance raised by the record and briefed in the court of appeals should not be included in the respondent's statement of the issues, whether mentioned in the opinion of the court of appeals or not. The question is whether the Supreme Court would want to grant a petition without having an opportunity to consider such a ground. For example, if the court of appeals affirms the trial court's judgment and the Supreme Court grants the petition without requesting briefs, the Supreme Court may never learn of the existence of an alternative valid ground for affirmance and may thus reverse a judgment that should be affirmed. Moreover, the Supreme Court may avoid an improvident granting of the petition if the respondent is allowed to raise such a ground in the response.

For these reasons, I suggest that (c)(3)(ii) be revised to read as follows:

> (ii) the respondent is asserting grounds for affirmance briefed in the court of appeals but not addressed in the petition for review.

* * * * * 3RD00411

132(d) If the above suggestion concerning 132(c) is adopted,

a revision of (d) becomes necessary. As noted, I think "not considered by the court of appeals" raises problems. In my view, the respondent ought to be able to raise in the response any ground for affirmance raised by the record and briefed in the court of appeals, whether considered by the court of appeals or not, if that ground is not put in issue in the petition. If not raised in the original response, respondent should be able to raise it in any subsequent brief allowed by the Supreme Court.

Three other situations should be provided for:

(1) when the petitioner, in reply to an alternative ground of affirmance raised in the response, seeks alternatively a remand to the court of appeals for consideration of an issue not decided by that court;

(2) when the petitioner, in motion for rehearing of an adverse judgment in the Supreme Court, seeks a remand to the court of appeals for consideration of a ground not decided by that court;

(3) when the court of appeals has reversed the judgment of the trial court and the respondent, to avoid reversal and rendition by the Supreme Court, seeks a remand to the court of appeals for consideration of a ground of reversal of the trial court's judgment not expressly decided in the opinion of the court of appeals. The revision of (c)(ii) above suggested would cover this situation unless the respondent desires consideration of a point not within the Supreme Court's jurisdiction, such as factual insufficiency of the evidence to support a fact finding;

In view of these considerations, I suggest the following revision of 130(d):

> **(d) Issues Not Decided by the Court of Appeals:** To obtain a remand to the court of appeals for consideration of issues or points briefed in the court of appeals but not decided by that court, or to request that the Supreme Court consider such issues or points, those issues or points may be presented:
>
> (1) in the response to the petition, or
>
> (2) in a brief in response to the petitioner's brief on the merits, or
>
> (3) in petitioner's reply to the response, or
>
> (4) in lieu if (2) or (3), by filing in the Supreme Court the party's brief in the court of appeals, as provided in Rule 134(d), or
>
> (5) in a motion for rehearing in the Supreme Court.

* * * * *

132(a) does not make clear what the parties may file after the petition is granted. It may imply that even if the petition is granted, no briefs on the merits will be allowed unless the Court requests briefs. If that is the intent, the rule should so provide explicitly. Apparently, the Supreme Court leaves open the possibility that it may grant a petition and reverse the judgment without allowing any party either to file a brief on the merits or to present oral argument.

A strong argument can be made that a Supreme Court decision on the merits should be made only after full briefing. The proposed abbreviated review procedure in any form will be unpopular enough with the bar without limiting the scope of appellate advocacy to this extent. I suggest that the opening paragraph of **(b)** be revised as follows:

> Without granting the petition for review, the Court may request that the parties file briefs on the merits. After the petition is granted, the petitioner may file a brief on the merits without such a request.

* * * * *

132(d) For easier reading, I suggest:

> Instead of filing a brief on the merits or a brief in response, a party may file with the clerk of the Supreme Court twelve legible copies of a brief filed in the court of appeals.

* * * * *

132(e) It seems to me that all provisions concerning the length and format of briefs should be contained in one rule, so far as practicable. Accordingly, I suggest that **132(e)** be deleted in view of the provisions of proposed TRAP 4(d)(3) and 4(d)(4) and should incorporate all provisions of TRAP 74(m) except the first sentence.

* * * * *

132(f) The last sentence is unnecessary in view of TRAP 19(g).

* * * * *

132(g) This provision is duplicative of TRAP 4(d)(5).

* * * * *

132(h) This paragraph is unnecessary in view of 4(d)(4). I see no reason for a difference here.

* * * * *

134(e) TRAP 59, with minor revision, should be sufficient to cover this subject. If a separate rule is needed, the draft is not clear as to whether the orders of the courts below are set aside by the settlement or by Supreme Court's order effectuating the settlement. I think the first sentence is too long. Accordingly, I suggest the following revision of the draft:

> If a case is settled by agreement of the parties, ~~the Supreme Court may,~~ on motion by all parties~~,~~ the Supreme Court may grant the petition and, without hearing argument or considering the merits, may enter a judgment in accordance with the agreement. ~~to effectuate the settlement that~~. The judgment may ~~include setting~~ set aside the judgments of the court of appeals or the trial court or both, and ~~remanding~~ may remand the case to the trial court for entry of a judgment in accordance with the ~~settlement~~ agreement ~~of the parties.~~, but will not vacate the opinion of the court of appeals.

A clean copy of the above would read as follows:

> If a case is settled by agreement of the parties, on motion by all parties the Supreme Court may grant the petition and, without hearing argument or considering the merits, may enter a judgment in accordance with the agreement. The judgment may set aside the judgment of the court of appeals or the trial court or both and may remand the case to the trial court for entry of a judgment in accordance with the agreement, but will not vacate the opinion of the court of appeals.

Copies to Hecht, Soules, Dorsaneo, Hatchell

10-03-95
4543.001
cc [redacted]
Nhd
Vang

October 2, 1995

HHD,
Scan Supp
Agenda
✓
Staff.
SBOI

TRAP 130-136.
(Petition for Review)

Mr. Luther H. Soules
Soules & Wallace
100 West Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Dear Luke:

Enclosed are copies of the letters received by Chief Justice Phillips in response to his inquiry regarding their procedure for appealing to their highest court.

Sincerely,

E. Lee Parsley
Rules Staff Attorney

enc.

THE SUPREME COURT

STATE OF OKLAHOMA

ALMA WILSON
CHIEF JUSTICE

ROOM 245 STATE CAPITOL
OKLAHOMA CITY, OK 73105
405-521-3843

July 6, 1995

The Honorable Thomas R. Phillips
Chief Justice
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

This letter is in response to your recent inquiry regarding the certiorari procedure before the Oklahoma Supreme Court. Enclosed are copies of pertinent court rules governing certiorari review and contents of petitions for certiorari.

In Oklahoma, appeals are to the Supreme Court. All preliminary matters raised prior to completion of the briefing cycle are dealt with by the Supreme Court. Once the briefing cycle is completed, the case is at issue and ready for assignment. If the case presents first impression or publici juris issues, the Supreme Court will retain jurisdiction. However, when at issue, most appeals are assigned by the Supreme Court to one of the four divisions of the Court of Appeals [3-judge panels]. Opinions of the Court of Appeals are then subject to certiorari review by the Supreme Court. Petitions for certiorari are limited to ten pages. In deciding whether to review an appeal on certiorari, the Supreme Court reviews only the petition for certiorari and response thereto. After issuance of a writ of certiorari, additional briefs may be submitted for consideration if good cause is shown by a party or the Supreme Court so directs.

Oklahoma's version of appellate practice allows the Supreme Court to consider significant public and/or first impression issues without the necessity of intermediate appellate court review. Our version of certiorari practice allows the Supreme Court to consider the propriety of certiorari review without considering the final outcome of the legal issues.

I look forward to futher discussing our certiorari practice in Monterey, should you so desire.

Sincerely,

Alma Wilson
Chief Justice

AW:jc

conclusion or the same conclusion upon a substantially different reasoning, or modifies its prior opinion in a manner which affects substantially the rights of a party, the party aggrieved by such decision or opinion shall be allowed to file a petition for rehearing.

RULE 3.13 REVIEW BY THE SUPREME COURT ON CERTIORARI

A. A review of an opinion of the Court of Appeals in the Supreme Court on writ of certiorari as provided in 20 O.S.1971, § 30.1 is a matter of sound judicial discretion and will be granted only when there are special and important reasons and a majority of the justices direct that certiorari be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the Court of Appeals has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals has decided a question of substance in a way probably not in accord with applicable decisions of this court or the Supreme Court of the United States;

(3) Where a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of that court;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of this court's power of supervision.

B. (1) A party may petition for certiorari without having first sought rehearing in the Court of Appeals.

(2) If any party seeks rehearing in accordance with Rule 3.9, Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, 12 O.S.Supp.1984, Ch. 15, App. 3, the time to bring a certiorari petition shall not begin to run for any party until the Court of Appeals has denied all rehearing petitions filed in the case and notice of its action has been sent to the parties.

(3) If on rehearing the Court of Appeals changes or corrects its opinion, any aggrieved party may bring, in accordance with Rule 3.9, Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, 12 O.S.Supp.1984, Ch. 15, App. 3, a rehearing petition addressing either the changed or corrected portions of the opinion or the text that was present before the change or correction. The time to bring a certiorari petition for review of a changed or corrected opinion in a case where rehearing was sought shall not begin to run until the rehearing petition has been denied and notice of the court's action has been sent to the parties.

(4) No petition for certiorari may be filed in the Supreme Court during the pendency of any rehearing petition in the Court of Appeals. A certiorari petition filed during the pendency of a rehearing will be treated as timely filed only if the Court of Appeals ultimately denies rehearing.

(5) If a petition for rehearing is timely filed in the Court of Appeals after a petition for certiorari has been filed, the certiorari petition shall be treated as timely filed only if rehearing is ultimately denied by the Court of Appeals.

[Amended effective February 28, 1972; October 30, 1976; May 10, 1991.]

RULE 3.14 THE PETITION FOR CERTIORARI—CONTENTS

A. An application for certiorari shall be by petition only which shall contain the following to be set forth in the order here indicated:

(1) The citation of the opinion in Oklahoma Bar Association Journal if published, and if not published, a copy of the opinion shall be appended to each copy of the petition;

(2) A concise statement as to: (a) the date of the judgment or decision sought to be reviewed and (b) the date of any order concerning a rehearing;

(3) An outline of the reasons for review as suggested in Rule 3.13, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(4) The reasons for granting writ shall be supported by:

(a) A concise statement of fact containing the matters material to consideration of the questions presented.

(b) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(5) The style of the petition for certiorari shall be the same as in the petition in error. If there be more than one petition in error, the style shall be the same as that in the petition in error which was determined to commence the principal appeal.

B. No petition for writ of certiorari shall exceed in length, ten 8½" × 11" double spaced pages, exclusive of the appendix.

C. All contentions in support of a petition shall be set forth in the body thereof as provided in Section A of this rule. No separate brief in support of the petition will be received and the clerk shall refuse to file any petition to which is annexed or appended any supporting brief.

D. The failure to present with accuracy, brevity and clarity matters essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying a petition.

E. The petition shall be served upon the respondent who may within ten (10) days thereafter file and serve upon the petitioner an answer in opposition to petition which shall be succinct and shall not exceed in length, ten 8½" × 11" double spaced pages. A concise reply of not more than five 8½" × 11" double spaced pages may be filed and served upon the respondent within ten (10) days after filing of the answer. The reply should be addressed to arguments raised in the answer which petitioner does not believe to be sufficiently covered in his petition. The court need not delay decision pending filing of a reply.

F. The petition, answer and reply shall not reach the merits of the appeal but rather pertain to reasons Supreme Court should review the decision of the Court of Appeals. The only matters considered on certiorari are the petition for certiorari and the response to the petition for certiorari. Briefs on appeal and briefs in support of petition for rehearing are not considered on certiorari.

G. When no party seeks rehearing in the Court of Appeals a petition will be deemed timely if filed with the clerk of the Supreme Court within twenty (20) days of the date the opinion was filed by the Court of Appeals. When a party sought rehearing a petition for certiorari will be deemed timely if filed with the clerk of the Supreme Court within twenty (20) days of the date the Court of Appeals has denied all timely filed rehearing petitions and notice of the action has been sent to the parties. The time to file petition for certiorari shall not be extended. Petition, answer and reply shall be accompanied by ten (10) legible copies.

H. Any party may file a supplemental pleading while a petition for certiorari is pending, calling attention to new cases or legislation or other intervening matter not available at the time of his last filing, which pleading shall be not in excess of three 8½" × 11" double spaced pages.

[Amended effective October 30, 1976; amended June 22, 1979; amended effective July 1, 1986; January 20, 1987; June 1, 1992; November 15, 1993.]

RULE 3.15 ORDER GRANTING CERTIORARI

A. When a petition for writ of certiorari to review a decision of the Court of Appeals is granted, an order shall be entered to that effect. Issues not presented in the petition for certiorari will not be considered by the Supreme Court. Provided, however, if the Court of Appeals did not decide all of the properly preserved and briefed issues, the Supreme Court may—should it vacate the opinion of the Court of Appeals—address such undecided matters or it may remand the cause to the Court of Appeals for that Court to address such issues. The case will then be decided on the reviewable issue or issues presented in the briefs theretofore filed, unless for good cause the filing of additional briefs be then allowed.

[Amended effective October 30, 1976; November 15, 1993.]

RULE 3.16 CONSIDERATION ON GRANTS OF CERTIORARI

The court may, upon consideration of the matter, recall its order granting certiorari and enter an order denying certiorari.

[Amended effective October 30, 1976.]

RULE 3.17 DENIAL OF WRIT

When a petition for writ of certiorari is denied an order shall be entered to that effect and the mandate shall issue. If writ of certiorari is denied, no petition for rehearing may be filed in the Supreme Court.

[Amended effective October 30, 1976.]

RULE 3.18 REHEARING AFTER OPINION ON CERTIORARI

A party aggrieved by an opinion of the Supreme Court rendered on the merits after the court has granted certiorari may file a petition for rehearing in the manner and within the time period provided by Rule 28, Rules of the Supreme Court, Title 12, Chapter 15, App. 1, Okla.Statutes.

[Amended effective October 30, 1976.]

RULE 3.19 MANDATE TO TRIAL COURT

If no rehearing be sought in a case assigned to the Court of Appeals within the time prescribed by Rule 3.9 or if a petition for rehearing is denied and no certiorari is sought to the Supreme Court as provided in these rules, or if certiorari is denied by the Supreme Court, the Chief Justice will forthwith direct the clerk of the Supreme Court to issue mandate.

[Amended effective October 30, 1976.]

RULE 3.20 POST-DECISIONAL RELIEF

Requests for post-decisional relief, including, but without limitation, motions for appeal-related attorney's fees, motions for judgment on the supersedeas bond in accordance with Supreme Court Rule 31, and motions to tax costs in accordance with Supreme Court Rule 32 shall be considered by the division of the Court of Appeals which addressed the merits of the case; provided, that if a timely petition for certiorari be filed as provided in Rules 3.13 and 3.14, any motion for post-decisional relief which remains pending at the time the petition for certiorari is filed shall be addressed by the Supreme Court, unless the Supreme Court directs otherwise. *Chamberlin* v. *Chamberlin*, 720 P.2d 721 (Okl.1986); *Riffe Petroleum Com-*

The Supreme Court of Ohio

30 EAST BROAD STREET COLUMBUS, OHIO 43266-0419

THOMAS J. MOYER
CHIEF JUSTICE

July 6,1995

The Honorable Thomas R. Phillips
Chief Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Your Letter of June 30, 1995

Dear Tom:

In response to your request for information regarding certiorari practice, I have attached a copy of the relevant portion of our Rule which I believe works very well. I would strongly urge the adoption of a rule that gives the court an opportunity to determine from preliminary briefing whether a case should be allowed for review on the merits after full briefing and oral argument. We receive 1800 to 2000 motions for cert or leave to appeal a year. I think it makes no sense to receive full briefing in all of those cases when a high percentage of them are not cases of legal significance.

I hope this helps. I look forward to seeing you in Monterey.

Sincerely,

Thomas J. Moyer

TJM:dh
Enclosure

preme Court, any other party may file a notice of cross-appeal pursuant to sections 4903.11 and 4903.13 of the Revised Code.

(C) Appeal from the Power Siting Board.

A notice of appeal or cross-appeal from the Power Siting Board shall be filed with the Supreme Court and the Board in accordance with division (B) of this section and pursuant to section 4906.12 of the Revised Code. See Form D following these rules for a sample notice of appeal from the Power Siting Board.

SECTION 4. Filing of Joint Notice of Appeal.

Where there are multiple parties appealing from the same decision of a court of appeals or an administrative agency, appellants may join in the filing of a single notice of appeal.

SECTION 5. Caption of Appeal.

Except in appeals from the Public Utilities Commission or the Power Siting Board, an appeal shall be docketed under the caption given to the action in the court or agency whose decision is being appealed.

RULE III. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS

SECTION 1. Memorandum in Support of Jurisdiction.

(A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. See Form E following these rules for a sample memorandum.

(B) A memorandum in support of jurisdiction shall contain all of the following:

(1) Table of contents, which shall include the proposition(s) of law stated in syllabus form as set forth in *Drake v. Bucher, Supt.* (1966), 5 Ohio St. 2d 37, at 39;

(2) A statement of the case and facts;

(3) Each proposition of law supported by a brief and concise argument;

(4) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted.

(C) Except in post-conviction death penalty cases, a memorandum shall not exceed 15 numbered pages, exclusive of the table of contents.

(D) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the memorandum.

(E) Except as provided in S. Ct. Prac. R. II, Section 2(A), if the appellant does not tender a memorandum in support of jurisdiction for timely filing along with the notice of appeal, the Clerk shall refuse to file the notice of appeal.

SECTION 2. Memorandum in Response.

(A) Within 30 days after the notice of appeal and memorandum in support of jurisdiction are filed, the appellee may file a memorandum in response.

(B) The memorandum in response shall not exceed 15 numbered pages, except in post-conviction death penalty cases, and shall contain both of the following:

(1) A brief and concise argument in support of the appellee's position regarding each proposition of law raised in the memorandum in support of jurisdiction;

(2) A statement of appellee's position as to whether a substantial constitutional question is involved, whether leave to appeal should be granted, or whether the case is of public or great general interest.

SECTION 3. Prohibition Against Reply Memoranda.

The appellant shall not file a reply to the jurisdictional memorandum filed by the appellee under Section 2 of this rule. If the appellant tenders a reply for filing in violation of this rule, the Clerk shall refuse to file it.

SECTION 4. Jurisdictional Memoranda in Case Involving Cross-Appeal.

In a case involving a cross-appeal, the appellant/cross-appellee shall file a memorandum in support of jurisdiction when that party's notice of appeal is filed. Within 30 days thereafter, the appellee/cross-appellant shall file a combined memorandum both in response to appellant/cross-appellee's memorandum and in support of jurisdiction for the cross-appeal. Within 30 days thereafter, the appellant/cross-appellee shall file the last memorandum, which shall be limited to a response to appellee/cross-appellant's memorandum in support of jurisdiction for the cross-appeal. Except in post-conviction death penalty cases, a memorandum filed under this section shall not exceed 15 numbered pages.

SECTION 5. Determination of Jurisdiction by the Supreme Court.

After the time for filing jurisdictional memoranda has passed, the Supreme Court will review the jurisdictional memoranda filed and determine whether to allow the appeal and decide the case on the merits.

(A) If the appeal is a claimed appeal of right, the Supreme Court will do one of the following:

(1) Dismiss the appeal as not involving any substantial constitutional question;

(2) Allow the appeal, and either order the case or limited issues in the case to be briefed and heard on the merits or enter judgment summarily.

(B) If the appeal is a discretionary appeal involving a felony, the Supreme Court will do one of the following:

(1) Deny leave to appeal, refusing jurisdiction to hear the case on the merits;

(2) Grant leave to appeal, allowing the appeal, and either order the case or limited issues in the case to be briefed and heard on the merits or enter judgment summarily.

(C) If the appeal is a discretionary appeal asserting a question of public or great general interest, the Supreme Court will do one of the following:

(1) Decline jurisdiction to decide the case on the merits;

(2) Grant jurisdiction to hear the case on the merits, allowing the appeal, and either order the case or limited issues in the case to be briefed and heard on the merits or enter judgment summarily.

(D) The Supreme Court may delay its determination of jurisdiction on a claimed appeal of right or a discretionary appeal pending the outcome of any other case before the Supreme Court that may involve a dispositive issue.

SECTION 6. Appointment of Counsel in Felony Cases.

If the Supreme Court grants leave to appeal in a discretionary appeal involving a felony and an unrepresented party to the appeal is indigent, the Supreme Court will appoint the Ohio Public Defender or other counsel to represent the indigent party or order the court of appeals to appoint counsel as provided in S. Ct. Prac. R. II, Section 2 (D)(2).

RULE IV. CERTIFICATION BY COURT OF APPEALS BECAUSE OF CONFLICT

SECTION 1. Filing of Court of Appeals Order Certifying a Conflict.

When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a copy of the order in the Supreme Court, along with copies of the opinions of the conflicting courts of appeals. The party that files the order certifying a conflict shall be considered the appellant. Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict.

SECTION 2. Supreme Court Review of Court of Appeals Order Certifying a Conflict.

The Supreme Court will review the court of appeals order certifying a conflict.

(A) If the rule of law upon which the alleged conflict exists is not clearly set forth in the order certifying a conflict, the Supreme Court may remand the case to the court of appeals with an order that the court of appeals clarify the issue presented.

(B) If the Supreme Court determines that a conflict does not exist, it will issue an order dismissing the case.

(C) If the Supreme Court determines that a conflict exists, it will issue an order finding a conflict, identifying those issues raised in the case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed.

SECTION 3. Briefs; Supplement to the Briefs.

Within 40 days after the Supreme Court has issued an order finding a conflict, the appellant shall file a merit brief, in conformance with S. Ct. Prac. R. VI, and a supplement, in conformance with S. Ct. Prac. R. VII. The parties shall otherwise comply with the requirements of S. Ct. Prac. R. VI and VII. In their merit briefs, the parties shall brief the issues identified in the order of the Supreme Court as issues to be considered on appeal.

SECTION 4. Effect of Pending Motion to Certify a Conflict Upon Discretionary Appeal or Claimed Appeal of Right Filed in Supreme Court.

(A) If a party has perfected a discretionary appeal or a claimed appeal of right with the Supreme Court in accordance with S. Ct. Prac. R. II, Section 2 (A), but also has timely moved the court of appeals to certify a conflict in the case, that party shall file a notice with the Supreme Court that a motion to certify a conflict is pending in the court of appeals. The Supreme Court will stay consideration of the jurisdictional memoranda filed in the discretionary appeal or claimed appeal of right until the court of appeals has determined whether to certify a conflict in the case.

(B) If the court of appeals determines that a conflict does not exist, the party that moved the court of appeals to certify a conflict shall file a notice of that determination with the Supreme Court within 12 days after the date of the courrt of appeals entry. In accordance with S. Ct. Prac. R. III, the Supreme Court will consider the jurisdictional memoranda filed in the discretionary appeal or the claimed appeal of right.

(C) If the court of appeals certifies the existence of a conflict and a copy of the court of appeals order is filed with the Supreme Court in accordance with Section 1 of this rule, the Supreme Court will consolidate the certified conflict case with the discretionary appeal or the claimed appeal of right. The Supreme Court will review the court of appeals order certifying a conflict when it reviews the jurisdictional memoranda filed by the parties. In accordance with Section 3 of this rule and S. Ct. Prac. R. III, Section 3, the Supreme Court will issue an order determining both whether a conflict exists

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711

TEL: (512) 463-1312

FAX: (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
JACK HIGHTOWER
NATHAN L. HECHT
JOHN CORNYN
BOB GAMMAGE
CRAIG ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN

CLERK
Supreme Court of Ohio MS

EXECUTIVE ASS T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS T
NADINE SCHNEIDER

JUL 03 1995

June 30, 1995

Honorable Thomas J. Moyer
Chief Justice, Supreme Court of Ohio
30 East Broad Street
Columbus, Ohio 43266-0419

Dear Chief Justice Moyer:

Until 1987, our Court exercised error-review jurisdiction. We were obligated to accept cases where the intermediate appellate court committed a material error of law, while we were forbidden to accept cases, no matter how significant, unless there was an error in the judgment, a dissenting opinion in the court below, or a conflict among different appellate courts.

To help us exercise this rather cumbersome jurisdiction, we required full briefing (limited to 50 pages) from petitioner within 25 days from the overruling of the motion for rehearing in the court below, and a full response from respondent 15 days thereafter. In most of our cases, no additional briefing was offered or received.

For nearly eight years, we have exercised largely certiorari jurisdiction, yet we cling to our old practice of full briefing. I believe that we might perform our functions more effectively, and at a substantial cost saving to litigants, if we limited our initial briefing to a short exposition of why we should take the case, e.g., why it either creates a conflict or presents issues "important to the jurisprudence of the state." Thus far, a majority of the bar, particularly the appellate specialists, resist such change.

My questions to you are these:

1) If you exercise largely certiorari jurisdiction, do you accept a case after full briefing or only after preliminary briefing, with full briefs to come later?

2) Regardless of your state's practice, what is your opinion of the better practice for a supreme court with certiorari jurisdiction?

I look forward to seeing you in Monterey next month.

Very truly yours,

Thomas R. Phillips
Chief Justice

3RD00423

SUPREME COURT OF NEW MEXICO

CHAMBERS OF
JOSEPH F. BACA
CHIEF JUSTICE

P O BOX 848
SANTA FE, NEW MEXICO
87504-0848

(505) 827-4892
FAX (505) 827-4837

July 5, 1995

Chief Justice Thomas R. Phillips
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

At the moment the New Mexico Supreme Court is not a certiorari court in that we exercise original jurisdiction in contract cases and in some other constitutional and statutory matters. In September of this year, we intend to convert to a Certiorari court shifting jurisdiction of the contract cases to our Court of Appeals. The questions you raise in your letter are questions that we will have to deal with in defining our certiorari jurisdiction and method of handling those cases. I would therefore be interested in responses to your survey.

We have been so busy working on the transfer of the contract cases to the Court of Appeals and accommodating their increased work load, we've given only scant thought to how we would process certiorari matters.

Looking forward to seeing you in Monterey.

Yours very truly,

JOSEPH F. BACA
Chief Justice

JFB:mgr

SUPREME COURT OF COLORADO
STATE JUDICIAL BUILDING
2 EAST 14TH AVENUE
DENVER, COLORADO 80203

ANTHONY F. VOLLACK
CHIEF JUSTICE

(303) 837-3765

July 7, 1995

Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: **Certiorari Jurisdiction**

Dear Chief Justice Phillips:

In response to your letter, we have appellate rules governing certiorari jurisdiction, found in Colorado Revised Statutes, in volume 7B C.R.S. (1984 & Supp. 1994), under Colorado Appellate Rules (C.A.R.) 49 to 58. We limit the number of pages to twelve (12), directing a concise statement of the issues and grounds for granting the petition. We do not allow the attachment of briefs to the petition. We have law clerks prepare objective certiorari memoranda on the petitions, which are circulated to the members of the court. If three members of the court want to grant certiorari on one or more issues, an order granting certiorari is entered, and the attorneys are advised and placed on the normal briefing schedule. Our briefs on appeal are limited to thirty (30) pages, unless good cause is shown to grant additional pages.

We find this practice of twelve-page petitions to work well and to be manageable for the court and fair to the litigants. If you have any further questions, please feel free to contact me.

Sincerely,

Anthony F. Vollack

AFV:mh
Enclosure

3RD00425

or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the court. He shall not permit any original record or paper to be taken from his custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and other printed papers filed.

Am. Jur.2d. See 4 Am. Jur.2d. Appeal and Error, § § 317, 322, 467; 5 Am. Jur.2d. Appeal and Error, § 678.

Rules 46 to 48. No Colorado Rules

JURISDICTION ON WRIT OF CERTIORARI

Rule 49. Considerations Governing Review on Certiorari

(a) Addressed to Judicial Discretion. A review in the Supreme Court on writ of certiorari as provided in section 13-4-108, C.R.S., and section 13-6-310, C.R.S., is a matter of sound judicial discretion and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the district or superior court on appeal from the county court has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals, or district or superior court on appeal from the county court, has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court;

(3) Where a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of said court; the same ground applies to judgments and decrees of district courts on appeal from the county court when a decision is in conflict with another district court on the same matters;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a lower court as to call for the exercise of the Supreme Court's power of supervision. (Effective January 1, 1970.)

Am. Jur.2d. See 14 Am. Jur.2d. Certiorari, § § 3, 7-13.

C.J.S. See 14 C.J.S., Certiorari, § § 6, 7.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

The common-law writ of certiorari serves to correct substantial errors of law not otherwise reviewable which are committed by an inferior tribunal. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Statutes creating appellate remedies take precedence over judicial rules of procedure. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Scope of constitutional rule-making power. The manner in which subject matter jurisdiction is exercised is properly within the scope of the supreme court's rule-making powers

vested by § 2(1) of art. VI, Colo. Const. This procedure has been established and is set forth in C.A.R. 50 to 57. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Supreme court may not expand jurisdiction by rule. Supreme court jurisdiction, as initially spelled out in the Colorado consutution, may be expanded by statute. But there is no authority for the supreme court to expand its jurisdiction by rule of court. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Certiorari is proper remedy to protect substantial right. An original proceeding in the nature of certiorari under this rule, when directed to an endangered, fundamentally substantive and substantial right, is maintainable and recognized as a proper remedy. Potashnik v. Public Serv. Co., 126 Colo. 98, 247 P.2d 137 (1952); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Where usual review does not afford adequate protection. The power of certiorari is exercisable where usual review on appeal would not afford adequate protection to substantive rights of the petitioners. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Certiorari may be granted to determine a policy. Where no well-defined policy has emerged on a subject, the court will grant certiorari in order to make such a determination. Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

The issuance of a writ of certiorari is always discretionary. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Review of interlocutory orders. The supreme court has the power under § 3 of art. VI, Colo. Const., to issue certiorari to review interlocutory orders of lower courts. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

The proper proceeding for relief from an interlocutory order is by certiorari. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Review of eminent domain interlocutory order. Within the period of stay of execution granted by a trial court, the owners of property being condemned, not having the right of review of an interlocutory order on appeal, may file original action by way of certiorari in the supreme court, alleging that otherwise they are without remedy whatsoever to protect their property from seizure under an order of a district court, which they contend is without lawful authority. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Pretrial proceedings reviewable. The denial of an asserted right in pretrial proceedings, not otherwise reviewable, may be determined by means of an original proceeding in certiorari in the supreme court. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Certiorari granted where judgment would render question moot. Application for an original writ of mandamus or certiorari in the supreme court is the only procedure by which to test the validity of a trial court's ruling where the question involved, if permitted to await final judgment, would become moot. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

Certiorari to review joinder of claims was issued where all parties would be put to unnecessary delay and expense were it required that one or both of these tort claims be fully tried before determining whether the claims should have remained joined in the first instance. Should plaintiffs obtain a favorable judgment in both lawsuits, none of the parties will be in a position to raise the procedural question of separate trials posed by this original proceeding. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Amended answers ordered to be struck. In an original proceeding for relief as in certiorari, it was held that the district court should strike amended and amending answers which it allowed to be filed subsequent to the supreme court's remanding order which mentioned the specific pleadings out of which the trial court should ascertain the issues and on which it should conduct the trial. People ex rel. Henderson v. Greeley Nat'l Bank, 112 Colo. 274, 148 P.2d 580 (1944).

Review of superior court's reversal of county court. The supreme court may review by certiorari a superior court's reversal of a county court judgment. People v. Dee, 638 P.2d 749 (Colo. 1981).

The appellate review of county court judgments by the superior court is subject to ultimate review by the supreme court, since any party has the right to petition for a writ of certiorari. People v. Superior Court, 175 Colo. 391, 488 P.2d 66 (1971).

Certiorari dismissed where denial of charge of venue may be considered on appeal. Under applicable rules of civil procedure, where a motion for change of venue has been filed by defendants and said motion has been denied, the defendants can thereafter file an answer and proceed to trial without waiving the question of error based upon the denial of said motion. An original proceeding in the nature of a writ of certiorari to review the denial of a motion for change of venue by a district

court will be dismissed. Colorado State Bd. of Exmrs. of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

Where conviction necessarily involves only a factual issue, certiorari to review such conviction will be dismissed as improvidently granted. Erickson v. City & County of Denver, 179 Colo. 412, 500 P.2d 1183 (1972).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Where a decision of a reviewing court could not result in further proceedings against the petitioner, he has no standing to prosecute appellate proceedings beyond the court where his acquittal occurred. Garcia v. City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Moot question not reviewed. Where the question involved does not have that degree of public importance to justify review of a moot question, it is properly dismissed. People in Interest of P. L. V., 176 Colo. 342, 490 P.2d 685 (1971).

Appellate courts are bound by the jury's findings where there is sufficient competent evidence in the record to support the finding, where the jury makes the finding on conflicting evidence, and where the jury has been correctly instructed by the trial court. Vigil v. Pine, 176 Colo. 384, 490 P.2d 934 (1971).

Rule as basis for jurisdiction. See Wells v. Bainbrich, 176 Colo. 503, 491 P.2d 976 (1971); Northland Ins. Co. v. Bashor, 177 Colo. 463, 494 P.2d 1292 (1972); Chambers v. Nation, 178 Colo. 124, 497 P.2d 5 (1972); Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972); Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973); Department of Insts. ex rel. S.L.G. v. Bushnell, 195 Colo. 566, 579 P.2d 1168 (1978).

Applied in McGregor v. People, 176 Colo. 309, 490 P.2d 287 (1971); Board of County Comm'rs v. Fifty-first Gen. Ass'y, 198 Colo. 302, 599 P.2d 887 (1979).

Rule 50. Certiorari to Court of Appeals Before Judgment

(a) **Considerations Governing.** A writ of certiorari from the Supreme Court to review a case newly filed or pending in the court of appeals, before judgment is given in said court, may be granted upon a showing:

(1) That the case involves a matter of substance not heretofore determined by the Supreme Court of Colorado, or that the case if decided according to the relief sought on appeal involves the overruling of a previous decision of the Supreme Court; or

(2) That the Court of Appeals is being asked to decide an important state question which has not been, but should be, determined by the Supreme Court; or

(3) That the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the Supreme Court.

(b) **By Whom Sought.** The petition for a writ may be filed by either party or by stipulation of the parties. The Court of Appeals on its own motion may request transfer to the Supreme Court, or the Supreme Court may on its own motion require transfer of the case to it. (Effective January 1, 1970.)

Cross references. As to general considerations governing certiorari, see C.A.R. 49. As to certification and transfer of cases, see § § 13-4-109 and 13-4-110, C.R.S.

Am. Jur.2d. See 14 Am. Jur.2d, Certiorari, § § 7-13, 31.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Procedure provides for appellate review. The procedure established in § 13-4-108(2), C.R.S., and in C.A.R. 50 through C.A.R. 57, C.A.R., clearly provides for appellate review in the supreme court. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

And is constitutional. The changes brought about by pertinent statutes with respect to the

jurisdiction of the supreme court and the court of appeals are within the authority of the general assembly. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Review similar to common-law certiorari. The form of certiorari review the supreme court will maintain over the court of appeals is quite similar to the common-law review by certiorari, and distinguishable from the limited ancillary type of certiorari in existence in past years under Rule 106(a)(4), C.R.C.P. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Study of petition and record constitutes review. The study by the supreme court of the petition provided in the Colorado appellate rules and of the record on appeal to determine whether to grant or deny the petition constitutes a review. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Rule as basis for jurisdiction. See Miller v. Industrial Comm'n, 173 Colo. 476, 480 P.2d 565 (1971); Kinterknecht v. Industrial Comm'n, 175 Colo. 60, 485 P.2d 721 (1971); In re Estate of Flanigan, 175 Colo. 499, 488 P.2d 897 (1971); Spann v. Industrial Comm'n, 181 Colo. 153, 508 P.2d 385 (1973); First Nat'l Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973); Harding v. Industrial Comm'n, 183 Colo. 52, 515 P.2d 95 (1973); Western Elec. Co. v. Weed, 185 Colo. 340, 524 P.2d 1369 (1974); People v. Mason, 192 Colo. 5, 555 P.2d 518 (1976); Roderick v. City of Colorado Springs, 193 Colo. 104, 563 P.2d 3 (1977); Federal Ins. Co. v. Public Serv. Co., 194 Colo. 107, 570 P.2d 239 (1977); Laubach v. Bradley, 194 Colo. 362, 572 P.2d 824 (1977); People v. Davis, 194 Colo. 466, 573 P.2d 543 (1978); Dodge v. Department of Social Servs., 198 Colo. 379, 600 P.2d 70 (1979); Trustees of Colo. Carpenters & Millwrights Health Benefit Trust Fund v. Pinkard Constr. Co., 199 Colo. 35, 604 P.2d 683 (1979); DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980); People v. Small, 631 P.2d 148 (Colo. 1981); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981); CF&I Steel Corp. v. Charnes, 637 P.2d 324 (Colo. 1981); Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Pennobscot, Inc. v. Board of County Comm'rs, 642 P.2d 915 (Colo. 1982).

Applied in Ackmann v. Merchants Mtg. & Trust Corp., 645 P.2d 7 (Colo. 1982); Slack v. City of Colorado Springs, 655 P.2d 376 (Colo. 1982); Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 254(Colo. 1983); Income Realty & Mtg., Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 257 (Colo. 1983); Krause v. Columbia Sav. & Loan Ass'n, 661 P.2d 265 (Colo. 1983).

Rule 51. Review on Certiorari — How Sought

(a) **Filing and Proof of Service.** Review on certiorari shall be sought by filing with the clerk of the Supreme Court, with service had and proof thereof as required by C.A.R. 25, ten typewritten or otherwise reproduced copies of a petition which shall be in the form prescribed in C.A.R. 21 (b) and a transcript of the record in the case as filed in said court which shall be certified by the clerk of the appropriate court. Service of a copy of the transcript of the record is not required.

(b) **Appearance and Docket Fee.** Upon the filing of the petition and the certified transcript of the record, counsel for the petitioner shall enter an appearance and pay the docket fee of $150.00, of which $1.00 shall be transferred to the state general fund as a tax levy pursuant to section 2-5-119, C.R.S. The case shall then be placed in the certiorari docket. (Amended December 4, 1980, effective January 1, 1981; amended May 6, 1982, effective July 1, 1982; amended September 23, 1983, effective January 1, 1984.)

(c) **Notice to Respondents.** It shall be the duty of counsel for the petitioner to notify all the respondents of the date of filing, and of the docket number of the case, and that the transcript of the record has been filed in the Supreme Court. (Amended September 23, 1983, effective January 1, 1984.)

(d) **Docket Fee.** Upon entry of appearance, counsel for respondent shall pay the docket fee of $75.00. (Adopted and effective May 26, 1977; amended

December 4, 1980, effective January 1, 1981; amended May 6, 1982, effective July 1, 1982.)

Am. Jur.2d. See 14 Am. Jur.2d. Certiorari, §§ 32, 33, 35.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 52. Review on Certiorari — Time for Petitioning

(a) **To Review a District Court Judgment.** A petition for writ of certiorari to review a judgment of a district court, or superior court on appeal from a county court, shall be filed not later than thirty days after the rendition of the final judgment in said court.

(b) **To Review Court of Appeals Judgment.** No writ of certiorari will issue unless a petition for rehearing has been filed in the Court of Appeals. A petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed not later than thirty days from the date rehearing is denied in said court, except that in Workmen's Compensation cases the time provided herein is reduced to fifteen days. (Amended and effective June 15, 1972.)

Am. Jur.2d. See 14 Am. Jur.2d. Certiorari, § 30.

C.J.S. See 14 C.J.S., Certiorari, § 147.

Law reviews. For article "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Applied in Honey v. Ranchers & Farmers Livestock Auction Co., 191 Colo. 503, 553 P.2d 799 (1976); Wiggins v. People, 199 Colo. 341, 608 P.2d 348 (1980); People v. Dee, 638 P.2d 749 (Colo. 1981).

Rule 53. The Petition for Certiorari

(a) **Contents of Petition.** The petition for certiorari shall contain in the order here indicated:

(1) An advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered. (Amended April 26, 1984, effective September 1, 1984.)

(2) A reference to the official or unofficial reports of the opinion or judgment and decree of the court which shall be in an appendix containing the papers as provided in subsection (6) hereof;

(3) A concise statement of the grounds on which jurisdiction of the Supreme Court is invoked, showing:

(I) The date of the judgment or decree sought to be reviewed and the time of its entry;

(II) The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to petition for certiorari;

(4) A concise statement of the case containing the matters material to consideration of the issues presented;

(5) A direct and concise argument amplifying the reasons relied on for the allowance of the writ;

(6) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the decision of the Court of Appeals; or if review of a judgment of the district or superior court on appeal from a county court is sought there shall be appended a copy of the findings, judgment and decree in question; and if a statute or ordinance is involved there shall be in the appendix their pertinent text.

(b) Length of Petition. No petition for writ of certiorari shall exceed twelve pages in length, exclusive of the appendix, unless by order of the Supreme Court first being obtained in a motion showing necessity for a more extensive petition. (Amended July 7, 1983, effective January 1, 1984.)

(c) No Supporting Brief. All contentions in support of a petition shall be set forth in the body thereof as provided in subsection (6) of section (a) of this rule. No separate brief in support of the petition will be received, and the clerk shall refuse to file any petition to which is annexed or appended any supporting brief.

(d) Petition Rejected — When. The failure to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

(e) Opposition Brief. A petition shall be served upon the respondent who may within ten days thereafter serve upon the petitioner a brief in opposition which shall be succinct and shall not exceed twelve pages in length. An original and ten copies of the brief in opposition shall be filed with the clerk of the Supreme Court. A succinct reply brief of not more than ten pages may be filed and served upon the respondent within five days after service of the brief in opposition. Thereupon the matter shall stand submitted. Service herein shall be in the same manner as provided for service of a notice of appeal in C.A.R. 3(d) hereof. (Amended and effective May 26, 1977; amended July 7, 1983, effective January 1, 1984.)

(Amended September 23, 1983, effective January 1, 1984.)

Comment: This rule was changed to add an element to the contents of the petition. Other required elements are then renumbered. Also note that Rules 53(b) and 53(e) were amended on July 7, 1983, to accommodate the change to letter-size paper.

Am. Jur.2d. See 14 Am. Jur.2d, Certiorari, § 33.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

The petition for writ of certiorari is an application of right. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Issue held not to be fairly comprised within issues raised by petition for certiorari, as required by subsection (a)(3). Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900 (Colo. 1982).

Applied in County of Clearwater v. Petrash, 198 Colo. 231, 598 P.2d 138 (1979).

3RD00431

Rule 54. Order Granting or Denying Certiorari

(a) Grant of Writ. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the petition. The order shall direct that the certified transcript of record on file be treated as though sent up in response to a formal writ. A formal writ shall not issue unless specially directed.

(b) **Denial of Writ.** No mandate shall issue upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. If, after granting the writ, the court later denies the same as having been improvidently granted or renders decision by opinion of the court on the merits of the writ, petition for rehearing may be filed in accordance with the provisions of C.A.R. 40. (Amended and effective March 30, 1972.)

Am. Jur.2d. See 14 Am. Jur.2d, Certiorari, § § 52, 73.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Review by certiorari constitutes appellate review under the Colorado constitution. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

The denial of a petition for certiorari is "appellate review" as that term is used in the Colorado constitution. Bill Dreiling Motor Co. v. Court of Appeals, 171 Colo. 448, 468 P.2d 37 (1970).

Petition for certiorari is addressed to sound judicial discretion, and denial does not constitute a determination of the issues on the merits. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Denial of a petition for certiorari in a criminal case means nothing more than that the supreme court has declared that the case is not properly postured for further appellate review. Menefee v. City & County of Denver, 190 Colo. 163, 544 P.2d 382 (1976).

Rule 55. Stay Pending Review on Certiorari

Application to the Supreme Court for stay of execution of a decision of the Court of Appeals or the judgment of a district or superior court on appeal from a county court will normally not be entertained until application for a stay has first been made to the court rendering the decision sought to be reviewed. (Effective January 1, 1970.)

Am. Jur.2d. See 14 Am. Jur.2d, Certiorari, § 46.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 56. Extension of Time

After appearance is made and a docket fee paid, the Supreme Court for good cause shown may upon motion enlarge the time prescribed by these rules for filing a petition for writ of certiorari, or may permit the petition to be filed after the expiration of such time. (Amended April 26, 1984, effective September 1, 1984.)

Comment: This change requires an appearance and payment of the docket fee under Rule 51(b) before counsel will be permitted to file a motion for the enlargement of time in which to file the writ of certiorari.

Am. Jur.2d. See 14 Am. Jur.2d, Certiorari, § 30.

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 57. Briefs — In General 3RD00432

Briefs on the Merits. Briefs of the petitioner and the respondent on the merits may be typewritten and in the form as permitted in C.A.R. 32(b) and

filed within the time as provided in C.A.R. 31; except that in Workmen's Compensation cases the petitioner shall serve and file his opening brief within ten days and the respondent shall file his brief within five days after service of petitioner's brief, and no other brief shall be permitted. The rule concerning the content and length of briefs shall be the same as in C.A.R. 28. Incorporation by reference of briefs previously filed in the lower court is prohibited. (Amended July 7, 1983, effective January 1, 1984; amended April 26, 1984, effective September 1, 1984.)

Law reviews. For article, "A Summary of Colorado Supreme Court Internal Operating Procedures", see 11 Colo. Law. 356 (1982).

Rule 58. Citation

These rules in Chapter 32 may be known as the Colorado Appellate Rules and shall be cited as "C.A.R.", followed by the number of the rule.

JURISDICTION ON WRIT OF CERTIORARI

Rule 50. Certiorari to Court of Appeals Before Judgment

Law reviews.

For comment, "In the Interest of R.C., Minor Child: The Colorado Artificial Insemination by Donor Statute and the Non-Traditional Family", see 67 Den. U.L. Rev. 79 (1990).

The supreme court may retain and review an appeal of a declaratory order of the state personnel board that should have been filed with the court of appeals. The court's authority rests in its power under section (b) of this rule to review cases pending in the court of appeals prior to judgment and under C.A.R. 2 to suspend the rules of appellate procedure. Colorado Ass'n of Pub. Emp. v. DOH, 809 P.2d 988 (Colo. 1991).

Applied in In the Interest of R.C., 775 P.2d 27 (Colo. 1989).

Rule 52. Review on Certiorari — Time for Petitioning

(a) To Review a District Court Judgment. A petition for writ of certiorari to review a judgment of a district court on appeal from a county court, shall be filed not later than thirty days after the rendition of the final judgment in said court.

(b) To review Court of Appeals Judgment. No writ of certiorari to the Supreme Court shall issue unless a petition for rehearing has been filed in the Court of Appeals. A petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed not later than thirty days from the date rehearing is denied in the Court of Appeals, except that in workers' compensation and unemployment insurance cases the time for filing a petition for writ of certiorari to the Supreme Court is reduced to fifteen days.

Source: (b) amended June 4, 1987, effective January 1, 1988; (a) amended and effective May 17, 1990; (b) amended July 11, 1991, effective July 1, 1991.

When a petition for rehearing of a municipal court judgment is timely filed in the district court, the district court judgment will not become final for purposes of this rule until the district court denies the petition. City of Aurora v. Rhodes, 689 P.2d 603 (Colo. 1984).

If a party files a conditional cross-petition for certiorari of issues not reached unless the underlying judgment is disturbed, there is no requirement that the party first file a petition for rehearing in the court of appeals. Farmers Group, Inc. v. Williams, 805 P.2d 419 (Colo. 1991).

Rule 53. Petition for Certiorari and Cross-Petition for Certiorari

3RD00434

(a) The Petition. The petition for certiorari shall be succinct and shall not exceed twelve pages, exclusive of appendix. The petition may be typewritten as prescribed in C.A.R. 32. The petition shall contain in the order here indicated:

(1) An advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary

issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered.

(2) A reference to the official or unofficial reports of the opinion or judgment and decree of the court, which shall be in an appendix containing the papers as provided in subsection (6) of this rule.

(3) A concise statement of the grounds on which jurisdiction of the Supreme Court is invoked, showing:

(A) The date of the judgment or decree sought to be reviewed and the time of its entry;

(B) The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to petition for certiorari.

(4) A concise statement of the case containing the matters material to consideration of the issues presented.

(5) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(6) An appendix containing:

(A) A copy of any opinions delivered upon the rendering of the decision of the Court of Appeals;

(B) If review of a judgment of the district court on an appeal from a county court is sought, a copy of the findings, judgment and decree in question; and

(C) The text of any pertinent statute or ordinance.

(7) No separate brief in support of the petition may be appended to the petition.

(b) The Cross-Petition. Within ten days after service of the petition for certiorari, a respondent may file and serve a cross-petition. A cross-petition shall be succinct and shall not exceed twelve pages, exclusive of appendix. The cross-petition may be typewritten as prescribed in C.A.R. 32. A cross-petition shall have the same contents, in the same order, as the petition.

(c) Opposition Brief. Within ten days after service of the petition, respondent may file and serve an opposition brief, a cross-petition or both. The petitioner may file an opposition brief within ten days after service of a cross-petition. An opposition brief shall be succinct and shall not exceed twelve pages. The opposition brief may be typewritten as prescribed in C.A.R. 32.

(d) Reply Brief. Within five days after service of an opposition brief, a petitioner or cross-petitioner may file and serve a reply brief. A reply brief shall be succinct and shall not exceed ten pages. The reply brief may be typewritten as prescribed in C.A.R. 32.

(e) Filing and Service. An original and ten copies of all petitions and briefs shall be filed with the Clerk of the Supreme Court. Service shall be in the same manner as provided for service of the notice of appeal.

Source: Entire rule repealed and readopted August 30, 1985, effective January 1, 1986; IP(a) and (b) to (d) amended and effective July 8, 1993; rule title amended and effective April 7, 1994.

If a party files a conditional cross-petition for certiorari of issues not reached unless the underlying judgment is disturbed, there is no requirement that the party first file a petition for rehearing in the court of appeals. Farmers

Group, Inc. v. Williams, 805 P.2d 419 (Colo. 1991).

Rule 57. Briefs — In General

Briefs on the Merits. Briefs of the petitioner and the respondent on the merits may be typewritten and in the form as permitted in C.A.R. 32 and filed within the time as provided in C.A.R. 31; except that in workers' compensation cases the petitioner shall serve and file the petitioner's opening brief within ten days and the respondent shall file the respondent's brief within five days after service of the petitioner's brief, and no other brief shall be permitted. The rule concerning the content and length of briefs shall be the same as in C.A.R. 28. Incorporation by reference of briefs previously filed in the lower court is prohibited.

Source: Entire rule amended June 4, 1987, effective January 1, 1988; entire rule amended and effective July 8, 1993.

Supreme Court of Missouri
P. O. Box 150
Jefferson City, Mo. 65102

CHAMBERS OF
JOHN C. HOLSTEIN, CHIEF JUSTICE

(314) 751-1004

July 5, 1995

The Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
P O Box 12248
Austin, TX 78711

Dear Chief Justice Phillips:

This letter responds to yours of June 30, 1995. Our Constitution permits us to accept transfer after opinion by the court of appeals on certification by the appellate court or a dissenting judge. In addition, we may grant discretionary transfer before or after opinion. Ordinarily, we exercise this discretionary jurisdiction only after opinion. I understand this is comparable to your certiorari jurisdiction.

We can accept transfer either before or after opinion on several grounds, including the "importance of the question" or because the opinion of the appellate court conflicts with an earlier appeals court or Supreme Court decision. The application for transfer must have the issue justifying transfer set forth on one page and may be accompanied by "suggestions" not to exceed six pages in length. No oral argument in support of the application for transfer is permitted. If transfer is granted, a briefing and oral argument schedule is established. Our rules encourage the parties to refile the same brief that was filed before the court of appeals. No new issues may be raised in a substitute brief.

With that background, I will attempt to answer your questions.

1. Full briefing is not permitted until transfer is granted.

2. My thought is that articulating the reasons justifying transfer (or certiorari) of a case should not require extensive discussion.

Please tell my classmate, Justice John Cornyn, hello for me. I look forward to meeting you at next month's meeting in Monterey.

Yours truly,

John C. Holstein

kb

3RD00437

Supreme Court
State of North Carolina
Raleigh

CHAMBERS OF
CHIEF JUSTICE BURLEY B. MITCHELL, JR.

BOX 1841
ZIP CODE 27602

3 July 1995

The Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

Dear Chief Justice Phillips:

This is by way of response to your inquiry of June 30. The North Carolina Supreme Court exercises mandatory jurisdiction over capital cases, public utility rate-making cases, and cases in which there is a dissent in the Court of Appeals. Otherwise, we exercise certiorari jurisdiction. The petitions for writ of certiorari which we receive have developed over the years into *de facto* briefs; in addition to explaining the facts, they set forth the contentions of the petitioner as to the significance of the case, the current status of the law, and any errors committed by the lower court. We have never established a page limitation on these petitions, but, for the most part, our attorneys have exercised considerable self-restraint in keeping them to a reasonable length. I believe that many in our practicing bar believe that an exceptionally lengthy petition discourages this Court from taking a case and that their brevity in their petitions is a pragmatic reaction in their desire to have their cases heard.

To answer your second question, I believe it is the better practice for a state Supreme Court to exercise its certiorari jurisdiction after only a preliminary briefing, with full briefs to be filed later. My view of this probably is affected by the fact that our Court does not use law clerks or staff at all in considering whether to grant certiorari. Each of our Associate Justices is assigned every sixth petition and prepares a brief memorandum for the entire Court, describing the issues presented by the case. Once each month, we consider and pass upon these petitions. It has been our view that one of the most important functions the Justices of this Court perform is the function of deciding what issues we will reach and decide. For that reason, we have kept this function exclusively to ourselves, long after developing the practice of using law clerks and other staff in writing opinions and at every other stage of our process. We do not need full briefs in order to decide whether a question is one of importance to the *corpus juris* which

it is timely for us to address. Therefore, we can wait until after we have decided to grant a writ of certiorari for full briefs. Additionally, it would seem to me that this is a more efficient use of the time of the counsel seeking our review.

I look forward to seeing you again next month and having the opportunity to talk with your then.

With warmest personal regards, I am

Very truly yours,

Burley Mitchell

Burley B. Mitchell, Jr.

BBM,jr/ppb

Supreme Court
State of Tennessee

CHAMBERS OF
E. RILEY ANDERSON
CHIEF JUSTICE

SUPREME COURT BUILDING
P.O. BOX 444
KNOXVILLE, TENNESSEE 37901
615/594-6400

July 6, 1995

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin TX 78711

Dear Tom:

In response to the questions in your letter of June 30, 1995, received today, Tennessee is a discretionary appeal jurisdiction. Persons seeking to appeal must file an application for permission to appeal as prescribed by Rule 11 of the Tennessee Rules of Appellate Procedure. I have enclosed a copy of the full text of the Rule for your information. The rule only requires preliminary briefing. However, an applicant may file, under Rule 11, a full brief initially, and if the application is granted, file a notice of election not to file a supplemental brief.

Most Rule 11 applicants file only a preliminary brief which must contain the date of entry of the judgment of the lower court, the questions presented for review, the facts relevant to the questions presented, either by reference to the intermediate court's decision or by recitation, and the reasons supporting review. The application has a better chance of being granted if the party seeking review demonstrates that the case involves a question about which there is a need either: (1) to secure uniformity of decision, (2) to secure settlement of important questions of law, (3) to secure settlement of questions of public interest, or (4) for the exercise of the Supreme Court's supervisory authority.

Requiring preliminary briefs that focus on the reasons for review, rather than the merits of the case, has worked well in our Court, and is, in my opinion, the better practice for a supreme court with discretionary jurisdiction. This procedure has allowed our Court to concentrate on law development, rather than error correction. We rarely grant simply to correct an error. If I can be of further assistance, let me know.

See you at Monterey.

Regards,

Riley Anderson, Chief Justice

dbh

Enclosure

Nuclear Fuel Servs., Inc. v. V.2d 550 (Tenn. Crim. App. st, 728 S.W.2d 32 (Tenn. aywood County v. Hudson, n. 1987); State v. Keenan, . Crim. App. 1987); Turner 2d 1201 (6th Cir. 1988); 8 S.W.2d 422 (Tenn. 1988); S.W.2d 769 (Tenn. Crim. Crawford, 783 S.W.2d 573 989); State v. Hulse, 785 im. App. 1989); AT & T Co. W.2d 761 (Tenn. 1990); 89 S.W.2d 557 (Tenn. Ct. Bennett, 798 S.W.2d 783 0); In re Ellis, 822 S.W.2d 991); State v. Sowder, 826 im. App. 1991); State v. (Tenn. Crim. App. 1992).

unt to this rule may be within a reasonable time, nstances of the case, but n on such applications is . 614 S.W.2d 791 (Tenn.

ive rise to applications e of such character that l and pursued immedi- endered moot except for appeal from final judg- 14 S.W.2d 791 (Tenn.

rsion Decision. side questioning diver- anted or denied, must ule and cannot come by State v. Montgomery, Crim. App. 1981); State 569 (Tenn. Crim. App. 713 S.W.2d 85 (Tenn.

rant or denial of diver- ory appeals provisions d this rule constitutes ord, 815 S.W.2d 218

ng or denying pretrial fter the defendant has State v. Mecord, 815 App. 1991). llow an interlocutory ndant chose to go to uilty. He, therefore, ue pretrial diversion. o trial, the defendant cation for an extraor- on under this rule. In d the issue. State v. (Tenn. Crim. App.

4. Strict Compliance.
Failure to follow the requirements of subsection (b) of this rule resulted in denial of appellant's application for extraordinary appeal. State v. Fiveash, 626 S.W.2d 477 (Tenn. Crim. App. 1981).

5. Nondispositive Search Questions.
Nondispositive search questions cannot be brought to the court of criminal appeals by an interlocutory appeal. State v. Wilkes, 684 S.W.2d 663 (Tenn. Crim. App. 1984).

6. Departure from Accepted and Usual Course of Proceedings.
The trial judge's order that the vote reinstate its prior plea bargain offer, after ordering a new trial based on ineffective assistance of counsel, was a total departure from the accepted and usual course of judicial proceedings under subdivision (a)(1). State v. Turner, 713 S.W.2d 327 (Tenn. Crim. App.); cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 360 (1986).

7. Loss of Right that Could Never be Recaptured.
The action of the trial judge in granting defendant's pretrial motion to strike from the indictment the allegation of a prior driving under the influence conviction resulted in the state losing a right that could never be recaptured, and appeal is under this rule rather than T.R.A.P. 3. State v. Gallaher, 730 S.W.2d 622 (Tenn. 1987).

8. Waiver.
On two issues where appellant contended that trial court erred in giving a jury instruction on flight and that the evidence was insufficient to support the verdict of guilt for sale of a controlled substance and the appellant had failed to make appropriate references to the record, cite authority in support of the issues and arguments advanced, or make appropriate argument, both issues were waived. State v. Hill, 875 S.W.2d 278 (Tenn. Crim. App. 1993).

9. Judgment Granting New Trial.
The determination of whether to grant an interlocutory appeal pursuant to this rule and T.R.A.P. 9 is discretionary with the appellate court when the State desires an interlocutory appeal from a judgment granting a defendant a new trial. State v. Perry, 740 S.W.2d 723 (Tenn. Crim. App. 1987).

10. Denial of Transcript.
When the trial judge rules that the defendant is not entitled to a transcript of all or a portion of the proceedings designated by defense counsel, the defendant may seek relief in the appellate court pursuant to this rule. State v. Draper, 800 S.W.2d 489 (Tenn. Crim. App. 1990).

DECISIONS UNDER PRIOR RULE

1. Strict Compliance.
To invoke the discretionary jurisdiction of the court, there must be strict compliance with the rules. Dearborne v. State, 575 S.W.2d 259 (Tenn. 1978).

Collateral References. 4 Am. Jur. 2d Appeal and Error §§ 290-351.

Rule 11. Appeal by Permission from Appellate Court to Supreme Court [For proposed amendment, see the Compiler's Notes]. — (a) Application for Permission to Appeal; Grounds. — An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

(b) Time; Content. — The application for permission to appeal shall be filed with the clerk of the Supreme Court within 60 days after the entry of the judgment of the Court of Appeals or Court of Criminal Appeals if no timely petition for rehearing is filed, or, if a timely petition for rehearing is filed,

Amended 1995

within ~~30~~ 60 days after the denial of the petition or entry of the judgment on rehearing; ~~provided, however, that an extension of not more than an additional 30 days may be granted by the court, or a justice thereof, upon motion and for good cause shown. No extension beyond said additional 30 day period shall be permitted, and any motion for extension must be made before expiration of the initial 30 day period. In no event shall an application for permission to appeal be considered if filed more than 60 days after the entry of the judgment of the Court of Appeals or the Court of Criminal Appeals, or the entry of an order denying a petition for rehearing, or the entry of judgment upon rehearing, whichever is latest.~~ The application shall contain a statement of: (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of the entry of the judgment on rehearing; (2) the questions presented for review; (3) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application; and (4) the reasons, including appropriate authorities, supporting review by the Supreme Court. The brief of the appellant referred to in subdivision (f) of this rule may be served and filed with the application for permission to appeal. A copy of the opinion of the appellate court shall be appended to the application.

(c) Number of Copies; Service. — The original and six copies of the application shall be filed. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

(d) Answer; Reply. — Within 15 days after service of the application, any other party may file an answer in opposition, with copies in the number required for the application. An answer shall set forth the reasons why the application should not be granted and any other matters considered necessary for correction of the application. The answer shall be served on all other parties in the manner provided in Rule 20 for the service of papers. No reply to the answer shall be filed.

(e) Action on Application. — The application shall be granted if two members of the Supreme Court are satisfied that the application should be granted. The appeal shall be docketed in accordance with Rule 5(c) upon entry of the order granting permission to appeal.

(f) Briefs. — If permission to appeal is granted, the appellant shall serve and file his brief within 30 days after the date on which permission to appeal was granted. If the appellant files a brief with the application for permission to appeal as provided in subdivision (b) of this rule, he may also file a supplemental brief, which shall likewise be served and filed within 30 days after the date on which permission to appeal was granted. Except by order of the appellate court or a judge thereof, the argument in a supplemental brief shall not exceed 25 pages. If available, the color of the cover of a supplemental brief shall be blue. An appellant who elects not to file a supplemental brief shall, within 30 days after the date on which permission to appeal was granted, file with the clerk of the appellate court and serve on the appellee notice of his election not to file a supplemental brief; if the appellant fails to file a notice within 30 days, the appellee's time runs from the 30th day after permission to appeal was granted.

The appellee shall serve and file his brief within 30 days after service of the brief or supplemental brief of the appellant or appellant's notice of his election not to file a supplemental brief.

Reply briefs shall be served and filed within 14 days after service of the preceding brief.

The briefs shall conform with the requirements of Rule 27.

(g) Appeal in Criminal Actions. — Permission to appeal under this rule may be sought by the state and defendant in criminal actions. [As amended by orders entered January 31, 1984, effective August 15, 1984, January 29, 1987, effective August 1, 1987, January 24, 1992, effective July 1, 1992, and December 20, 1993, effective July 1, 1994.]

Advisory Commission Comments. This rule covers discretionary review by the Supreme Court of final decisions of the intermediate appellate courts. It does not speak to those cases in which an appeal lies directly from the trial court to the Supreme Court, since all direct appeals are either appeals as of right or appeals by permission covered by other rules. Similarly, this rule does not speak to plenary review of cases pending in the intermediate appellate courts, since discretionary review by the Supreme Court is limited to final decisions of the intermediate appellate courts. See Tenn. Code Ann. §§ 16-452, 27-819 (1955 & Supp. 1977) [§§ 16-5-112 (repealed), 27-8-119 (repealed)]. The essential purpose of the rule, therefore, is to identify those cases of such extraordinary importance as to justify the burdens of time, expense and effort associated with double appeals.

The situations described in subdivision (a) are not exclusive. Instead, subdivision (a) simply sets forth those reasons that typically will be considered sufficient to secure review by the Supreme Court. However, even cases falling within the articulated reasons are subject to review only in the discretion of the Supreme Court.

The procedure for securing review by the Supreme Court is essentially the same as the procedure for seeking permission for interlocutory review under Rule 9. It should be noted that the application for permission to appeal filed in the Supreme Court serves the purpose of demonstrating to that court that the case is an appropriate one for the exercise of the court's discretion in favor of permitting an appeal. The application is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court.

In order to avoid confusion with constitutional, common law and statutory certiorari, this rule changes existing terminology. This rule also differs from existing law in at least two additional respects. First, the rule requires two justices to vote in favor of granting permission to appeal, as opposed to the current law under which only one justice need favor granting certiorari in order for the case to be heard. See Tenn. Code Ann. § 27-819 (1955) [§ 27-8-119 (repealed)]. In addition, the time for filing an application for permission to appeal is 30 days from the date of entry of the judgment of the intermediate appellate court, and no extensions are permitted. This differs from the 45 days currently permitted for seeking certiorari, which time may be extended an additional 45 days. See Tenn. Code Ann. § 27-820 (1955) [repealed].

The [1987] amendments to (b) and (f) seek to clarify the prior rule in two respects. First, the appellant formerly was not required to notify the appellee of the election to file or not file a supplemental brief. Consequently, the appellee was unable to calculate the time for filing a responsive brief. The revised language requires the appellant to notify the appellee of an election not to file a supplemental brief; without such notice, the appellee will properly assume that time begins to run only upon service of the appellant's supplemental brief. Second, nothing in the earlier rule indicated the correct form for a supplemental brief. The revision limits the argument section to 25 pages and provides for a blue cover. [1987.]

Subdivision (b). The Supreme Court has been constrained to dismiss applications for permission to appeal filed more than the absolute maximum of 60 days from the Court of Appeals judgment. Examples are recited in State v. Sims, 626 S.W.2d 3 (Tenn. 1981). Perhaps some lawyers have requested an extension of time when the initial 30-day period ended on a weekend or holiday; and those lawyers have calculated the extra 30 days to begin on the following business day; that calculation is erroneous, dangerous, and sometimes fatal. The Commission recommends the amended language for emphasis and clarity. [1984.]

By cross-reference to T.R.A.P. 21(a) the reader will observe that, should the sixtieth day fall on a weekend or holiday, the permission to appeal application could be filed on the next business day. In this instance, the total time interval would actually exceed sixty days. In no event would the deadline be extended

where the thirtieth day was not a court day. [1984.]

Subdivision (f). The Supreme Court is receptive to a full brief on all issues accompanying the application for permission to appeal, but an application without brief will meet the requirement of the Rule. [1984.]

Advisory Commission Comments [1994]. The insertion of 'timely' in two places in the first sentence of subsection (b) clarifies the language. The proviso allows a discretionary extension.

Compiler's Notes. This rule may affect §§ 20-10-103, 69-6-126, 69-12-119 (repealed).

The amendment of this rule as promulgated and adopted by the supreme court in its order dated January 24, 1992, was ratified and approved by 1992 House Resolution No. 160 and Senate Resolution No. 61. The order promulgating the 1992 amendment of this rule provided that it take effect July 1, 1992.

The amendment of this rule as promulgated and adopted by the Supreme Court in its order dated December 20, 1993, was ratified and approved by 1994 House Resolution No. 119 and Senate Resolution No. 52. The order provided that the 1993 amendment of this rule take effect July 1, 1994.

On February 1, 1995, the supreme court of Tennessee promulgated the following proposed amendments and advisory commission comment, which, if approved by resolutions of both houses of the general assembly, take effect on July 1, 1995. The first amendment, in Rule 11(b), would delete the language after the semicolon in the first sentence, delete the second and third sentences, and in the first sentence substitute "60 days" for "30 days."

The second amendment would add the following language as subsection (h): "(h) GRANT OF PERMISSION; COST BOND. In civil cases, if application for permission to appeal is made by the appellee in the Court of Appeals and there is no appeal bond for costs with sufficient surety filed by the appealing party in the Court below, the appealing party must file an appeal bond for costs with sufficient surety in the amount of $1000. If this amount is deemed insufficient to cover the costs on appeal the Court may require an additional bond in an amount the Court deems sufficient to cover the cost of appeal. If application for permission to appeal is made by the appellant in the Court of Appeals and the appeal bond is insufficient to cover the cost of appeal, the Court may require the appealing party to file an additional bond in an amount the Court deems sufficient to cover the cost of appeal."

The advisory commission comment would read: "Advisory Commission Comment [1995]. The amendment to Rule 11(b) gives an absolute 60-day period for filing an application for permission to appeal."

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 702.

Tennessee Criminal Practice and Procedure (Raybin), §§ 12.48, 12.51, 33.100, 33.106.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-2-1, 2-11-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 26, 30, 51, 217; 5 Tenn. Juris., Certiorari, §§ 2, 18, 32.

Law Reviews. "Seeking Justice on Appeal," 27 No. 4, Tenn. B.J. 28 (1991).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

Cited: Puryear v. Belcher, 614 S.W.2d 344 (Tenn. 1981); Hogan v. Cooper, 619 S.W.2d 516 (Tenn. 1981); State v. Henderson, 620 S.W.2d 484 (Tenn. 1981); State v. Smith, 627 S.W.2d 356 (Tenn. 1982); State v. Campbell, 641 S.W.2d 890 (Tenn. 1982); Smith v. Smith, 643 S.W.2d 320 (Tenn. 1982); Stidham v. Fickle Heirs, 643 S.W.2d 324 (Tenn. 1982); State v. Shrum, 643 S.W.2d 891 (Tenn. 1982); State v. Warner, 649 S.W.2d 580 (Tenn. 1983); State v. Glenn, 649 S.W.2d 584 (Tenn. 1983); State v. Cabage, 649 S.W.2d 589 (Tenn. 1983); State v. Hammersley, 650 S.W.2d 352 (Tenn. 1983); State v. Bryant, 654 S.W.2d 389 (Tenn. 1983); Blasingame v. American Materials, Inc., 654 S.W.2d 659 (Tenn. 1983); Austin v. Memphis Publishing Co., 655 S.W.2d 146 (Tenn. 1983); Foley v. Hamilton, 659 S.W.2d 356 (Tenn. 1983); State v. Burchfield, 664 S.W.2d 284 (Tenn. 1984); State v. Bell, 664 S.W.2d 288 (Tenn. 1984); State v. Northington, 667 S.W.2d 57 (Tenn. 1984); State v. McClain, 667 S.W.2d 64 (Tenn. 1984); State v. Francis, 669 S.W.2d 85 (Tenn. 1984); Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471 (Tenn. 1984); Ferguson v. Paycheck, 672 S.W.2d 746 (Tenn. 1984); Turner v. Benson, 672 S.W.2d 752 (Tenn. 1984); Tansil v. Tansil, 673 S.W.2d 131 (Tenn. 1984); Fox v. Fox, 676 S.W.2d 956 (Tenn. 1984); Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 (Tenn. 1984); Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984); State v. Pierson, 678 S.W.2d 905 (Tenn. 1984); Union Carbide Corp. v. Alexander, 679 S.W.2d 938 (Tenn. 1984); King v. Warren, 680 S.W.2d 459 (Tenn. 1984); Holt v. Citizens Cent. Bank, 688 S.W.2d 414 (Tenn. 1984); Huskey v. State, 688 S.W.2d 417 (Tenn. 1984); State v. Seagroves, 691 S.W.2d 537 (Tenn. 1985); Peoples Nat'l Bank v. King, 697 S.W.2d 344 (Tenn. 1985); Lewis v. Allen, 698 S.W.2d 58 (Tenn. 1985); Chaille v. Warren, 689 S.W.2d 173 (Tenn. Ct. App. 1985); State v. Drake, 701 S.W.2d 604 (Tenn. 1985); Commerce Union Bank v Warren County, 707 S.W.2d 854 (Tenn. 1986); State v.

Hughes, 713 S.W.2d 58 (Tenn. 1986); Allen v. McWilliams, 715 S.W.2d 28 (Tenn. 1986); State v. Franklin, 714 S.W.2d 252 (Tenn. 1986); Tennessee Dep't of Human Servs. v. Barbee, 714 S.W.2d 263 (Tenn. 1986); State v. Dye, 715 S.W.2d 36 (Tenn. 1986); State v. Bouldin, 717 S.W.2d 584 (Tenn. 1986); Jadwin v. State, 718 S.W.2d 278 (Tenn. Crim. App. 1986); Lease v. Tipton, 722 S.W.2d 379 (Tenn. 1986); Hathaway v. Middle Tenn. Anesthesiology, P.C., 724 S.W.2d 355 (Tenn. Ct. App. 1986); Steinhouse v. Neal, 723 S.W.2d 625 (Tenn. 1987); Pankow v. Mitchell, 737 S.W.2d 293 (Tenn. Ct. App. 1987); State ex rel. Gerbitz v. Curriden, 738 S.W.2d 192 (Tenn. 1987); Delbridge v. State, 742 S.W.2d 266 (Tenn. 1987); McGee v. State, 739 S.W.2d 789 (Tenn. Crim. App. 1987); Wilson Mgt. Co. v. Star Distribs. Co., 745 S.W.2d 870 (Tenn. 1988); Seessel v. Seessel, 748 S.W.2d 422 (Tenn. 1988); State v. Brobeck, 751 S.W.2d 828 (Tenn. 1988); Thomasson v. Thomasson, 755 S.W.2d 779 (Tenn. 1988); Nevill v. City of Tullahoma, 756 S.W.2d 226 (Tenn. 1988); City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988); Kahn v. Kahn, 756 S.W.2d 685 (Tenn. 1988); Davenport v. State Farm Mut. Auto. Ins. Co., 756 S.W.2d 678 (Tenn. 1988); City of Bluff City v. Morrell, 764 S.W.2d 200 (Tenn. 1988); State v. Scales, 767 S.W.2d 157 (Tenn. 1989); Watson v. Cleveland Chair Co., 789 S.W.2d 538 (Tenn. 1989); Forrester v. State, 784 S.W.2d 1 (Tenn. Crim. App. 1989); Bayberrry Assoc. v. Jones, 783 S.W.2d 553 (Tenn. 1990); McCallen v. City of Memphis, 786 S.W.2d 633 (Tenn. 1990); State v. Hutcherson, 790 S.W.2d 532 (Tenn. 1990); Ferguson v. Peoples Nat'l Bank, 800 S.W.2d 181 (Tenn. 1990); H.D. Edgemon Contracting Co. v. King, 803 S.W.2d 220 (Tenn. 1991); State v. Davidson, 816 S.W.2d 316 (Tenn. 1991); John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991); Demontbreun v. CNA Ins. Cos., 822 S.W.2d 619 (Tenn. Ct. App. 1991); Curde v. Tri-City Bank & Trust Co., 826 S.W.2d 911 (Tenn. 1992); Sasser v. Averitt Express, Inc., 839 S.W.2d 422 (Tenn. Ct. App. 1992); Cook v. Spinnaker's of Rivergate, Inc., 846 S.W.2d 810 (Tenn. 1993); State v. Adams, 864 S.W.2d 31 (Tenn. 1993); Rust v. Rust, 864 S.W.2d 52 (Tenn. Ct. App. 1993).

NOTES TO DECISIONS

ANALYSIS

1. Time for application.
2. Extension of time.
3. Delayed appeal.
4. Insufficient grounds for appeal.
5. Waiver of appeal.

1. Time for Application.

The supreme court is without jurisdiction to determine an appeal after the expiration of the 60-day limitation for filing an application for permission to appeal prescribed by this rule. State v. Sims, 626 S.W.2d 3 (Tenn. 1981).

The burden is upon appellant and his counsel to calculate the proper number of days within which to file an application for permission to appeal, and to insure that the application is timely filed. State v. Sims, 626 S.W.2d 3 (Tenn. 1981).

2. Extension of Time.

Neither the supreme court nor any member thereof has authority to grant an extension of the time in which an application for permission to appeal must be filed pursuant to this rule beyond 60 days from the entry of judgment of the Court of Appeals. State v. Sims, 626 S.W.2d 3 (Tenn. 1981).

3. Delayed Appeal.

A defendant could not be deprived of second tier review through no fault of his own, and unilateral termination of a direct appeal following first-tier review entitled a prospective appellant to relief in the form of a delayed appeal. Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App. 1984).

4. Insufficient Grounds for Appeal.

Convictions entered in trial courts prior to Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which requires that guilty pleas be made knowingly and voluntarily, are not subject to post-conviction attack for Boykin violations. State v. Frazier, 784 S.W.2d 927 (Tenn. 1990).

Violations of the holdings in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), requiring trial judges to advise defendants of the consequences of guilty pleas, that exceed the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which requires guilty pleas to be made knowingly and voluntarily, are not constitutional violations and are not available except on direct appeal. State v. Frazier, 784 S.W.2d 927 (Tenn. 1990).

5. Waiver of Appeal.

The issue of waiver for failure to raise violations of the holdings in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which requires guilty pleas to be made knowingly and voluntarily, is not available to the state. State v. Frazier, 784 S.W.2d 927 (Tenn. 1990).

DECISIONS UNDER PRIOR RULE

ANALYSIS

1. Strict compliance.
2. Sufficiency of application.
3. —Effect of brief and argument.
4. Request for extension of time.
5. Cross-errors waived.
6. Procedure generally.

1. Strict Compliance.

To invoke the discretionary jurisdiction of the court, there must be strict compliance with the rules. Dearborne v. State, 575 S.W.2d 259 (Tenn. 1978).

2. Sufficiency of Application.

The petition must be complete within itself and must not attempt to supply a statement of facts and assignment of errors by reference to any other papers or to the record of the Court of Appeals. Mayor of Nashville v. Patton, 125 Tenn. 361, 143 S.W. 1131 (1911); Murrell v. Rich, 131 Tenn. 378, 175 S.W. 420 (1914).

Cause was not properly before the Supreme Court where the petition for the writ of certiorari to the Court of Appeals wholly failed to meet the requirements of former rule for the reason that there was no statement in the petition for certiorari as to the nature of the case or in what manner petitioner was prejudiced by the judgment and decree of the court. Kentucky-Tennessee Light & Power Co. v. Dunlap, 181 Tenn. 105, 178 S.W.2d 636 (1944).

Assignments of error relating to exclusion of evidence could not be considered by Supreme Court where substance of evidence excluded was not quoted with citation of record where evidence and ruling could be found. Roberts v. Tennessee Wesleyan College, 60 Tenn. App. 624, 450 S.W.2d 21 (1969).

3. —Effect of Brief and Argument.

Insufficient assignments were not cured by the brief and argument in support thereof not filed within the time allowed. Fort v. Fort, 118 Tenn. 103, 101 S.W. 433, 11 Ann. Cas. 964 (1906).

4. Request for Extension of Time.

There was no need to grant request for time to reply to adverse supplemental brief where the decision did not depend upon anything presented in such brief. New River Lumber Co. v. Blue Ridge Lumber Co., 146 Tenn. 181, 240 S.W. 763 (1921).

5. Cross-errors Waived.

Where certiorari is granted to one party and the other party does not assign cross-errors the party not assigning waives the right to do so. Davidson v. State, 223 Tenn. 193, 443 S.W.2d 457 (1969).

6. Procedure Generally.

Notwithstanding the discretion of the Supreme Court in certain cases to entertain a petition for the common law writ of certiorari to review the action of the Court of Criminal Appeals in granting or denying such a writ, the proper procedure is to petition the Court of Criminal Appeals for the writ and, upon its denial, to petition the Supreme Court for the writ, assigning as error the action of the trial court, and reciting fully the fact of the filing of the former petition and the action taken thereon by the Court of Criminal Appeals. Dearborne v. State, 575 S.W.2d 259 (Tenn. 1978).

Collateral References. 4 Am. Jur. 2d Appeal and Error §§ 290-351.

D. DIRECT APPELLATE REVIEW OF ADMINISTRATIVE PROCEEDINGS

Rule 12. Direct Review of Administrative Proceedings by the Court of Appeals.

I.

For those agencies which are subject to the Tennessee Uniform Administrative Procedures Act and from which appeals are taken directly to the Court of Appeals, the procedure upon review shall be as follows:

(a) Any person who is aggrieved by a final decision in a contested case may seek judicial review by filing a petition for review with the clerk of the Court

Amendment passed by Legislature 1995

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 11. APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT

(b) Time; Content.--

[Delete the language after the semicolon in the first sentence, and delete the second and third sentences. Substitute in the first sentence "60 days" for "30 days."]

Advisory Commission Comment

The amendment to Rule 11(b) gives an absolute 60-day period for filing a notice of appeal.

THE SUPREME COURT
STATE OF WASHINGTON

CHARLES Z. SMITH
JUSTICE
TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON
98504-0929

(360) 357-2053
SCAN 661-2053
TELEFACSIMILE (360) 357-2103

July 6, 1995

Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
Post Office Box 12238
Austin, Texas 78711

Dear Chief Justice Phillips:

I was pleased to learn from your letter of June 28 that the Texas Legislature has appropriated a sum of money for the Supreme Court of Texas to establish a Commission on Judicial Efficiency.

I was also pleased to note that the Legislature has asked the Chief Justice to consult with the National Center for State Courts, as well as the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts, to secure "guidance in the formulation, composition, and mandate of the Commission." I note the Legislature asks the Commission on Judicial Efficiency to provide a report "containing findings and recommendations regarding judicial selection, staff diversity within the court system, funding parity, and information technology." The subject of staff diversity seems to be within the purview of the Consortium.

My role is that of Moderator of the Consortium, a function I have assumed for several years without election, but after election for a one-year term in 1994, and election to a two-year term in 1995. Dr. Yolande P. Marlow, executive director of the New Jersey Supreme Court Committee on Minority Concerns, serves as the unpaid Coordinator for the Consortium. We meet only once each year. Our 1995 meeting was held in New Orleans on May 13. Our 1996 meeting will be held in Atlanta on Saturday, May 11, at the Marriott Marquis Hotel.

The Consortium has no funds and presently has no possible source of funds, although we have established a committee to explore funding. Some of us finance our activities from personal funds. I shall be available to speak with you, or members of your staff, to provide whatever advice we may pass on to you as you proceed towards establishment of your Commission. In large measure, we merely draw upon our own experience. Certainly in my case I draw upon my experience with the Washington State Minority and Justice Commission (since 1990) and its predecessor Washington State Minority and Justice Task Force (1987-1990). I telephoned your office upon receipt of your letter on July 5 and left a message that I had called.

In connection with the proposed Commission on Judicial Efficiency in process by the Supreme Court of Texas, I am responding to your request for information in my capacity as Moderator of the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts.

I start first with the Washington State Minority and Justice Commission which was created by order of the Washington State Supreme Court in October 1990 following the report of its predecessor, the Washington State Minority and Justice Task Force, created upon legislative request in 1987. Under a separate mailing, I am sending to you a copy of the 1994 Annual Report of our Commission. This report will provide a history of our activities from the beginning, a report of projects completed, and a report on projects under way or contemplated in the near future. Rather than encumbering you with actual copies of our research reports, I will offer to provide the actual document for any such report you may wish. In the meantime, I am providing a copy of this letter to Ms. Vicki J. Toyohara, executive director of our Commission, with the request that she respond to any inquiry you or members of your staff may make.

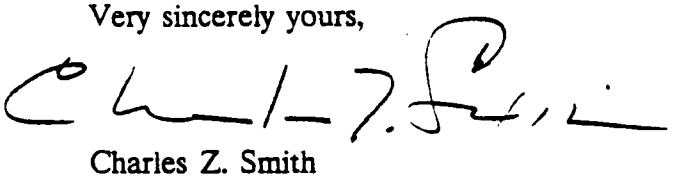
I serve, along with my Supreme Court colleague Justice James M. Dolliver, as co-chairman of the Commission. Of twenty-one members on our Commission, three are supreme court justices (Justice Charles W. Johnson is the other). The judiciary is also represented on the Commission by appellate court, superior court, district court and municipal court judges.

Following establishment of racial and ethnic bias commissions in New Jersey, Michigan, New York and Washington (which came together as the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts in 1988), the Conference of Chief Justices in 1990 recommended establishment of similar commissions in the other states by court order (later reaffirming that recommendation in 1993). To date we count as members court-mandated groups in Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Washington and the District of Columbia; and the Canadian provinces of British Columbia, Nova Scotia and Ontario.

A manual was published by the National Center for State Courts, *Establishing and Operating a Task Force or Commission on Racial and Ethnic Bias in the Courts.* It was actually developed by the National Consortium (its authors are the former executive directors of the New Jersey, New York, Michigan and Washington commissions). That document contains perhaps the best information for any court establishing a commission concerned with racial and ethnic fairness and diversity. It is out of print, but a copy may be available from the National Center for State Courts. In any event, I am sending you a photocopy of the document.

Our court will not be regularly in session for *en banc* hearings until September. I am thus reasonably available in my office in the interim except for absences attendant to meetings such as the American Bar Association in early August. You or members of your staff should feel free to communicate with me direct. I look forward to hearing from you further.

Very sincerely yours,



CZS:sa

Charles Z. Smith

cc: Dr. Yolande P. Marlow
Mr. H. Clifton Grandy
Ms. Vicki J. Toyohara

CHAMBERS OF
MICHAEL A. BILANDIC
CHIEF JUSTICE
SUPREME COURT OF ILLINOIS

160 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
(312) 793-5460

July 7, 1995

Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

Re: Your Letter of June 30, 1995

Dear Chief Justice Phillips:

The jurisdiction of the Supreme Court of Illinois is primarily discretionary, with petitions for leave to appeal comprising approximately 90 percent of the case filings on the Court's predominant docket. These petitions from decisions of the intermediate appellate court are limited in length to 20 pages, and a petitioner may elect to stand on his petition should the Court allow leave to appeal. I am enclosing a copy of Rule 315 which governs the leave to appeal process.

I hope that this information proves helpful.

Sincerely,

M A Bilandic

Michael A. Bilandic

Encl.

ILLINOIS SUPREME COURT RULES

PETITION FOR LEAVE TO APPEAL

Rule 315. Leave to Appeal From the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal; Grounds. Except as provided below for appeals from the Industrial Commission division of the Appellate Court, a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

No petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Industrial Commission orders shall be filed, unless at least one judge of that panel files a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court. A motion asking that such a statement be filed may be filed as a prayer for alternative relief in a petition for rehearing, but must, in any event, be filed within the time allowed for filing a petition for rehearing.

(b) Time; Contents. Unless a timely petition for rehearing is filed in the Appellate Court, a party seeking leave to appeal must file the petition for leave in the Supreme Court within 21 days after entry of the judgment of the Appellate Court, or within the same 21 days file an affidavit of intent to file a petition for leave, and file the petition within 35 days after the entry of such judgment. If a timely petition for rehearing is filed, the party seeking review must file the petition for leave to appeal within 21 days after the entry of the order denying the petition for rehearing, or within the same 21 days must file an affidavit of intent to file a petition, and file the petition within 35 days after entry of such order. If a petition is granted, the petition for leave to appeal must be filed within 21 days of the entry of the judgment on rehearing, or if within the same 21 days an affidavit of intent is filed, then within 35 days after the entry of such judgment. The Supreme Court, or a judge thereof, on motion, may extend the time for petitioning for leave to appeal, but such motions are not favored and will be allowed only in the most extreme and compelling circumstances.

The petition for leave to appeal shall contain, in the following order:

(1) a prayer for leave to appeal;

(2) a statement of the date upon which the judgment was entered; whether an affidavit of intent to seek review was filed and, if so, the date

it was filed; whether a petition for rehearing was filed and, if so, the date of the denial of the petition or the date of the judgment on rehearing;

(3) a statement of the points relied upon for reversal of the judgment of the Appellate Court;

(4) a fair and accurate statement of the facts, which shall contain the facts necessary to an understanding of the case, without argument or comment, with appropriate references to the pages of the record on appeal, *e.g.*, R. C7 or R. 7, or to the pages of the abstract, if one has been filed, *e.g.*, A. 7. Exhibits may be cited by references to pages of the record on appeal, or of the abstract, or by exhibit number followed by the page number within the exhibit, *e.g.*, Pl. Ex. 1, p. 6; and

(5) a short argument (including appropriate authorities) stating why review by the Supreme Court is warranted and why the decision of the Appellate Court should be reversed or modified; and

(6) an appendix which shall include a copy of the opinion or order of the Appellate Court and any documents from the record which are deemed necessary to the consideration of the petition.

(c) Format; Service; Filing. The petition shall otherwise be prepared, duplicated, served, and filed in accordance with the requirements for briefs as set forth in Rules 341 through 344, except that it shall be limited to 20 pages excluding only the appendix.

(d) Records; Abstracts. If an abstract has been filed in the Appellate Court, the petitioner shall file two or, if available, eight copies thereof in the Supreme Court, and for that purpose the clerk of the Appellate Court, when requested, shall release to the petitioner any available copies thereof. The clerk of the Supreme Court shall send notice of the filing of the petition to the clerk of the Appellate Court, who, upon request of the clerk of the Supreme Court made either before or after the petition is acted upon and at the expense of the petitioner, shall transmit to the clerk of the Supreme Court the record on appeal that was filed in the Appellate Court and a certified copy of the Appellate Court record. If leave to appeal is not granted, any certified papers and, to the extent available, copies of abstracts shall be returned forthwith to the clerk of the Appellate Court.

(e) Answer. The respondent need not but may file an answer, with proof of service, within 14 days after the expiration of the time for the filing of the petition, or within such further time as the Supreme Court or a judge thereof may grant within such 14-day period. An answer shall set forth reasons why the petition should not be granted, and shall conform, to the extent appropriate, to the form specified in this rule for the petition, omitting the items (1), (2), (3), (4) and (6) set forth in paragraph (b) except to the extent that correction of the petition is considered necessary. The answer shall be prepared, duplicated, served, and filed in accordance with the requirements for briefs except that it shall be limited to 20 pages excluding only the appendix. No reply to the answer shall be filed. If the respondent does not file an answer or otherwise appear but wants notice of the disposition of the petition for leave to appeal, a letter requesting such notice should be directed to the clerk in Springfield.

(f) Abstracts; Transmittal of Trial Court Record if Petition Is Granted. If the petition is granted, and to the extent that copies have not already been filed, the appellant shall file 20 copies of the abstract, as filed in the Appellate Court, within the time for the filing of his brief. If no abstract was filed in the Appellate Court, but the Supreme Court so orders, an abstract shall be prepared and filed in accordance with Rule 342. Upon the request of any party made at any time before oral argument or upon direction of the Supreme Court, the clerk of the Appellate Court, at the expense of the petitioner, shall transmit to the Supreme Court the record on appeal that was filed in the Appellate Court and the Appellate Court record, if not already filed in the Supreme Court.

(g) Briefs. If leave to appeal is allowed, the appellant may allow his or her petition for leave to appeal to stand as the brief of appellant, or may file a brief in lieu of or supplemental thereto. Within 14 days after the date on which leave to appeal was allowed, appellant shall serve on all counsel of record a notice of election to allow the petition for leave to appeal to stand as the brief of appellant, or to file an additional brief, and within the same time shall file a copy of the notice with the clerk of the Supreme Court. If appellant elects to allow the petition for leave to appeal to stand as his or her brief, appellant shall file with the notice a complete table of contents, with page references, of the record on appeal. If appellant elects to file an additional brief, it shall be filed within 35 days from the date on which leave to appeal was allowed. Motions to extend the time for filing an additional brief are not favored and will be allowed only in the most extreme and compelling circumstances.

The appellee may allow his or her answer to the petition for leave to appeal to stand as the brief of appellee, or may file a brief in lieu of or supplemental thereto. If the appellant has elected to allow the petition for leave to appeal to stand as the brief of appellant, within 14 days after the due date of appellant's notice the appellee shall serve on all counsel of record a notice of election to let the answer stand as the brief of appellee, or to file an additional brief, and within the same time shall file a copy of the notice with the clerk of the Supreme Court. If the appellee elects to file an additional brief, such brief shall be filed within 35 days of the due date of appellant's notice of election to let the petition for leave to appeal stand as the brief of appellant.

If the appellant has elected to file an additional brief, within 14 days after the due date of appellant's brief the appellee shall serve on all counsel of record a notice of election to let his or her answer stand as the brief of appellee, or to file an additional brief, and within the same time shall file a copy of the notice with the clerk of the Supreme Court. If appellee elects to file an additional brief it shall be filed within 35 days of the due date of appellant's brief.

If an appellee files a brief, the appellant may file a reply brief within 14 days of the due date of appellee's brief. If the brief of appellee contains arguments in support of cross-relief, the appellant's arguments in opposition shall be included in the reply brief and the appellee may file a reply brief confined strictly to those arguments within 14 days of the due date of appellant's

reply brief. If the brief of the appellee contains arguments in support of cross-relief, the cover of the brief shall be captioned: "Brief of Appellee. Cross-Relief Requested."

Briefs, pleadings and other documents filed with the Supreme Court in cases covered by this rule shall, to the extent appropriate, conform to Rules 341 through 344.

In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(h) Oral Argument. Oral argument may be requested as provided in Rule 352(a).

Amended effective November 30, 1972; amended effective September 1, 1974; amended October 1, 1976, effective November 15, 1976; amended September 29, 1978, effective November 1, 1978; amended July 30, 1979, effective October 15, 1979; amended February 19, 1982, effective April 1, 1982; amended May 28, 1982, effective July 1, 1982; amended February 1, 1984, effective February 1, 1984, with Justice Moran dissenting (see *Yellow Cab Co. v. Jones* (1985), 108 Ill. 2d 330, 342); amended April 27, 1984, effective July 1, 1984; amended February 21, 1986, effective August 1, 1986; amended February 27, 1987, effective April 1, 1987; amended April 7, 1993, effective June 1, 1993; amended December 17, 1993, effective February 1, 1994.

* * *

Commentary

(December 17, 1993)

Paragraph (b) is amended to require the filing of an affidavit of intent within 21 days of the Appellate Court judgment on rehearing or the Appellate Court order denying a petition for rehearing in order to have 35 days to file the petition for leave to appeal in the Supreme Court. Previously an affidavit of intent was not required to obtain a 35-day period when a petition for rehearing was filed in the Appellate Court.

Paragraphs (c) and (e) were amended to limit petitions for leave to appeal and answers, excluding appendices, to 20 pages.

Supreme Court

STATE OF ARIZONA

FROM THE CHAMBERS OF
STANLEY G. FELDMAN
CHIEF JUSTICE

1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3327
(602) 542-4532
FAX 542-9481

July 10, 1995

The Honorable Thomas R. Phillips
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711-2248

Dear Chief Justice Phillips:

I have your June 30 letter regarding certiorari jurisdiction. Except for capital cases and election appeals, this Court's jurisdiction is now entirely certiorari in nature, exercised after a dissatisfied litigant files what we call a petition for review. Under our rules (a copy of which is enclosed), the petition is quite limited in scope and size. It is designed to point out the reason why this Court should exercise its discretion to accept the case. We rule on these petitions without oral argument and almost always without supplemental briefing. If we grant review, the record is transmitted to us from the Court of Appeals. At that time, we utilize the litigants' briefs filed with that court. However, we sometimes request supplemental briefing and often grant motions for supplemental briefing. We also set some, but not all, cases for oral argument.

I do not believe that we could efficiently manage our certiorari jurisdiction with full briefing on every case. At the moment, we entertain approximately 1,200 petitions for review per year and grant less than five percent of them. If we allowed full briefing on each petition, we would be unable to manage our calendar.

I hope this information is of some help. If I can provide anything further, please write or call. I look forward to seeing you in Monterey and would be happy to discuss this further.

Best regards.

Yours truly,

Stanley G. Feldman

svc:trptexas.ltr

Enclosure

3RD00457

(b) **Time for Filing; Response.** Any party desiring reconsideration of a decision of an appellate court may file a motion for reconsideration in the appellate court within fifteen days after the filing of a decision by the appellate court. The motion shall not be amended except by leave of court.

No response to a motion for reconsideration will be filed unless requested by the Court, but a motion for reconsideration will not be granted in the absence of such a request.

Amended April 28, 1983, effective Sept. 1, 1983; June 24, 1993, effective Dec. 1, 1993; Feb. 24, 1994, effective June 1, 1994.

(c) **Contents.** A motion for reconsideration shall be directed solely to discussion of those specific points or matters in which it is claimed the appellate court erred in determination of facts or law. Neither the motion for reconsideration nor the response shall exceed fifteen pages.

Amended April 28, 1983, effective Sept. 1, 1983.

(d) **Motions Not Permitted.** Unless permitted by specific order of the appellate court, no party shall file a motion for reconsideration of (1) an order denying a motion for reconsideration; (2) an order denying a petition for review; or (3) an order declining to accept jurisdiction of a petition for special action.

Amended April 28, 1983, effective Sept. 1, 1983.

Comment to 1993 Amendment

The purpose of the 1993 amendment to Rule 22(b), which precluded responses to motions for reconsideration except upon request by the court, was to avoid the significant and in most cases unnecessary legal expense incurred in connection with motions for reconsideration. A parallel change was made in Rule 31.18(b), Rules of Criminal Procedure.

RULE 23. PETITION FOR REVIEW

(a) **Time for Filing; Cross-Petition.** Within thirty days after the filing of a decision or within fifteen days after the clerk has mailed notice of the determination of a motion for reconsideration, any party may file with the clerk of the Court of Appeals a petition for review by the Supreme Court. A cross-petition for review may be filed with the clerk of the Court of Appeals within fifteen days after either service of a petition for review or mailing by the clerk of notice of the determination of a motion for reconsideration.

Amended April 28, 1983, effective Sept. 1, 1983; amended effective July 6, 1987.

(b) **Priority of Motion for Reconsideration.** In the event of the timely filing of a petition for review prior to the disposition of a motion for reconsideration, further proceedings relating to the petition or cross-petition for review shall be stayed until the clerk of the Court of Appeals has mailed notice of the court's ruling on the motion for reconsideration.

If a motion for reconsideration is granted, proceedings relating to the petition or cross-petition for review shall be further stayed until the clerk of the Court of Appeals has mailed notice of the court's ruling on any motion for reconsideration of the decision upon reconsideration, or until the time for filing a motion for reconsideration of such decision upon reconsideration has expired.

In the event a petition or cross-petition has become moot by reason of the granting of a motion for reconsideration, the petitioner or cross-petitioner shall give immediate written notice of such mootness to the clerk of the Court of Appeals prior to the transmittal of the partial record to the clerk of the Supreme Court as provided in Rule 23(d).

Amended April 28, 1983, effective Sept. 1, 1983.

(c) **Form and Contents.** The form of the petition or cross-petition for review shall comply with Rule 6(c) and the parties shall be designated as in the Court of Appeals. The petition shall not exceed twenty pages, exclusive of the appendix, and shall contain concise statements of the following:

1. A synopsis of the decision of the Court of Appeals. A copy of the decision shall be attached to the petition.

2. The issues which were decided by the Court of Appeals and which the petitioner wishes to present to the Supreme Court for review. The petitioner shall also list, separately and without argument, those additional issues which were presented to, but not decided by, the Court of Appeals and which may need to be decided if review is granted.

3. The facts material to a consideration of the issues which are presented to the Supreme Court for review.

4. The reasons why the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

All references to the record on appeal shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices exclusive of the copy of the Appeals Court's decision exceed fifteen pages in length, such appendices shall be fastened together separately from the petition and the copy of the Appeals Court's decision.

Any petition for review presented for filing that does not substantially comply with this rule may, in the discretion of the clerk of the appellate court, be returned to the petitioner by the clerk with written instructions to the petitioner to file a proper petition

within 30 days from the date on which the written instructions are mailed to the petitioner.

Amended April 28, 1983, effective Sept. 1, 1983; Sept. 15, 1987, effective Nov. 15, 1987; May 24, 1989, effective Aug. 1, 1989; April 26, 1994, effective June 1, 1994.

(d) Transmittal of Partial Record Upon Filing of a Petition for Review. Upon the expiration of the time for filing a cross-petition for review, the clerk of the Court of Appeals shall transmit to the clerk of the Supreme Court a partial record of the case consisting of the original and all copies of the petition or cross-petition for review, the original and all copies of the briefs filed in the Court of Appeals, and one copy of the decision of the Court of Appeals.

Amended April 28, 1983, effective Sept. 1, 1983.

(e) Service and Response. The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on all parties who have appeared in the Court of Appeals. Any party wishing to oppose the petition or cross-petition may file with the clerk of the Supreme Court a response within thirty days from the date upon which the petition or cross-petition for review is served. The response shall comply with Rule 6(c) and shall not exceed twenty pages, exclusive of any appendix. All references to the record on appeal not contained in the petitioner's appendix shall be supported by an appendix to the response. The response shall not incorporate any document by reference except the appendices. Failure to file a response shall not be considered an admission that the petition should be granted. If the appendices exceed fifteen pages in length, such appendices shall be fastened together separately from the response.

If a response is filed, the response shall list, separately and without argument, those additional issues, if any, which were presented to, but not decided by, the Court of Appeals, which were not listed by the petitioner, and which may need to be decided if review is granted.

No reply shall be filed by petitioner unless the Court has so directed by specific order, in which event a reply may be filed within the time set by the Court.

Amended April 28, 1983, effective Sept. 1, 1983; Sept. 15, 1987, effective Nov. 15, 1987; May 24, 1989, effective Aug. 1, 1989; March 28, 1990, effective July 1, 1990; April 26, 1994, effective June 1, 1994.

(f) Order Granting Review. If the Supreme Court grants review, its order shall specify the issue or issues which are to be reviewed. The Supreme Court may order that the parties file additional briefs or that oral argument be heard, or both. If the order granting review does not provide for supplementation of briefs or for oral argument, either party may, within 15 days after the clerk mails notice of the Court's order, request the Court to do so by a motion specifying the reasons for supplementation or for oral argument, or both.

Amended April 28, 1983, effective Sept. 1, 1983.

(g) Transmittal of Remaining Record. Upon notification by the clerk of the Supreme Court that a petition or cross-petition for review has been granted, the clerk of the Court of Appeals shall transmit the remaining record to the clerk of the Supreme Court.

Amended April 28, 1983, effective Sept. 1, 1983.

(h) Order Denying Review. If the Supreme Court denied review, its order shall specify those justices of the Supreme Court, if any, who voted to grant review. When all petitions and cross-petitions for review have been denied, the clerk of the Supreme Court shall so notify the clerk of the Court of Appeals and the parties, and shall return the original copies of the briefs and the petition or cross-petition for review to the clerk of the Court of Appeals.

Amended April 28, 1983, effective Sept. 1, 1983; June 29, 1987, effective July 1, 1987.

(i) Dispositions.

(1) If an appeal is resolved by agreement of the parties after a petition for review by the Supreme Court is filed, the Supreme Court may order that the decision of the Court of Appeals be vacated, or that any opinion of the Court of Appeals be redesignated as a Memorandum Decision.

(2) When review has been granted, the Supreme Court may remand the appeal to the Court of Appeals for reconsideration in light of authority identified in the Supreme Court's order.

(3) If issues were raised in, but not decided by, the Court of Appeals and review has been granted, the Supreme Court may consider and decide such issues, may remand the appeal to the Court of Appeals for decision of such issues, or may make such other disposition with respect to such issues as it deems appropriate.

Amended May 24, 1989, effective Aug. 1, 1989.

(j) Motions to Extend Time. The court of appeals shall have authority to grant or deny motions to extend time to file motions for reconsideration of its decisions or opinions or to extend the time to file a petition for review. These motions shall be filed in the court of appeals.

Promulgated March 1, 1994, effective April 1, 1994.

RULE 24. ISSUANCE OF MANDATES BY APPELLATE COURTS AND MANDATES FROM UNITED STATES SUPREME COURT

(a) Mandates by Appellate Courts.

(1) If there has been no motion for reconsideration and no petition for review filed, the clerk of the Court of Appeals shall issue the mandate at the expiration of the time for the filing of such motion or petition.

(2) If a motion for reconsideration has been filed, the mandate shall not issue until the motion has been

ROBERT C. MURPHY
CHIEF JUDGE
COURT OF APPEALS OF MARYLAND
COURTS OF APPEAL BUILDING
ANNAPOLIS, MARYLAND 21401-1699

July 10, 1995

Honorable Thomas R. Phillips
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Tom:

Your letter of June 30, 1995 is herewith returned to you with my penciled notations.

With best regards,

Sincerely,

Robert C. Murphy

RCM:ja
Enclosure

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
LUCY D. HIGHTOWER
NATHAN L. HECHT
JOHN CORNYN
DOUG GAMMAGE
CRAIG ENOCH
JOSE SPECTOR
PRISCILLA R. OWEN

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX. (512) 463-1365

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

June 30, 1995

Honorable Robert C. Murphy
Chief Judge, Court of Appeals of Maryland
County Courts Bldg., 401 Bosley Ave.
Towson, Maryland 21204

Dear Chief Justice Murphy:

Until 1987, our Court exercised error-review jurisdiction. We were obligated to accept cases where the intermediate appellate court committed a material error of law, while we were forbidden to accept cases, no matter how significant, unless there was an error in the judgment, a dissenting opinion in the court below, or a conflict among different appellate courts.

To help us exercise this rather cumbersome jurisdiction, we required full briefing (limited to 50 pages) from petitioner within 25 days from the overruling of the motion for rehearing in the court below, and a full response from respondent 15 days thereafter. In most of our cases, no additional briefing was offered or received.

For nearly eight years, we have exercised largely certiorari jurisdiction, yet we cling to our old practice of full briefing. I believe that we might perform our functions more effectively, and at a substantial cost saving to litigants, if we limited our initial briefing to a short exposition of why we should take the case, e.g., why it either creates a conflict or presents issues "important to the jurisprudence of the state." Thus far, a majority of the bar, particularly the appellate specialists, resist such change.

My questions to you are these:

1) If you exercise largely certiorari jurisdiction, do you accept a case after full briefing or only after preliminary briefing, with full briefs to come later? Preliminary Briefing — Full Briefs later

2) Regardless of your state's practice, what is your opinion of the better practice for a supreme court with certiorari jurisdiction? As stated in one above

I look forward to seeing you in Monterey next month.

Very truly yours,

3RD00461

Thomas R. Phillips

Thomas R. Phillips
Chief Justice

SUPREME COURT OF MISSISSIPPI
POST OFFICE BOX 117
JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3697
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ARMIS E. HAWKINS
CHIEF JUSTICE

DAN M. LEE
LENORE L. PRATHER
PRESIDING JUSTICES

MICHAEL D. SULLIVAN
EDWIN LLOYD PITTMAN
FRED L. BANKS, JR.
CHUCK McRAE
JAMES L. ROBERTS, JR.
JAMES W. SMITH, JR.
JUSTICES

STEPHEN J. KIRCHMAYR
COURT ADMINISTRATOR

July 14, 1995

Chief Justice Thomas R. Phillips
THE SUPREME COURT OF TEXAS
P. O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

Chief Justice Hawkins asked that I send you the enclosed in response to your letter of June 30 to him. Our Court of Appeals is brand new, having begun January 3 of this year.

He said he will be glad to discuss your certiorari questions with you in California. He is and will be traveling between now and the Chief Justices' Conference.

Respectfully,

Jean K. Cochran

(Mrs.) Jean K. Cochran
Judicial Assistant to
Chief Justice Hawkins

Enclosure

3RD00462

be assigned to the Court of Appeals, the Supreme Court will retain all cases involving attorney discipline, judicial performance, and certified questions from a federal court. The Court will also ordinarily retain cases involving:

(1) a major question of first impression;

(2) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court;

(3) substantial constitutional questions as to the validity of a statute, ordinance, court rule, or administrative rule or regulation;

(4) issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court or conflict between the decisions of the two courts.

In assigning matters to the Court of Appeals, the Supreme Court may take into account the relative workloads of the Supreme Court and the Court of Appeals. The Supreme Court may also, by order, provide that cases falling within identified categories, defined by subject matter or other general criteria, shall be designated for immediate transfer to the Court of Appeals or retention by the Supreme Court, and, therefore, not subject to screening review. Except for those cases which the Supreme Court is required by statute to retain, a party has no right to have his or her case heard by the Supreme Court.

(e) Assignment Decision Final and Not Subject to Reconsideration on Petition of Party or Court of Appeals. After entry of an order assigning a case to the Court of Appeals, neither the Court of Appeals nor any party may file any pleading or certification seeking reassignment. Any reassignment may take place only on the motion of the Supreme Court.

[Adopted to govern matters filed on or after January 1, 1995.]

Comment

M.R.A.P. 16, dealing with the jurisdiction of the Supreme Court and the Court of Appeals, has no counterpart in the former Supreme Court Rules. The rule specifies the cases which must, pursuant to Miss.Code Ann. § 9-4-3(1) (Supp. 1994), be decided by the Supreme Court. The rule further provides that all matters involving bar discipline and judicial performance will be decided by the Supreme Court, as will certified questions from federal courts. The rule makes it clear that any other case may, in the discretion of the Supreme Court, be assigned to the Court of Appeals. The rule sets forth criteria for retention of other cases in the Supreme Court, but the rule suggests that the Supreme Court will not ordinarily exercise its discretion to retain a case unless it is apparent that the case presents an issue which is of such broad and fundamental public importance that the Supreme Court must ultimately be involved in its disposition or unless the issue presented is such that its resolution is highly likely to result in significant development of the law. The rule does not preclude the assignment of cases involving law development to the Court of Appeals but provides that such assignments will not be routinely made.

Section (d) provides that a party has no right to have his case heard by the Supreme Court, and section (a) provides that the Court will not entertain any pleading which seeks to have a case reassigned to the Supreme Court from the Court of Appeals.

RULE 17. REVIEW IN THE SUPREME COURT FOLLOWING DECISION BY THE COURT OF APPEALS

(a) Decisions of Court of Appeals Reviewable by Writ of Certiorari. A decision of the Court of Appeals is a final decision which is not reviewable by the Supreme Court except on writ of certiorari. Review on writ of certiorari is not a matter of right, but a matter of judicial discretion. The Supreme Court may grant a petition for writ of certiorari on the affirmative vote of four of its members and may, by granting such writ, review any decision of the Court of Appeals. Successive review of a decision of the Court of Appeals by the Supreme Court will ordinarily be granted only for the purpose of resolving substantial questions of law of general significance. Review will ordinarily be limited to:

(1) cases in which it appears that the Court of Appeals has rendered a decision which is in conflict with a prior decision of the Court of Appeals or published Supreme Court decision;

(2) cases in which it appears that the Court of Appeals has not considered a controlling constitutional provision;

(3) cases which should have been decided by the Supreme Court because:

(i) the statute or these rules require decision by the Supreme Court, or

(ii) they involve fundamental issues of broad public importance requiring determination by the Supreme Court.

Notwithstanding the presence of one or more of these factors, the Supreme Court may decline to grant a petition for certiorari for review of the decision of the Court of Appeals. The Court may, in the absence of these factors, grant a writ of certiorari.

(b) Time for Filing Petition for Writ of Certiorari; Content and Length of Petition. A party seeking review of a judgment of the Court of Appeals must first seek review of that court's decision by filing a petition for rehearing in the Court of Appeals. If a party seeks review in the Supreme Court, a petition for a writ of certiorari for review of the decision of the Court of Appeals must be filed in the Supreme Court and served on other parties within 14 days from the date of judgment by the Court of Appeals on the petition for rehearing. The petition for writ of certiorari may not exceed ten (10) pages in length and must briefly and succinctly state the precise basis on which the party seeks review by the Supreme Court, and may include citation of authority in support of that

contention. No citation to authority or argument may be incorporated into the petition by reference to another document. The petitioner must file an original and 10 copies of the petition. The petitioner must attach, as appendices to the petition, a copy of the opinion and judgment of the Court of Appeals, and a copy of the petition for rehearing filed in the Court of Appeals.

(c) Briefs and Oral Argument Not Permitted. Neither briefs nor oral argument shall be allowed in support of a petition for a writ of certiorari, unless requested by the Supreme Court.

(d) Response to Petition for Writ of Certiorari. Within 7 days after the filing of an application for a writ of certiorari, any other party to the case may, but need not, file and serve an original and 10 copies of a written response in opposition to the petition. The response may not exceed ten (10) pages in length. No citation to authority or argument may be incorporated into the response by reference to another document. The respondent may attach, as an appendix, his or her response to the petition for rehearing filed in the Court of Appeals.

(e) Decision by the Supreme Court. The Supreme Court shall act upon a petition for a writ of certiorari within 60 days of the filing of the petition. The failure of the Court to issue such a writ within that period shall constitute a rejection of the petition and the petition shall be deemed denied.

(f) Reconsideration Not Permitted. Neither an acceptance nor a rejection of a petition for certiorari shall be subject to further pleading by a party for rehearing or reconsideration. Prior to final disposition, the Supreme Court may, on its own motion, find that the petition for certiorari was improvidently granted and may dismiss the certiorari proceeding.

(g) Notification of Grant of Petition for Certiorari. Upon the Supreme Court's disposition of a petition for a writ of certiorari, the clerk of the Supreme Court shall immediately notify the parties.

(h) Record on Review. Upon notice of a grant of certiorari, any party may, whether requested by the Court or not, within 10 days, file an original and 10 copies of a supplemental brief not to exceed 10 pages. No additional time or pages shall be allowed for supplemental briefs. The Supreme Court may require supplemental briefs on the merits of all or some of the issues for review. The Supreme Court's review on the grant of certiorari shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed. The Supreme Court may limit the question on review.

(i) Oral Argument; Supplemental Briefs. Oral argument shall not be allowed, unless requested by the Supreme Court. The Court may require oral argument.

(j) Mandate. The timely filing of a petition for a writ of certiorari shall stay the issuance of the mandate of the Court of Appeals. Upon the issuance of an order of denial of a petition for a writ of certiorari or upon the expiration of the period allowed for the Supreme Court's consideration of such a petition, the clerk of the Supreme Court shall issue the mandate, pursuant to M.R.A.P. 41.

[Adopted to govern matters filed on or after January 1, 1995; amended February 10, 1995.]

Comment

Rule 17 provides a procedure by which parties may seek Supreme Court review of a judgment of the Court of Appeals. Section (a) follows Miss.Code Ann. § 9-4-3(2) (Supp. 1994) which provides that "[d]ecisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by [grant of] writ of certiorari ... by the affirmative vote of four (4) of [the Supreme Court's] members."

RULE 18. [OMITTED]

APPEALS FROM AGENCY RESPONSIBLE FOR UTILITY RATES

RULE 19. APPEALS FROM THE PUBLIC SERVICE COMMISSION

Appeals from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility are governed by statutes enacted pursuant to the Mississippi Constitution of 1890, art. 6, § 146.

[Adopted to govern matters filed on or after January 1, 1995.]

Comment

Legislative authority to provide for direct appeals to the Supreme Court from certain decisions of the Mississippi Public Service Commission was established by amendment to § 146 of the Mississippi Constitution of 1890. That amendment was ratified by the electorate on November 8, 1983, and was inserted as a part of the Constitution on January 3, 1984. Pursuant to the authority granted by § 146, the legislature enacted Miss.Code Ann. § 77-3-72 (1991) which establishes procedures for such direct appeals.

Under § 77-3-72, final orders in any utility rate proceeding involving a filing for a rate change are appealed by filing an "appeal" comparable to the Rule 3 notice of appeal. The "appeal," however, is filed with the clerk of the Supreme Court, not with the Commission, and it must "state briefly the nature of the proceedings before the commission, and shall specify the order complained of." Miss.Code Ann. § 77-3-72(1) (1991). The appeal is on the entire record unless the parties stipulate to the contrary. Miss.Code Ann. § 77-3-72(2) (1991). The statutes do not require a cost

Supreme Court of California
303 SECOND STREET, SOUTH TOWER
SAN FRANCISCO, CA 94107

MALCOLM M. LUCAS
CHIEF JUSTICE

July 13, 1995

Hon. Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Tom:

Thank you for your letter of June 30, posing questions regarding the briefing and review practices of the California Supreme Court.

Since 1985 or so, we have essentially exercised certiorari jurisdiction over non-death cases, confining our review to the isolated issues in a case that appear to require our attention. Prior to that time, a grant of review required us to address all issues in the case, regardless of their importance.

Before we accept review, the non prevailing party will file a petition for review setting forth the issues of possible interest to us. (The record accompanying this petition will also include the briefing of the appellate issues before the Court of Appeal.) The prevailing party may, or may not, answer the petition for review with a brief urging denial of review.

Once we decide to grant review, under the Rules of Court both parties then have the opportunity to file additional "briefs on the merits," confined, of course, to the issue or issues we designated for review.

The court staff generally find that these post-review briefs (1) are largely repetitive of the discussion already set out in the petition and answer, and (2) substantially delay setting the case for argument. I tend to agree that pre-review

briefing is usually adequate to develop the issues. The court may call for supplemental briefs if appropriate.

The danger in limiting pre-review briefing to a "short exposition" of the issues or reasons warranting review is that some petitions will be granted that are ultimately found unsuitable and must be dismissed as improvidently granted. I tend to favor a system of full pre-review briefing to assure that only appropriate cases are selected.

I too look forward to Monterey, and will see you there!

Cordially,

MALCOLM M. LUCAS

MML:mja

SUPREME JUDICIAL COURT
BOSTON, MASSACHUSETTS 02108

PAUL J. LIACOS
CHIEF JUSTICE

July 7, 1995

Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear ~~Chief Justice Phillips:~~

I write in response to your recent letter concerning your Court's exercise of certiorari jurisdiction and the related reliance on full briefing.

The cases which we hear come to this Court by five different routes. You may be especially interested in numbers four and five.

1. Original Entries - such as disciplinary proceedings involving clerks and judges.

2. Direct Entries - including appeals from convictions of murder in the first degree, as well as appeals from and reservations and reports by our Single Justice.

3. From the Appeals Court, before argument, on our initiative. We review each case filed in the Appeals Court, as it is briefed, to decide whether to exercise our authority to transfer the case here on our initiative if it raises a question of first impression, a question of constitutional law, or a question of significant public interest. We rely on the briefs filed in the Appeals Court in making our decisions. If a case has been fully briefed in the Appeals Court and it is then transferred here by us, no further briefs may be filed, except for a reply brief.

4. From the Appeals Court, before argument, at the request of one or both parties. After docketing an appeal with our Appeals Court, one or both parties may file with us an application for direct appellate review. The application procedure is governed by our Appellate Rule 11 (copy enclosed). Rule 11(b)(5) specifies that the argument not exceed ten typed pages. We make our decision whether to transfer the case based on this

application, without requiring full briefing.

5. From the Appeals Court, after decision, at the request of one or both parties. We also act on applications for review following a decision by the Appeals Court. The application procedure is governed by our Appellate Rule 27.1 (copy enclosed). Rule 27.1 (b)(5) provides that the application contain a statement not to exceed ten typed pages indicating why further appellate review is appropriate. We also make these decisions based on the applications. Of course, if the matter is particularly complex we might review the briefs prepared for the Appeals Court.

Thus, we do select a portion of our caseload based on short applications, without requiring briefing for this Court to aid us in making those decisions. If you would like additional information, please do not hesitate to ask.

I look forward to seeing you at the end of the month.

Sincerely,

Paul J. Liacos
Chief Justice

CJL:lah

Enclosures

RULE 11. DIRECT APPELLATE REVIEW

(a) **Application; When Filed; Grounds.** An appeal within the concurrent appellate jurisdiction of the Appeals Court and Supreme Judicial Court shall be entered in the Appeals Court before a party may apply to the Supreme Judicial Court for direct appellate review. Within twenty days after the docketing of an appeal in the Appeals Court, any party to the case (or two or more parties jointly) may apply in writing to the Supreme Judicial Court for direct appellate review, provided the questions presented by the appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court. Oral argument in support of an application will not be permitted except by order of court.

(b) **Contents of Application; Form.** The application for direct appellate review shall contain, in the following order: (1) a request for direct appellate review; (2) a statement of prior proceedings in the case; (3) a short statement of facts relevant to the appeal; (4) a statement of the issues of law raised by the appeal; (5) a brief argument thereon (covering not more than ten pages of typing) including appropriate authorities, in support of the applicant's position on such issues; and (6) a statement of reasons why direct appellate review is appropriate. A certified copy of the docket entries shall be appended to the application. The application shall comply with the requirements of Rule 20.

(c) **Opposition; Form.** Within ten days after the filing of the application, any other party to the case may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reason why the application should not be granted. The opposition shall not restate matters described in subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. The opposition shall comply with the requirements of Rule 20.

(d) **Filing; Service.** One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. Fourteen copies of the application and fourteen copies of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall comply with Rule 13.

(e) **Effect of Application Upon Appeal.** The filing of an application for direct appellate review shall not extend the time for filing briefs or doing any other act required to be done under these rules.

(f) **Order of Direct Appellate Review; Certification.** If any two justices of the Supreme Judicial Court shall sign an order for direct appellate review, or if all the justices of the Appeals Court or any majority thereof shall certify that direct appellate review is in the public interest, the order or the certificate as the case may be, shall be transmitted to the clerk of the Appeals Court; upon receipt, direct appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that the appeal has been transferred.

(g) **Cases Transferred for Direct Review; Time for Serving and Filing Briefs.** In any appeal transferred to the full Supreme Judicial Court from the Appeals Court:

(1) If at the time of transfer all parties have served and filed briefs in the Appeals Court, no further briefs may be filed except that a reply brief may be served and filed on or before the last date allowable had the case not been transferred, or within ten days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later.

(2) If at the time of transfer only the appellant's brief has been served and filed in the Appeals Court, the appellant may, but need not, serve and file an amended brief within twenty days after the date on which the appeal is docketed in the full Supreme Judicial Court. The appellee shall serve and file his brief within thirty days after service of any amended brief of the appellant, or within fifty days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later.

(3) Service and filing of a reply brief shall comply with Rule 19.

(4) If at the time of transfer to the full Supreme Judicial Court no party to the appeal has served or filed a brief, the appellant shall serve and file a brief within twenty days after the date on which the appeal is docketed in the full Supreme Judicial Court or within forty days after the date on which the appeal was docketed in the Appeals Court, whichever is later.

Amended May 15, 1979, effective July 1, 1979; amended effective July 1, 1991.

Reporters' Notes—1973

Appellate Rule 11 implements the statutorily-authorized direct review by the Supreme Judicial Court of cases which would otherwise first be heard and determined in the Appeals Court: G.L. c. 211A, § 10. (For procedure subsequent to an Appeals Court decision, see Appellate Rule 27.1). Direct review may result if: (1) The Supreme Judicial Court (or two justices thereof) shall so order, either (a) sua sponte, or (b) on application of one or more parties; or (2) The Appeals Court (or a majority of the justices thereof) shall certify that direct review is in the public interest.

The rule deals with the mechanics of application for direct review, and also prescribes the procedure governing cases accorded direct review, no matter what the means which caused such review (order by the Supreme Judicial Court ex mero motu, order on application, or certification by the Appeals Court).

Of the routes to direct review, only one—Supreme Judicial Court order after application—ought appropriately to be governed by the Appellate Rules. The other two, self-initiated exercises of judicial discretion and administration, are intracourt matters not subject to procedural regulation.

What Appellate Rule 11(a)–(d) accomplishes, therefore, is to assure appellate parties the right to put the matter before the Supreme Judicial Court and to urge direct review; the rule leaves all other means by which review may be granted out of the parties' control entirely, and completely in the dispositive power of the respective courts.

The application for direct review proceeds parallel to the usual requirements, Appellate Rule 11(e). Application does not in any way "stop the clock" with respect to normal appellate procedure. Once review is granted, however, a special timetable controls, Appellate Rule 11(g). In general, any brief already filed in the Appeals Court need not be refiled in the Supreme Judicial Court; if no party has yet filed, the briefing schedule, proceeding as though the appeal had commenced initially in the Supreme Judicial Court, is controlled by Appellate Rule 19.

Reporter's Notes—1979

Appellate Rule 11 was previously applicable to direct appellate review in criminal cases by virtue of Supreme Judicial Court Rule 3:24, § 4(1) (1975) 366 Mass. 870, (1975) except that the words "the appeal is docketed" were taken to mean "the case is entered." That distinction is no longer viable (see Rule 10([a][2]).

Only two changes are made in the former rule. A new first sentence is added to subdivision (a), which restates the first sentence of Supreme Judicial Court Rule 3:24 supra § 3. Section 3 also provided that:

> All matters preliminary to the entry of . . . appeals [within the concurrent appellate jurisdiction of the Appeals and Supreme Judicial Court] which require action by an appellate court shall be presented to and disposed of by the Appeals Court.

That requirement is implicit in Rule 11.

Secondly, the time within which an application for direct appellate review may be filed is increased from ten to twenty days after the docketing of the appeal in the Appeals Court. The remainder of the rule is unchanged.

RULE 27.1 FURTHER APPELLATE REVIEW

(a) Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order: (1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case (including whether any party is seeking a rehearing in the Appeals Court); (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating why further appellate review is appropriate. A copy of the rescript and opinion, if any, of the Appeals Court shall be appended to the application. In addition, if the Appeals Court entered a memorandum and order under Appeals Court Rule 1:28 which refers to another document, such as a brief or judge's findings and rulings, a copy of that document, or, if appropriate, the pertinent pages of that document, shall be appended to the application. The application shall comply with the requirements of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why the application should not be granted. The opposition shall not restate matters described in subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. Fourteen copies of the application, and fourteen copies of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Vote for Further Appellate Review; Certification. If any three justices of the Supreme Judicial Court shall vote for further appellate review for substantial reasons affecting the public interest or the interests of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, the vote or certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Briefs. Any party may apply to the Supreme Judicial Court within ten days of the granting of further appellate review for permission to file a separate or supplemental brief in the Supreme Judicial Court. If the application is granted, the court may impose terms as to the length and filing of such brief and any response thereto. If such permission is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs and appendix filed in the Appeals Court.

(g) Order of Argument. The applicant for leave to obtain further appellate review will argue first unless the court directs or the parties agree otherwise.

Amended effective Feb. 24, 1975; July 1, 1991; Jan. 1, 1994; Nov. 1, 1994; Feb. 1, 1995.

Reporters' Notes—1973

G.L. c. 211A, § 11 permits the Supreme Judicial Court, for substantial reasons of justice or the public interest, to review cases determined in the Appeals Court, provided three justices of the Supreme Judicial Court so order, or a majority of the Appeals Court or a majority of the Appeals Court panel deciding the case certify the desirability of further review. Appellate Rule 27.1 regulates the application for such review.

Further review is analogous to the granting of certiorari by the Supreme Court of the United States. Applications for such review will not ordinarily entail oral argument; and if granted, review will usually be argued on the briefs and record appendix filed in the Appeals Court.

Reporters' Notes—1975

As originally promulgated, a party desiring further appellate review had 10 days from the date of rescript to file an appropriate application. Because, in practice, this period did not suffice, it has been enlarged to 20 days. In addition, an amendment to Appellate Rule 27.1(f) allows a party who so desires to apply to the Supreme Judicial Court for leave to file a brief different from or supplementary to his brief in the Appeals Court. As originally promulgated, Rule 27.1(f) did not make clear that the party had a right to lodge such a request. However, absent leave of court, whether because the court denies the application or because the party fails to file it initially, the case will be argued on the Appeals Court papers.

Reporter's Notes—1979

Appellate Rule 27.1 was previously applicable to further appellate review in criminal cases by virtue of Supreme Judicial Court Rule 3:24, § 7 (1975: 366 Mass. 874), except that the words "record appendix" (prepared by the appellant) were taken to mean "record" (assembled by the clerk, former G.L. c. 278, § 33C [St.1974, c. 458, § 1]). That distinction is no longer viable (see Rule 18[a]).

In criminal cases, § 7 of Supreme Judicial Court Rule 3:24 imposes two requirements additional to those of Appellate Rule 27.1. Subdivision 27.1(d) calls for copies of an application for further appellate review and any opposition to be filed with the clerks of the Appeals and Supreme Judicial Courts; Rule 3:24, § 7 further mandates that a copy of the application is to be served on the clerk of the trial court the action of which is on appeal. Subdivision 27.1(e) provides for notice to the clerk of the lower court by the clerk of the Appeals Court when an application for further appellate review is granted; Rule 3:24, § 7 further requires such notice in criminal cases if an application is denied.

Reporter's Notes—1994

In those cases in which the Appeals Court has reversed or vacated the judgment in the Trial Court and the Supreme Judicial Court has allowed further appellate review, Rule

27.1(g) places the applicant for further appellate review in the position of appellant for the purpose of order of argument. See Rule 22(c). The court by order or the parties by agreement may change the order of argument. In a case in which both parties apply for further appellate review, order of argument will be controlled by such agreement of the parties or order of the court.

Reporter's Notes—1995

The 1995 amendment to appellate Rule 27.1(e) makes the rule consistent with the practice of the Supreme Judicial Court which is to vote for further appellate review but not to sign an order concerning such vote.

Supreme Court
of
Georgia
State Judicial Building
Atlanta, Georgia 30334

CHAMBERS OF
ROBERT BENHAM
CHIEF JUSTICE

656-3476

July 19, 1995

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

I am responding to your letter of June 30, 1995, in which you make inquiry about the practice of the Supreme Court of Georgia regarding the briefing of cert petitions, and my opinion as to the "better"practice.

While we do exercise cert jurisdiction and have many cert petitions filed, our Supreme Court Rule 29 provides that "A petition for the writ will be granted only in cases of great concern, gravity, and importance to the public." Consequently, only a small percentage of cert petitions are granted. The court is not without sufficient work, however, since the Georgia Constitution provides this court with original appellate jurisdiction in a variety of cases.

The cert petitions filed in this court are accompanied by what you have described as a preliminary brief -- a statement of the facts accompanied by a discussion of why cert should be granted, keeping Rule 29 in mind. Attached to the petition should also be a copy of the Court of Appeals' opinion which gave rise to the cert petition. If cert is granted, the parties are instructed to submit briefs on questions set forth by this court in the order granting cert, and the litigants are given the opportunity to orally argue the case before the court sitting en banc.

I believe our practice of a preliminary cert petition brief followed by a "fuller" brief should the petition be granted is better than having the parties fully brief the issues in the cert petition. Due to the sheer number of cert petitions filed, full briefing would require each justice to devote most of his/her time to reviewing cert petitions, to the detriment of pending cases. In addition, requiring the petitioners to initially establish gravity

forces the petitioner to focus on a limited number of issues rather than permit the petitioner to file a "shotgun" cert petition.

I hope my responses convey the information you need. Please feel free to contact me again should you wish additional information. I look forward to seeing you next week.

Very truly yours,

Robert Benham

Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

July 18, 1995

The Honorable Thomas R. Phillips
Chief Justice
Supreme Court of Texas
Post Office Box 12248, Capitol Station
Austin, Texas 78711

Dear Chief Justice Phillips:

Please excuse my delay in responding to your letter of June 30, 1995. I have been out of town a substantial portion of this period.

The Florida Supreme Court has certain mandatory jurisdiction, such as in death penalty cases and those in which statutes have been held unconstitutional. However, the bulk of our cases arrive as a result of a district court of appeal having certified that its decision passes on an issue of great public importance or a district court of appeal decision which conflicts in legal principle with a decision of another district court of appeal or one of our decisions. Thus, I gather that our jurisdiction is somewhat like yours in that we do not have unlimited certiorari jurisdiction of the type employed in the United States Supreme Court.

Though we retain discretion to reject them, our policy is to take all of the cases which are certified to us by the district courts of appeal. Hence, in these cases the parties simply go forward and file briefs on the merits.

The more troublesome jurisdiction is with respect to the so-called "conflict" cases. Naturally, the parties who lose in the district courts of appeal are anxious to obtain another review in our court. However, our rules provide that the conflict must appear from the face of the majority opinions which are being compared. Hence, district courts

of appeal decisions in which no opinions were written are unreviewable. Further, the parties are not permitted to discuss the case beyond that which is reflected in the opinion. A party seeking review in a conflict case files a brief on jurisdiction which cannot exceed ten pages. The winning party then files a respondent's brief on jurisdiction which also cannot exceed ten pages. These briefs do not discuss the wisdom of the decision but rather address only whether or not the subject decision conflicts in legal principle with another decision. There is no oral argument on the jurisdictional issue. If there is conflict, we still have discretion to deny review, but in most instances we go ahead and take the case. In the event we accept jurisdiction, the parties are then permitted to file full appellate briefs.

As you suggest, it might be well to modify your procedure to limit the initial briefing to matters directed toward whether or not you should accept the case for review. I would be happy to discuss this with you further in California.

With kind regards, I am

Sincerely yours,

Stephen H. Grimes

SHG/pm

SUPREME COURT OF ALABAMA
JUDICIAL BUILDING
300 DEXTER AVENUE
MONTGOMERY, AL 36104-3741
(334) 242-4609

July 18, 1995

The Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

Thank you for your letter of June 30th. At present, the Supreme Court of Alabama is in a state of transition from a high court with extensive original appellate jurisdiction to a Court with much greater certiorari jurisdiction.

At present, the Alabama Court of Criminal Appeals has jurisdiction of criminal cases and the Alabama Court of Civil Appeals has jurisdiction of cases involving an amount in controversy of $50,000 or less and workers' compensation and domestic relations cases. In addition, the Supreme Court has statutory authority to "transfer" cases within its jurisdiction to the Court of Civil Appeals as it deems appropriate. As new judges are added to the Court of Civil Appeals, the Supreme Court will be able to transfer cases for original appellate review and become more of a "certiorari" type court.

Certiorari practice in Alabama occurs with the Supreme Court's review of a petition for certiorari and a supporting brief. This petition and brief is not, in the usual case, as extensive as the briefing in an original appeal. I note, however, that the respondent may also present a brief arguing why certiorari should not be granted. Generally, full briefing is not undertaken until the Court grants the petition, and then both sides are permitted to file briefs on the issues presented.

With regard to your first question, our certiorari practice does envision preliminary briefing on the question of whether the petition is due to be granted. This briefing is generally less extensive than briefing of a full appeal, and the usual petition for certiorari is more easily reviewed and disposed than in a full appeal. However, as our certiorari practice increases, especially on the civil side, this situation may not hold true. There is nothing in our rules or statutes that would specifically limit the size of petitions and briefs, so only the narrowing effect of the lower appellate court's ruling on particular issues limits the extent of the Supreme Court's certiorari review.

As to your second question, I do believe that the better practice is a limited initial briefing of critical issues. It seems to me that such briefing is warranted by the review by the lower appellate court and its focus on particular issues of concern. This sort of approach also fits with the purpose of a certiorari court as the court to maintain uniformity within a particular judicial system.

Please let me know if I can be of any further assistance with this request. I will certainly be interested in any conclusions you gather as to the usual practice in briefing for petitions for certiorari. I look forward to seeing you soon.

Sincerely,

Sonny Hornsby
Chief Justice

SH:gw

MICHIGAN SUPREME COURT

JAMES H. BRICKLEY
CHIEF JUSTICE

July 12, 1995

Hon. Thomas R. Phillips
Chief Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief ~~Justice Phillips~~:

Your letter of June 30, 1995, has caused me to reflect upon the struggles of our Court with the very issues you raise. When our intermediate appellate court was created thirty years ago, many of us thought that the respective functions of the appellate courts would be error correction by the Court of Appeals and jurisprudence by the Supreme Court. Our experience, however, has not been nearly as tidy. Try as we might to strive for the ideal in maintaining the distinction, two factors have militated against our success.

One is the natural resistance of any judge to the idea of leaving an error uncorrected. Our Court has from time to time found an outlet for this pent-up instinct by entering peremptory orders disposing of cases without oral argument or opinion. The criticism of that practice from the bar has largely ignored the distinction between error correction and jurisprudential development, stressing instead the notion of the unfairness of not giving litigants the opportunity to present oral argument.

The more disheartening factor, which is probably the source of the resistance you have encountered, is the tendency of attorneys to take the short view (what do I say so my client will win?) rather than a longer view of the health of the jurisprudence. Our rules require a showing in an application for leave to appeal that "the issue involves legal principles of major significance to the state's jurisprudence," but we see that conclusory language echoed back at us over and over without supporting exposition. We urge the parties at oral argument in leave granted cases to provide us with substantial argument as to the significance of a particular case to our jurisprudence, and we invite amicus curiae participation in hopes that we will receive such

LAW BUILDING, P.O. BOX 30052, LANSING, MI 48909, PHONE (517) 373-0123

assistance from some source, but, again and again, we are disappointed. Our rules also provide that an application make a showing that the ruling below was "clearly erroneous," and it is this showing which is usually the exclusive focus of applications here.

I wish you luck in finding an effective method for getting real argument from the parties as to the long-term significance of the issues they present. If you do, I hope you will share it with us.

I look forward to visiting with you in Monterey.

Sincerely,

James A. Brickley
Chief Justice

JHB/cmd
CONF-CJ\PHILLIPS.LTR

THE SUPREME COURT
STATE OF WASHINGTON

BARBARA DURHAM
CHIEF JUSTICE

(360) 357-2049

TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON 98504-0929

July 25, 1995

The Honorable Thomas B. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

You wrote to me earlier this month requesting information on brief length restrictions in conjunction with certiorari jurisdiction.

In Washington, the Supreme Court does not exercise certiorari jurisdiction. Our Rules of Appellate Procedure permit review by either a matter of right (appeal) or discretionary review.

We do, however, have a procedure for streamlining some appeals which is known as a "motion on the merits". This procedure may be invoked by either the appellate court's motion or that of the parties. The motion may be presented any time after the appellant's brief is filed. A motion on the merits may not exceed 25 pages, excluding attachments. The motion may be decided by either an appellate court judge or commissioner or submitted with a recommendation to a panel of the appellate court.

A motion on the merits will be granted if the appeal or any part thereof is determined to be clearly without merit. The use of this procedure is optional with the Supreme Court and each of the three divisions of our intermediate appellate court.

In our experience the motion on the merits procedure has been effective in weeding out meritless appeals in an expedited manner resulting in savings to the litigants and the best use of limited court resources.

Sincerely,

B Durham

Barbara Durham

Supreme Court
STATE OF LOUISIANA
New Orleans

CHIEF JUSTICE
PASCAL F. CALOGERO, JR. First District
JUSTICES
WALTER F. MARCUS, JR. First District
JEFFREY P. VICTORY Second District
JACK CROZIER WATSON Third District
JAMES L. DENNIS Fourth District
CATHERINE D. KIMBALL Fifth District
HARRY T. LEMMON Sixth District
BERNETTE J. JOHNSON Orleans

301 LOYOLA AVE., 70112

TELEPHONE 504-568-5707

July 18, 1995

Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

In your letter of June 30, 1995, you requested information concerning the exercise of the Louisiana Supreme Court's jurisdiction. Although our state constitution provides that this court shall have exclusive original jurisdiction over bar disciplinary proceedings and appellate jurisdiction when a law or ordinance has been declared unconstitutional or if a defendant has been convicted of a capital offense and a penalty of death has been imposed, we primarily enjoy general supervisory jurisdiction over all other state courts.

While the exercise of that general supervisory jurisdiction rests within the discretion of the court, we have adopted guidelines in our Supreme Court Rules, which suggest certain reasons which must ordinarily be present in order for a writ application to be granted. These reasons include the existence of conflicting decisions, significant unresolved issues of law, erroneous interpretation or application of the constitution or laws, gross departure from proper judicial proceedings by the court of appeal, or the need to overrule or modify controlling precedents. Although these reasons do not control or fully measure the court's discretion, they provide some direction to the applicants and a statement of these considerations must be included in any writ application.

Our rules further provide that the application consist of a memorandum, not exceeding 25 pages in length, which contains a concise statement of the case, an assignment of errors, a summary of the argument, and an argument on each assignment of error. In civil matters, the appendix to the application is required to contain only copies of the action of the trial court and the court of appeal, and is limited to any other pleadings or documents that are specifically relevant to the writ application. Memoranda in

opposition to the writ application may be filed within 15 days of the filing of the writ application itself. Although our rules encourage the filing of oppositions, it is specified that they should be as brief as possible and must not exceed 25 pages in length. "Briefing" occurs only after a writ application has been granted or after the record has been lodged in the limited instances in which an appeal to this court is available. While our rules do not now contain size limitations on these briefs, as a practical matter, they are generally simply expansions of the memoranda in support of or in opposition to the writ application.

Since more than 3000 writ applications are filed annually in this state, it is essential that both the length of the memoranda and the number of attached exhibits be restricted in order to permit an adequate review by each justice within the time constraints imposed. Furthermore, our court plans to consider additional ways to reduce the volume of paper filed in association with each application. It may be that these limitations restrict the ability of some litigants to persuasively present their applications for the court's consideration. However, we are eager to emphasize to all applicants that we do not equate the merit of their memoranda and their weight.

We feel that subsequent briefing, after the writ application is granted, offers the litigants the chance to elaborate on their arguments or to focus on a particular issue should the court choose to so designate in its order. It also offers the respondent the opportunity to revise an obviously ineffective opposition. Although an imperfect procedure, I believe that the filing of a restricted writ application, to be followed by a brief which expands the arguments, is the better practice to first select meritorious applications from the thousands filed for our consideration and then to decide them after fuller briefing.

I hope that this information will be useful to you.

With kind personal regards, I remain

Very truly yours,

Pascal F. Calogero, Jr.
Chief Justice

SUPREME COURT OF NEW JERSEY

ROBERT N. WILENTZ
CHIEF JUSTICE

257 MONMOUTH ROAD
OAKHURST, NEW JERSEY 07755

July 25, 1995

Honorable Thomas R. Phillips
Chief Justice
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: Inquiry Regarding Certiorari Jurisdiction (your June 30 letter to Chief Justice Wilentz)

Dear Chief Justice Phillips:

This will acknowledge receipt of your June 30 letter asking Chief Justice Wilentz two questions on the topic of certiorari jurisdiction. He will be sending you a response to those questions shortly.

Sincerely,

Steven D. Bonville, Esquire
Special Assistant to
the Chief Justice

SUPREME COURT OF NEW JERSEY

ROBERT N. WILENTZ
CHIEF JUSTICE

257 MONMOUTH ROAD
OAKHURST, NEW JERSEY 07755

August 3, 1995

Chief Justice Thomas R. Phillips
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Chief Justice Phillips:

I write to respond, belatedly, to your letter of June 30, 1995. As you are well aware, I was unable to make it to Monterey. I hope you had an opportunity to chat with Associate Justice Dan O'Hern, who graciously agreed to substitute for me at the last minute. Although Dan probably gave you a clear and concise response to your letter's questions in person, I thought a written response wouldn't hurt, either. It will give you the incidental benefit of discovering whether the answers are consistent.

In response to Question 1, the New Jersey Supreme Court does most of its business through a certiorari procedure (which we have anglicized to be a "petition for certification" process). Under our Rules of Court, the parties are limited to twenty pages on their Supreme Court briefs. The Rules require counsel to focus on the issues on which they seek Supreme Court review; lengthy statements of facts and procedural histories are discouraged.

Counsel are also required to submit copies of the briefs they filed with the intermediate appellate court (our "Appellate Division of Superior Court") when they file their petitions for certification. Those briefs, which may be up to sixty-five pages long, are considered by the Court as a part of the petition for certification record.

If the Court grants cert, the briefing is <u>finished</u> unless the parties move before the Court for leave to file supplemental briefs.

In answer to Question 2, I am impelled to say -- all modesty aside -- that our practice works rather well. The Court has all the information it needs to decide whether to take a case while not being obliged to read more than necessary to make that decision. I would resist strongly any effort to

change our practice to make post-grant briefing mandatory. In many cases, it simply is not necessary.

If you would like further specifics on the certification process, I invite you or members of your staff to communicate with Stephen Townsend, the Clerk of our Court. His telephone number is (609) 984-7791 and his fax number is (609) 396-9056.

I hope that the foregoing is of some help to you. I would be interested to learn the results of your survey.

Very truly yours,

cc: Justice Daniel J. O'Hern
Stephen W. Townsend, Esquire
Steven D. Bonville, Esq.

The Chief Judge of the State of New York

Judith S. Kaye

August 15, 1995

Hon. Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Dear Tom:

I hope this response to your June 30 letter is still timely.

Our Court, which is largely a certiorari court, distinguishes between civil and criminal applications for leave to appeal. Criminal cases come to us by leave of a single Judge, with applications assigned to each Judge, in order of seniority, by the Clerk of the Court. Criminal leave applications (of which we have several thousand a year) are usually made by letter, and responding letter, from counsel, together with the briefs in the intermediate appellate court.

Civil cases come to us by leave of the full Court, requiring the vote of at least two of the seven Judges. The leave application is usually supported by a very preliminary brief, again attaching the intermediate appellate briefs. Based on this submission, one Judge prepares a written report recommending the grant or denial of leave. That report is then conferenced by the full Court.

Thus, the short answer to your first question is that we accept appeals after preliminary briefing--sometimes <u>very</u> preliminary briefing--with full briefs to come only after leave has been granted.

Our system works well--your second question--and certainly strikes me as a better practice than requiring full briefing from counsel before leaveworthiness is determined.

Sincerely,

Judith S. Kaye

3RD00487

SUPREME COURT

COURT of APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97310

RECORDS SECTION
503-986-5555
Fax 503-986-5560
TDD 503-986-5561

August 10, 1995

Honorable Thomas R. Phillips
Chief Justice
The Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: Your letter dated June 30, 1995, inquiring concerning certiorari jurisdiction

Your Honor,

The Supreme Court of Oregon has direct and mandatory appellate review of certain tax cases, of cases in which a sentence of death was imposed, and of a small number of other cases in which the legislature has established mandatory or direct review by the Court. The Court also has original, discretionary jurisdiction in mandamus, habeas corpus and a few other cases. The balance of the Court's cases come before it on petition for review of decisions of the Court of Appeals. The decision whether to grant review upon such a petition is wholly within the discretion of the Court. Enclosed are copies of Oregon Rules of Appellate Procedure (ORAP) 9.05 and 9.07 describing the petition for review process and identifying the criteria the Court employs in determining which cases to accept for review.

With respect to the issue of when is the appropriate time to request full briefing, our Court recently wrestled with that issue and, effective January 1, 1994, adopted new rules.

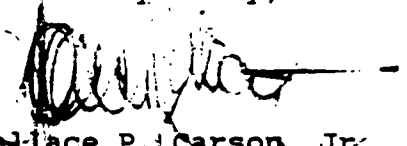
Under the former procedure, an aggrieved party seeking to invoke the Supreme Court's discretionary jurisdiction would file a petition for review. The petition for review was required to contain both a statement of reasons the party believed the Court should take the case and an argument on the merits of the case.

The ORAPs at that time permitted a party opposed to the petition to file a response brief arguing why the Court should not accept review. If the Court allowed review, the respondent also had the opportunity to file a brief on the merits, but there was no opportunity for the petitioner to submit additional briefing.

Effective January 1, 1994, the ORAPs were amended to permit the filing of briefs on the merits separate from the petition for review and the response to a petition for review. The Supreme Court of Oregon firmly believes that litigants spend too little time and thought on why their case merits exercise of the Court's discretionary jurisdiction and spend too much time arguing why the Court of Appeals was wrong. By distinctly separating the subject matter of a petition for review (focusing on why the Court should take the case, apart from the claimed error committed by the Court of Appeals) and the subject matter of a brief on the merits (focusing on the correct disposition of the legal issues themselves), we hope to sharpen parties' presentations regarding whether the court should take review at all.

Thank you for your inquiry. If I can provide you with any further information about our process of considering petitions for review or about our briefing system, feel free to contact me. I look forward to hearing about whether and how Texas will change its method of granting review.

Yours very truly,



Wallace P. Carson, Jr.
Chief Justice

g:corr.sc

9. PETITION FOR REVIEW AND RECONSIDERATION

Rule 9.05

PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

(1) Any party seeking to obtain review of a decision of the Court of Appeals shall file a petition for review in the Supreme Court within 35 days from the date of the Court of Appeals decision.

(2) The petition shall be in the form of a brief, prepared in conformity with Rules 5.05 and 5.35. The cover of the petition shall identify:

(a) Which party is the petitioner, including the name of the specific party or parties on whose behalf the petition is filed, if there are multiple parties on the same side in the case;

(b) The date of the decision of the Court of Appeals;

(c) The means of disposition of the case by the Court of Appeals:

(i) If by opinion, the author of the challenged opinion and the other members of the court who concurred in or dissented from the court's decision;

(ii) If without opinion (affirmed from the bench, affirmed without opinion or *per curiam*), the members of the court who decided the case.[1]

(3) The petition shall contain in order:

(a) A prayer for review.

(b) Concise statements of the legal question or questions presented on review and of the rule of law

(continued on next page)

that petitioner proposes be established, if review is allowed.

(c) A concise statement of each reason asserted for reversal or modification of the decision of the Court of Appeals, including appropriate authorities.

(d) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the Court of Appeals should not be restated.

(e) A brief argument related to each reason asserted for review, if desired.

(f) A statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court.

(g) A copy of the decision of the Court of Appeals, including the court's opinion and any concurring and dissenting opinions.

(4) An assertion of the grounds on which the of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with subsection 3(e) of this rule.[2]

(5) Any party filing a petition for review shall serve two copies of the petition on every other party to the appeal or judicial review, and file with the Administrator an original petition, marked as such, and 15 copies, together with proof of service.

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[1] *See* example in Appendix M.

[2] *See* Rule 9.07 regarding the criteria considered by the Supreme Court when deciding whether to grant discretionary review.

See generally, ORS 2.520; *see* Rule 7.25(2) regarding moving for an extension of time to file a petition for review.

Rule 9.07

CRITERIA FOR GRANTING DISCRETIONARY REVIEW

The Supreme Court considers the items set out below to be relevant to the decision whether to grant discretionary review. These criteria are published to inform and assist the bar and the public. They are neither exclusive nor binding. The court retains the inherent authority to allow or deny any petition for review. A petition for review may refer to those items that are relevant to the case and need not address each listed item.

(1) Whether the case presents a significant issue of law. A significant issue of law may include, for example:

(a) the interpretation of a constitutional provision,

(b) the interpretation of a statute,

(c) the constitutionality of a statute,

(d) the legality of an important governmental action,

(e) the use or effect of a rule of trial court procedure,

(f) the jurisdiction of the Court of Appeals or the trial court, or

(g) the application or proposed modification of a principle of common law.

(2) Whether the issue or a similar issue arises often.

(3) Whether many people are affected by the decision in the case. Whether the consequence of the decision is important to the public, even if the issue may not arise often.

(4) Whether the legal issue is an issue of state law.

(5) Whether the issue is one of first impression for the Supreme Court.

(continued on next page)

(6) Whether the same or a related issue is pending before the Supreme Court.

(7) Whether the legal issue is properly preserved, and whether the case is free from factual disputes or procedural obstacles that might prevent the Supreme Court from reaching the legal issue.

(8) Whether the record does, in fact, present the desired issue.

(9) Whether present case law is inconsistent (among Court of Appeals cases, between Court of Appeals cases and Supreme Court cases, or among Supreme Court cases).

(10) Whether it appears that trial courts or administrative agencies are inconsistent or confused in ruling on the issue that the case presents.

(11) Whether the Court of Appeals published a written opinion.

(12) Whether the Court of Appeals was divided on the case.

(13) Whether the Court of Appeals decided the case *in banc*.

(14) Whether the Court of Appeals decision appears to be wrong. If the decision appears to be wrong:

(a) Whether the error results in a serious or irreversible injustice or in a distortion or misapplication of a legal principle.

(b) Whether the error can be corrected by another branch of government, such as by legislation or rulemaking.

(15) Whether the issues are well presented in the briefs.

(16) Whether an amicus curiae has appeared, or is available to advise the court.

Rule 9.10

RESPONSE TO PETITION FOR REVIEW

(1) A party to an appeal or judicial review in the Court of Appeals may, but need not, file a response to a petition for review. In the absence of a response, the party's brief in the Court of Appeals will be considered as the response.

(2) A party seeking to respond to a petition for review may file a response within 21 days after the petition for review has been filed.

(3) A response shall conform to Rules 5.05 and 5.35. The cover of a response shall be orange. Any party filing a response shall file with the Administrator one response, marked as the original, and 15 copies, serve 2 copies of the response on every other party to the review and file proof of service.

Rule 9.17

BRIEFS ON THE MERITS ON REVIEW

(1) After the Supreme Court allows review, the parties to the case on review may file briefs on the merits of the case, as provided in this rule. A respondent may file a brief on the merits on review even if the petitioner on review elects not to do so.

(2) Within 7 days after the petition for review is filed, the petitioner shall file with the court and serve on the parties to the review a notice stating whether petitioner intends to file a brief on the merits or to rely on the petition for review and brief or briefs filed in the Court of Appeals. If the petitioner files no notice, petitioner will not be permitted to file a brief without leave of the court.

(3) (a) If a petitioner on review has filed a notice of intent to file a brief on the merits, the petitioner

(continued on next page)

shall have 28 days from the date that the Supreme Court allows review to file the brief.

(b) The brief on the merits of the petitioner on review shall contain:

(i) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established. The questions should not be argumentative or repetitious. The phrasing of the questions need not be identical with any statement of questions presented in the petition for review, but the brief may not raise additional questions or change the substance of the questions already presented.

(ii) A concise statement of:

(A) The nature of the action or proceeding, the relief sought in the trial court, and the nature of the judgment rendered by the trial court; and

(B) All the facts of the case material to determination of the review, in narrative form with references to the places in the record where the facts appear.

(iii) A summary of the argument.

(iv) The argument.

(v) A conclusion, specifying with particularity the relief which the party seeks.

(c) The brief on the merits of the petitioner on review shall conform to Rules 5.05, 5.35 and 9.05(2), except that the cover of the brief shall be white.

(continued on next page)

(4) (a) The brief on the merits of the respondent on review shall be filed within these time limits:

(i) If petitioner on review files a brief on the merits on review, respondent's brief is due within 28 days thereafter;

(ii) If petitioner on review files a notice of intent to file a brief on the merits but ultimately either does not do so or does not do so within the time allowed, respondent's brief is due within 28 days after the date on which petitioner's brief was due;

(iii) If petitioner on review files a notice of intent not to file a brief on the merits, respondent's brief is due within 28 days after review is allowed.

(b) Items required by subsection (3)(b) of this rule need not be included in the brief on the merits of the respondent on review unless respondent is dissatisfied with their presentation in petitioner's brief.

(c) The brief on the merits of respondent on review shall conform to Rules 5.05 and 5.35, except that the cover of a brief shall be tan.

(5) The original of each brief, marked as such, and 12 copies, shall be filed with the Administrator, together with proof of service. Two copies of the brief shall be served on each party to the review.

Rule 9.20

ALLOWANCE OF REVIEW BY SUPREME COURT

(1) A petition for review of a decision of the Court of Appeals shall be allowed if one less than a majority of the judges eligible to vote on the petition vote to allow it.

(2) If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.

(3) When the Supreme Court allows a petition for review, the court may request the parties to address specific questions. Those specific questions should be addressed on oral argument and may also be addressed in the parties' briefs on the merits or by additional memoranda. If addressed by additional memoranda, the original and 12 copies of such additional memoranda shall be served and filed not less than 7 days before argument or submission of the case.

(4) The parties' briefs in the Court of Appeals will be considered as the main briefs in the Supreme Court, supplemented by the petition for review and any response, brief on the merits or additional memoranda that may be filed.[1]

(5) The record on review shall consist of the record before the Court of Appeals.

[1] *See* Rule 9.10 regarding responses to petitions for review; *see* Rule 9.17 regarding briefs on the merits.

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

October 2, 1995

Hon. Clarence A. Guittard
6306 Desco
Dallas, Texas 75225

Professor William V. Dorsaneo
School of Law
Southern Methodist University
Dallas, Texas 75275-0116

Mr. Michael A. Hatchell
Ramey & Flock
500 First Place
Tyler, Texas 75702

Dear Gentlemen:

Enclosed is a copy of an article prepared by Scott Rothenberg listing the "Ten Worst Traps" in the Texas Rules of Appellate Procedure. I think traps 10, 9, 8 and 7 have been fixed by the proposed amendments; I don't think there is a solution for traps 6, 5, 2 and 1; and I am not sure if the proposed amendments fix traps 4 and 3.

Please let me know if you think we need to make any further amendments in light of Mr. Rothenberg's paper.

Sincerely,

E. Lee Parsley
Rules Staff Attorney

enc.

3RD00494

c: Mr. Luther H. Soules, III

TEN WORST TRAPS

SCOTT ROTHENBERG
Law Offices of Scott Rothenberg
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Bellaire, Texas 77401-4505
(713) 667-5300 (telephone)
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9TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE
State Bar of Texas Professional Development Program
September 14-15, 1995

R

TEN WORST TRAPS

Scott Rothenberg

INTRODUCTION

Before getting to the Ten Worst Traps themselves, a few housekeeping items are in order.

First, some continuing legal education articles are nothing more than an opportunity for the author to pontificate for pages on end about some abstract and obscure point of legal minutiae. See, e.g., Rothenberg, S., "Advanced Legal Research – 15 Tips and 20 Traps," State Bar of Texas Advanced Civil Appellate Practice Course, Fall, 1994. This one is not. If I have done my job well, this article will serve as a practical, point-by-point discussion of ten of the trickiest aspects of appellate practice this side of the Sabine, Rio Grande and Red Rivers.

Second, in order to save valuable paper, the following abbreviations are used throughout this article:

TRCP = Texas Rules of Civil Procedure;
TRCE = Texas Rules of Civil Evidence;
TRAP = Texas Rules of Appellate Procedure.

Third, it should be stated at the outset that the author has no axe to grind with any court, counsel, or litigant with regard to the matters discussed in this article. The author is neither counsel of record in, nor a party to, any of the appeals discussed in this paper. The author has the utmost respect for each and every judge who is a member of all of the courts that have issued opinions in cases discussed in this paper. The commentary contained in this paper is not intended to single out any judge, panel of judges, or court for criticism. The commentary contained in this paper is intended solely to apprise appellate practitioners of potentially dangerous and little-known traps that have arisen through the development of the common law of the State of Texas. If, by chance, an appellate judge or court should happen to agree that one or more of the traps discussed in this paper should be eliminated, we have done a service both to our profession and to the people of the State of Texas.

Fourth, the author represents both plaintiffs and defendants in personal injury litigation (although not in the same lawsuit). The opinions stated in this article do not reflect any particular bias one way or the other, except, perhaps, for the author's bias that it should not take board certification to be able to figure out how to preserve error, perfect an appeal, write a brief, or any of the other things that appellate lawyers do on a day-to-day basis.

Finally, the reader is cautioned that several of the cases discussed in this article were still pending on rehearing in the appellate courts of the State of Texas at the time this article was written. Therefore, the reader is strongly cautioned to shepardize and check writ histories before relying on them in any court proceeding or other written publication.

As we are about to see, there are several very good reasons why the Texas Rules of Appellate Procedure are commonly referred to as TRAPs.

TRAP NUMBER 10 - The Multiple Parties Appeal Bond Trap

In Burlington Northern Railroad Co. v. Taylor, 1995 WL 500422, 01-94-00360-CV, ___ S.W.2d ___ (Tex. App.– Houston [1st Dist.] August 24, 1995, no writ history), the Taylors sued Burlington Northern and Barnard for negligence and gross negligence. The jury found that Burlington and Barnard were each negligent and liable for 50% of the Taylors' damages. Prior to trial, Burlington had cross-acted against Barnard for contribution. The trial court's judgment did not award Burlington a right of contribution against Barnard in the event Burlington paid more than 50% of the plaintiffs' damages.

Burlington appealed, specifically naming only the Taylors in their appeal bond. Among other relief sought, Burlington asked the court of appeals to reform the trial court's judgment to reflect that it was entitled to contribution against Barnard to the extent that Burlington paid more than 50% of the plaintiffs' damages.

Citing Lone Star Ford, Inc. v. Cooper, 838 S.W.2d 734, 742 (Tex. App.– Houston [1st Dist.] 1992, writ denied), the First Court of Appeals dismissed Burlington's appeal against Barnard, stating that an appellant may not obtain appellate relief against a party at trial that was not named in the appeal bond. Burlington Northern, Opinion at 3-4.

In the author's opinion, both Burlington Northern and Lone Star are wrongly decided. TRAP 46(a) states, in relevant part, as follows:

> Unless excused by law, the appellant shall execute a bond payable to the appellee in the sum of $1000 unless the court fixes a different amount upon its own motion or motion of either party or any interested officer of the court. . . . Appellant may make the bond

> payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee.

Thus, TRAP 46(a) does state that the bond shall be made payable to either the appellee or to the clerk. TRAP 46(a) does not state that a party to the trial court's final judgment must be named in the appeal bond in order for the appellant to obtain appellate relief against that party. A litigant or attorney reading the face of TRAP 46(a) would not know that the appeal bond must name all parties against whom appellate relief is sought. This is especially true where, as here, the express wording of the rule states that the bond could have been made payable to the clerk of the court rather than the appellees.

The first and best solution to the Burlington Northern - Lone Star trap is for a court of appeals to recognize the trap and dismantle it. Until that occurs, you are strongly advised to make your appeal bonds payable to the clerk of the court rather than to the appellees. In the alternative, be certain to include all parties against whom you seek appellate relief in the appeal bond.

TRAP NUMBER 9 - Everything I Needed to Know about the Appellate Timetable I Learned by Reading the Texas Rules of Appellate Procedure -- NOT!

TRAP 54(a) states that in civil cases, the transcript and statement of facts shall be filed within 60 days after the date of judgment if no timely motion for new trial, motion to modify the judgment or request for findings of fact and conclusions of law are filed, or 120 days after the date of judgment if any of the foregoing are timely filed. The trap here is that you can be in total compliance with TRAP 54(a), and every other Texas Rule of Appellate Procedure, for that matter, and still lose your appeal on procedural grounds.

As many of you are aware by now, several counties throughout the State of Texas have received permission from the Supreme Court of Texas to generate electronic or tape-recorded statements of facts rather than the traditional stenographically produced statement of facts that most of us are familiar with. Nothing tricky so far. This trap arises for three reasons.

First, the orders authorizing the courts in question to generate electronic or tape-recorded statements of facts contain deadlines that are shorter than the deadline authorized in TRAP 54(a). Typically, an electronic statement of facts must be filed with the clerk of the court of appeals within fifteen days after the perfection of an appeal.

Second, the deadlines contained in orders authorizing the courts in question to generate electronic or tape-recorded statements of facts expressly supercede TRAP 54(a) even though there is no reference to the existence of these shorter deadlines anywhere in the Texas Rules of Appellate Procedure.

Third, the Orders of the Supreme Court of Texas authorizing the use of electronic or tape-recorded statements of facts are not published either in West's Southwestern Reporter 2d or in the Texas Lawyer magazine. At best, they are available by request from the Clerk of the Supreme Court.

Why is this trap so potentially dangerous? Assume the following scenario:

January 2, 1996	trial court signs final judgment.
February 1, 1996	motion for new trial timely-filed.
February 28, 1996	appeal is perfected.
March 14, 1996	electronic statement of facts due to be filed.
March 29, 1996	last day for filing motion to extend time for filing of statement of facts.
May 1, 1996	stenographic statement of facts due to be filed.

If you did not know that the statement of facts was recorded electronically rather than stenographically, you could attempt to file the statement of facts two weeks "early" on April 15, 1996, only to find out that your deadline for filing the statement of facts expired approximately one month earlier and your deadline for filing a motion for extension of time expired approximately two weeks earlier.

In Uptmore v. Fourth Court of Appeals, 878 S.W.2d 601 (Tex. 1994), the Supreme Court of Texas afforded appellate attorneys some measure of relief from the potentially onerous application of this trap. The court held, in relevant part, as follows:

> Within the time in which the appellate record must be filed under Rule 54, relator tendered not only the recordings of the proceedings, together with the exhibits and other materials, but a transcription of the recordings as well. In these circumstances, relator satisfied the requirements of the appellate rules. The appellate court abused its discretion in concluding that it was without authority to accept and consider the statement of facts.

Uptmore v. Fourth Court of Appeals, 878 S.W.2d 601, 601 (Tex. 1994).

An appellate attorney who misses the deadline for filing an electronic statement of facts and for filing a motion for extension of time for the filing of the electronic statement of facts, can apparently avoid this particular trap by filing a "transcription of the recordings" within the 60 or 120 days allotted by TRAP 54. The unanswered question is whether the "transcription of the recordings" filed by the relator in Uptmore was prepared by the official court reporter or the relator's own office staff. If the former, will the latter suffice in the event the official court reporter cannot timely prepare the transcription of the recordings?

The foregoing questions remain to be answered another day. For now, all appellate practitioners who handle appeals from trial courts in the following counties are well-advised to specifically ask court personnel whether an electronic or tape-recorded record is being used, and to adhere to the accelerated deadlines in the event that they are: Bexar, Brazos, Dallas, Harris, Haskell, Kent, Kleberg, Liberty, Montgomery, Stonewall & Throckmorton.

TRAP NUMBER 8 - My Client's Appeal Bond is Valid Even though he has Filed for Bankruptcy – NOT!

If you file an appeal bond on behalf of your client after he or she has filed for bankruptcy while the bankruptcy is pending, the appeal bond is not valid. It is not even voidable. **It is void!** Burrhus v. M.S. Mach. Supply Co., 897 S.W.2d 871, 873 (Tex. App.– San Antonio 1995, no writ history); Nautical Landings Marina, Inc. v. First Nat'l Bank in Port Lavaca, 791 S.W.2d 293, 296 (Tex. App.– Corpus Christi 1990 writ denied).

If your client is in financial difficulty and bankruptcy is contemplated, either perfect the appeal prior to the filing or wait until after the stay has been lifted or the bankruptcy proceedings are concluded. Otherwise, you may find your appeal dismissed because it was not timely perfected.

TRAP NUMBER 7 - You Need an Extension of Time to File the Appeal Bond after a Temporary Injunction Hearing. No problem, right? WRONG!

You've just completed a three-day hearing on your opponent's motion for a temporary injunction. The trial court granted the injunction. Your client wishes to appeal. TRAP 42 states that the appeal must be perfected within twenty days after the judgment or other appealable order is signed. Your client needs an additional few days to decide whether to appeal before ultimately filing the appeal bond. TRAP 41(a)(2) permits extensions of time for the filing of the appeal bond so long as the motion for extension is filed within 15 days of the date that the appeal is to be perfected. What will you do? What will you do?

If you want to represent your client competently, you will inform your client that the appeal bond must be filed within twenty days of the date that the order is signed and that no extensions are permitted as a matter of law. In Rosanky v. Seal-Pac Professional Services, Inc., 775 S.W.2d 675, 675-76 (Tex.App.– Houston [14th Dist.] 1989, writ denied) and St. Louis Federal Savings & Loan Ass'n v. Summerhouse Joint Venture, 739 S.W.2d 441 (Tex.App.– Corpus Christi 1987, no writ), the 14th and Corpus Christi Courts of Appeals held that since TRAP 42 contains the deadlines for perfection of the accelerated appeal, and TRAP 41 contains the provisions for extension of time to perfect the appeal, TRAP 41 does not apply to TRAP 42. Therefore, despite an express rule of civil procedure permitting extensions of time for perfection of the appeal, a party may not extend the time for perfection of an appeal in accelerated appeals.

TRAP NUMBER 6 - Briefing Rules are Construed Liberally– NOT!

In Inpetco, Inc. v. Texas American Bank/Houston, N.A., 729 S.W.2d 300 (Tex. 1987), the Supreme Court of Texas disapproved of that portion of the court of appeals' opinion which states that Inpetco waived its point of error by failing to comply with the briefing requirements of TRAP 74. The court stated that TRAP 74 should be read in conjunction with TRAP 83 which provides that, "A judgment shall not be affirmed or reversed or an appeal dismissed for defects in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities. . . ." The supreme court concluded that the court of appeals "erred in affirming the trial court on the basis of Inpetco's briefing inadequacies without first ordering Inpetco to rebrief." Id. But see Fredonia State Bank v. General American Life Ins. Co., 881 S.W.2d 279, 284 (Tex. 1994) ("[A]n appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing, and that whether that discretion has been properly exercised depends on the facts of the case.").

The problem with the supreme court's Fredonia analysis is that it violates the court's own rules pertaining to abuse of discretion. Abuse of discretion is established when a court acts "without reference to any guiding rules and principles." Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991) (citing Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985)). The guiding principle addressing rebriefing is TRAP 83 which says that litigants shall be given a reasonable opportunity to cure deficiencies in their appeals, briefing or otherwise. If the guiding principle– Rule 83– requires rebriefing or other opportunity to correct the substantive or procedural deficiency, then it must be incorrect that an appellate court

"has some discretion to choose between deeming a point waived and allowing amendment or rebriefing."

The bottom line is that although TRAP 83 facially permits litigants to correct substantive or procedural problems affecting their appeals, there exists no bright line by which the appellate attorney can measure whether appellate courts will permit correction or revision of the error in question. Make your briefs, motions and other documents filed with the appellate court as specific and distinct and correct as possible. You can never tell in advance whether you will have the opportunity to fix what the appellate court perceives you should have done in the first place.

TRAP NUMBER 5 - Can an Appellate Court Consider a Document that I Filed Late in Response to a Motion for Summary Judgment in the Absence of a Written Order Granting Leave to File the Late Document? Yes. And No!

If you must file your response to the motion for summary judgment late, be certain to obtain a signed order granting leave to file a late response. If the trial court does not sign an order granting leave to file a late response, the appellate court will presume that the trial court did not consider the late filed response. INA v. Bryant, 686 S.W.2d 614, 615 (Tex. 1985). The same is true of late-filed evidence in response to the motion for summary judgment. WTFO, Inc. v. Braithwaite, 899 S.W.2d 709, 721 (Tex.App.– Dallas 1995, no writ history).

The same is not true, however, with regard to amended pleadings. As most practitioners know, a summary judgment hearing has been held to constitute a "trial" within the meaning of TRCP 63. Hand v. Dean Witter Reynolds, Inc., 889 S.W.2d 483, 490 (Tex.App.– Houston [14th Dist.] 1994, no writ history) (citing Goswami v. Metropolitan Savings & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988). This means that an amended pleading must be filed "within seven days" prior to the hearing on the summary judgment.

What happens if the respondent files an amended pleading four days prior to the hearing on the movant's motion for summary judgment, and the record is silent as to whether a motion for leave to amend pleadings has been granted, or for that matter, even filed? Intuitively, one would think that the rule should be the same as responses to motions for summary judgment– if leave is not affirmatively shown on the record it is presumed that leave was not granted. Unfortunately, this is not the case.

If the trial court does not sign an order stating that the late-filed amended pleading was not considered by the trial court, then the appellate court will presume that the trial court considered the amended pleading. Goswami v. Metropolitan Savings & Loan Ass'n, 751 S.W.2d 487, 490-91 (Tex. 1988). This is another one of those traps that endears appellate lawyers to our trial counterparts.

TRAP NUMBER 4 - If I Follow TRAP 52(a) to the Letter, I'm Sure to Preserve My Trial Court Objection – NOT!

As most appellate attorneys are aware, the general rule pertaining to preservation of error is found in TRAP 52(a). TRAP 52(a) states as follows:

> **(a) General Rule.** In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial court refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

Thus, according to TRAP 52(a), preservation of error is a three-step process:

1. Make a timely objection;
2. State the specific basis of your objection if it is not apparent from the context; and
3. Obtain a ruling on your objection, or object to the trial court's refusal to rule.

Despite the general statement contained in TRAP 52(a), a trial court's oral pronouncement from the bench that a motion for directed verdict is denied, either at the close of the plaintiff's case or at the close of all evidence, preserves nothing for appeal. The order must be in writing or error resulting therefrom is waived. Wal-Mart Stores, Inc. v. Berry, 833 S.W.2d 587, 590 (Tex. App.– Texarkana 1992, writ denied). This rule has been criticized but not yet overruled. See Sipco Services Marine, Inc. v. Wyatt Field Service Co., 857 S.W.2d 602, 609 (Tex. App.– Houston [1st Dist.] 1993, writ dism'd). The criticism levied at this trap is justified because TRAP 52(a) requires only that a litigant "obtain a ruling" on the objection. It does not require a "written ruling."

TRAP NUMBER 3 - My Motion for Directed Verdict at the Close of the Plaintiff's Case Preserved Error – NOT!

If a defendant makes a motion for directed verdict at the close of the plaintiff's case, and the motion is denied, then the defendant proceeds to introduce evidence, the defendant waives his motion for directed verdict at the close of the plaintiff's case if he does not make a motion

for directed verdict at the close of all evidence. Star Houston, Inc. v. Shevack, 886 S.W.2d 414, 425, fn.2 (Tex. App.– Houston [1st Dist.] 1994, writ denied) (per curiam); McMeens v. Pease, 878 S.W.2d 185, 190 (Tex. App.– Corpus Christi 1994, no writ); Story Services, Inc. v. Ramirez, 863 S.W.2d 491, 505 (Tex.App.– El Paso 1993, writ denied); Texas Animal Health Comm'n v. Miller, 850 S.W.2d 254, 255 (Tex. App.– Eastland 1993, writ denied).

TRAP NUMBER 2 - Stare Indecisis

No solution!

In Weiner v. Wasson, 1995 WL 341541, ___ S.W.2d ___ (June 8, 1995), a 6-3 majority of the Supreme Court of Texas discussed the value of "stare decisis" in relevant part, as follows:

> Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Second, we should give due consideration to the settled expectations of litigants like Emmanuel Wasson, who have justifiably relied on the principles articulated in Sax. See Quill Corp. v. North Dakota, 504 U.S. 298, 321, 112 S.Ct. 1904, 1916, 119 L.Ed.2d 91 (1992) (J. Scalia, concurring) ("[R]eliance on a square, unabandoned holding of the Supreme Court is always justifiable reliance. . . .") Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process that differs dramatically from that properly employed by the political branches of government. See Vasquez v. Hillery, 474 U.S. 254, 265-66, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986) ("[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.").

Most appellate attorneys and judges would heartily agree with and endorse the majority's analysis of stare decisis in Weiner. Why, then, does a court that has such an obvious grasp of the principle of stare decisis seem to have occasional difficulty with its day-to-day application? Two illustrations shall suffice.

A. Availability of Mandamus Relief

In Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304 (Tex. 1994), a defendant was sued in state district court in Texas. The defendant did not believe that it was amenable to suit in Texas because it lacked sufficient minimum contacts with the State of Texas. The defendant filed a special appearance. The defendant's special appearance was denied by the trial court. Satisfied that the trial court's ruling was incorrect, the defendant filed a petition for writ of error with the Supreme Court of Texas.

In National Industrial Sand Ass'n v. Gibson, 897 S.W.2d 769 (Tex. 1995), a defendant was sued in state district court in Texas. The defendant did not believe that it was amenable to suit in Texas because it lacked sufficient minimum contacts with the State of Texas. The defendant filed a special appearance. The defendant's special appearance was denied by the trial court. Satisfied that the trial court's ruling was incorrect, the defendant filed a petition for writ of error with the Supreme Court of Texas.

As the reader can see, the factual and procedural issues underlying Canadian Helicopters and Gibson are identical. As the reader likely knows from reading the Southwestern Reporter 2d series, this is where the similarities between Canadian Helicopters and Gibson end.

In Canadian Helicopters, a 7-2 majority of the Supreme Court of Texas held that a challenge to personal jurisdiction (i.e. special appearance), "may ordinarily be adequately reviewed on appeal" and therefore denied the petition for writ of mandamus. Canadian Helicopters, 876 S.W.2d at 307.

In Gibson, a 5-4 majority of the Supreme Court of Texas held that an ordinary appeal was inadequate to remedy the "irreparable harm to NISA caused by the trial court's denial of the special appearance," and therefore, granted NISA's petition for writ of mandamus. Gibson, 897 S.W.2d at 776.

Canadian Helicopters was decided by the Supreme Court of Texas on April 28, 1994. Gibson was decided less than a year later on April 27, 1995. Query: Were the facts of Canadian Helicopters and Gibson so very different as to warrant diametrically opposite results? Was the different result caused by a change in heart by the court, a change in the composition of the court, or some other unapparent reason? Given the way that the Court embraced stare decisis in Weiner, do any of the foregoing justify the different results in each case? Will the court's diametrically opposite rulings bring about some of the very consequences that were sought to be avoided by the majority in Weiner? Unfortunately, the foregoing will remain questions for now, perhaps only to be answered with the passage of time.

B. Charge practice

In State Department of Highways v. Payne, 838 S.W.2d 235 (Tex. 1992), the Supreme Court of Texas

summarized preservation of error in charge practice as follows:

> There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

In Lester v. Logan, 38 Tex.Sup.Ct.J. 554 (April 27, 1995), Lester submitted a jury question regarding the implied warranty of fitness for a particular purpose, some related definitions, and some related instructions on a single sheet of paper. The trial court refused the group submission. Lester complained on appeal that the trial court should have given the jury his instructions as part of the charge. The Corpus Christi Court of Appeals observed that the trial court was not required to go through the submitted group of requests and submit the proper ones while refusing the improper ones. The court of appeals therefore held that Lester had waived his complaints regarding the failure to give his instructions as part of the jury charge. Citing Payne, the supreme court stated that, "[i]n denying the application for writ of error, a majority of the court disapproves of the analysis of the court of appeals concerning this issue." Thus, despite the intent of certain courts of appeals to cleave to pre-Payne preservation of error analysis as to charge error, the supreme court seemed to reinforce that Payne is the standard of review for preservation of charge error, at least until the applicable Texas Rules of Civil Procedure are amended.

In contrast with Lester, less than two months later in Universal Services Company v. Ung, 38 Tex.Sup.Ct.J. 870 (June 15, 1995), Universal complained that the trial court erred in refusing to submit its definitions of negligence and ordinary care. These definitions were offered at the same time as a requested issue regarding the negligence of various non-parties. Ung contended that Universal failed to properly preserve its complaints in the trial court and the Supreme Court of Texas agreed, in relevant part, as follows:

> Although Universal requested definitions of negligence and ordinary care, these requests were made at the same time as a requested issue regarding the negligence of various non-parties. Thus, it was not apparent either from Universal's argument to the trial court or from the context of the request that Universal considered these definitions necessary to the gross negligence issue. The trial court could have easily concluded that Universal desired the requested definitions only in connection with the negligence question. While it is not always necessary for a party to explain the reasons for requested jury questions and instructions in order to preserve error if the requests are refused, in this case we conclude that Universal's request did not make clear to the trial court the nature of its present complaint and thus did not preserve error. See State Dep't of Highways v. Payne, 838 S.W.2d 235, 241 (Tex. 1992).

The only way to explain why what the supreme court did in Universal was correct and what the Corpus Christi Court of Appeals did in Lester was incorrect is to say that Lester's complaints must have been more readily apparent to the trial court than were Universal's complaints in its case. Unfortunately, the opinions in Lester and Universal do not permit this comparison. The only other alternative is that stare decisis was not followed, and the Supreme Court of Texas issued two conflicting opinions less than two months apart.

Assuming for the sake of argument that courts sometimes refuse to follow their own precedent, why does this constitute a trap within the context of this article? Two reasons come to mind. First, as discussed by the majority in Weiner, several unfortunate consequences follow from a court's failure to follow its own precedent (vast quantities of speculative relitigation, no final resolution of issues, violates the settled expectations of litigants, creates questions regarding the integrity of the judiciary as part of our tripartite system of government). Second, failure to follow stare decisis makes it difficult, if not impossible, for attorneys to advise their clients on the probable outcome of litigation and appeals resulting therefrom. If the petition for writ of mandamus in Gibson had been filed after, rather than before the supreme court's opinion in Canadian Helicopters had been issued, is there any one of us who believes that National Industrial Sand Association's attorneys would have been much less likely to have filed its petition for writ of mandamus? The bottom line is that Gibson and Canadian Helicopters make it much more difficult for any attorney to tell his or her client that the client's legal position is likely to win or lose, thereby increasing the quantity of litigation in our already burdened judicial system.

TRAP NUMBER 1 - Preservation of Error– It May Not Be Just for Losers Anymore.

Who must preserve error? The traditional answer is that litigants who wish to obtain reversal of the trial court's judgment on appeal must preserve error in the trial court. This traditional notion has been seriously challenged in a very recent opinion by a panel of the 14th Court of Appeals in Harris County Appraisal District v. Herrin, No. 14-94-00408-CV (Tex. App.– Houston [14th Dist.] August 17, 1995, no writ history).

NO Solution ??

Facts - Herrin owned several tracts of real estate in Harris County, Texas. The Harris County Appraisal District appraised the property so that taxes could be assessed on the appraised value of the real estate. Herrin believed that the tracts should have a lower appraised value (thereby lowering the taxes on the property), so he appealed the valuation. The District lowered the appraised value, but not as low as Herrin had requested. Herrin filed suit in state district court to appeal the valuation.

The Jurisdictional Dispute - Section 42.08 of the Texas Tax Code says that if a property owner does not pay a substantial portion of the assessed taxes prior to the delinquency date, the property owner cannot maintain its lawsuit to appeal the valuation. The record reflects that Herrin did not pay taxes prior to the delinquency date.

The Trial Court Proceedings - The District filed a motion for summary judgment asserting that the trial court did not have jurisdiction over Herrin's appeal because Herrin did not pay a substantial portion of the assessed taxes prior to the delinquency date. The trial court denied the District's motion for summary judgment. The case proceeded to trial on an agreed record pursuant to Texas Rule of Civil Procedure 263. The trial court ruled in favor of Herrin. The District appealed.

The Supreme Court to the rescue - In the trial court, Herrin successfully argued against application of section 42.08 on several different bases, none of which included unconstitutionality. After the Herrin trial, but before the Herrin appeal was decided, the Supreme Court of Texas held in **R Communications v. Sharp**, 875 S.W.2d 314 (Tex. 1994), that it violates the Open Courts provision of the Texas Constitution to require a litigant to pay disputed taxes as a predicate to trial court jurisdiction.

Onward to the court of appeals - The District filed a one-point Brief of Appellants in the court of appeals. The District urged that the trial court lacked jurisdiction over Herrin's appeal because Herrin did not pay a substantial portion of the assessed taxes prior to the delinquency date. The District **did not** urge any waiver on the part of Herrin in its brief. In his Brief of Appellees, Herrin urged all of the matters in avoidance of section 42.08 that he did in the trial court. Herrin also urged the unconstitutionality of section 42.08 under the supreme court's recent decision in the **R Communications** case.

Herrin "waives" goodbye to his judgment - A panel of the 14th Court of Appeals issued its opinion in **Herrin** on August 17, 1995. The court of appeals disagreed with all of the arguments that Herrin asserted in the trial court to avoid dismissal of his lawsuit on section 42.08 grounds. The court then reached Herrin's unconstitutionality argument. The panel held that Herrin waived the unconstitutionality argument in the trial court. How?

The summary judgment - Footnote 2 on page 5 of the panel's opinion attempts to explain how Herrin waived an appellate argument as to a summary judgment that he won, as follows:

> Although appellees prevailed below, to preserve the issue for appeal they still should have raised it in their response to Harris County's Motion for Summary Judgment, just as they raised the issue to this Court in their appellate reply brief.

The problem with the panel's analysis is that the Texas Rule of Civil Procedure pertaining to summary judgments does not require the **winning** party to preserve error in the trial court. "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c) (emphasis added). Herrin obtained all of the relief that he sought in the trial court. He was the appellee. He was not asserting **any** argument "as grounds for reversal." In the author's opinion, the court of appeals saddled Herrin with a preservation burden that was not rightfully his under the applicable rule of civil procedure.

The bench trial - As to the proceedings during the bench trial, the court of appeals, citing Texas Rule of Appellate Procedure 52(a), stated as follows, "Generally, in order to preserve a complaint for appellate review, the party must present a timely request, objection, or motion to the trial court." There is no disputing that this is indeed the general rule regarding preservation of error. The problem with applying the general rule to this particular case is the fact that Herrin was satisfied with the trial court's judgment in every way. He was not complaining of anything that occurred in the trial court. Why then should he state a complaint in the trial court when he was satisfied with everything that the trial court did?

The bottom line - The author's opinion is that **Herrin** was wrongly decided. A litigant who is satisfied in every way with the proceedings in the trial court should not be required to preserve anything for appellate review. This is true in the summary judgment context under the express wording of TRCP 166a, and it is true in the trial context under the express wording of TRAP 52(a). The problem is that unless **Herrin** is corrected on rehearing (as of the date this paper was written, the deadline for filing a motion for rehearing had not yet expired) or by the Supreme Court of Texas, the panel decision in **Herrin** creates a whole new series of traps for the unwary practitioner.

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Uses of Herrin if it survives the appellate process - If the panel's opinion and judgment in **Herrin** somehow survive the appellate process intact, trial practitioners should be prepared to use it to their clients' advantage:

> Losing litigants in the trial court should be prepared to hold the winning side to the specific legal theories and arguments asserted in the trial court. Any attempt by the winning party (the appellee in the trial court) to deviate in any way from the arguments and authorities raised in the trial court should be met with an assertion of waiver.
>
> If you are the prevailing party in the trial court (or at least are planning to be), it will no longer be sufficient to make a winning argument. If the trial court agrees with your argument but the appellate court disagrees, then you will be held to have waived any other potential winning argument that you could have, but did not, raise in the appellate court.

Whether you agree or disagree with the panel's decision in **Herrin**, you need to be aware of it, and anticipate its potential usefulness in your pending cases and appeals in the event that it is not reversed further along in the appellate process.

12-11-95
4343.001
[redacted]
and

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
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CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
JACK HIGHTOWER
NATHAN L. HECHT
JOHN CORNYN
CRAIG ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN
JAMES A. BAKER

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

December 8, 1995

HHD
SCAC Agenda
Appellate Section
Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

TRAP 130-136
Petition for Review

Dear Luke:

Enclosed are copies of letters from Fulbright & Jaworski, the HBA's Appellate Practice Section, the State Bar's Appellate Practice and Advocacy Section, and David Gunn regarding the Court's briefing practice and from Chief Justice Bob Thomas regarding Texas Rule of Appellate Procedure 18.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

FULBRIGHT & JAWORSKI
L.L.P.
A REGISTERED LIMITED LIABILITY PARTNERSHIP
1301 MCKINNEY, SUITE 5100
HOUSTON, TEXAS 77010-3095

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WRITER'S DIRECT DIAL NUMBER:
713/651-5190

December 1, 1995

The Honorable Nathan L. Hecht
Supreme Court of Texas
209 West 14th Street
Austin, TX 78701

Dear Justice Hecht:

This letter is written to add our voices to the debate regarding the Court's proposed petition for review practice as a substitute for the current application for writ of error, under which a petition for review limited to ten pages would become the initial means bringing a case before the Court.

We echo those practitioners and commentators who have voiced serious concerns regarding this proposed change, including the Appellate Practice and Advocacy Section of the State Bar of Texas. Our concerns include the following:

- reliance on ten-page petitions likely will make decisions to grant or deny writs of error less consistent with the existence of error important to the jurisprudence of the state, and more influenced by clever marketing and the ability of advocates to reduce complex arguments to "sound bites";

- the contemplated page limit will exacerbate the difficulty of explaining the facts of complex cases in sufficient detail to permit proper application of governing legal standards, and of pointing out factual errors or omissions in the court of appeals' opinion; and

- the new approach will not reduce costs, but will instead require the same amount of record analysis, and, in cases in which writ is granted, the expense of another round of briefing.

As appellate practitioners who appear before this Court, and who advise clients about the writ of error process, we respectfully urge the Court to leave the current application process unchanged. Less paper does not equate to more efficiency, better decisionmaking, or better advocacy.

At a minimum, we suggest that additional time for discussion and comment be permitted before the current writ process is changed. In addition, the alternative

proposal put forth by Pamela Stanton Baron merits serious consideration and discussion.

We respectfully urge this Court to acknowledge the warnings and concerns raised by appellate practitioners across Texas, and to postpone any contemplated changes in the current writ procedure. We believe the contemplated changes would not serve justice; are not favored by the majority of practitioners; and would not assist the Court in its review process in a positive manner.

Respectfully submitted,

Reagan W. Simpson
W. Wendell Hall
Joy M. Soloway
Ben Taylor
William J. Boyce
Tracey Robertson

RWS-WJB/jcd

Appellate Practice Section

Houston Bar Association
1300 First City Tower 1001 Fannin Houston, Texas 77002-6708 (713)759-1133

November 30, 1995

The Honorable Nathan Hecht
Supreme Court of Texas
209 West 14th Street
Austin, Texas 78701

Dear Justice Hecht:

The Council of the Houston Bar Association's Appellate Practice Section has asked me to write in support of Pam Baron's alternative to the Court's proposal to adopt a petition for review practice similar to the certiorari system employed by the United States Supreme Court. As you know, our section wrote to the Court on October 20th raising serious concerns as to the advisability of the petition for review proposal. Based on our review of Pam's proposal, our Council voted to formally endorse it. In our view, this proposal both achieves the Court's goals and addresses the concerns expressed by the appellate bar.

Thank you for your consideration in this matter. If we can be of any other assistance to the Court concerning this matter, please do not hesitate to ask.

Very truly yours,

Kathy Butler

Katherine L. Butler

STATE BAR OF TEXAS

APPELLATE PRACTICE AND ADVOCACY SECTION

Kevin Dubose
Chair

Direct correspondence to:
440 Louisiana, Suite 1410
Houston, Texas 77002
Telephone 713/222-8800
Facsimile 713/222-8810

November 30, 1995

Honorable Nathan L. Hecht
The Texas Supreme Court
201 West 14th Street
Austin, Texas 78701

Re: *Changes in Supreme Court Briefing Practices*

Dear Justice Hecht:

This morning the Council of the Appellate Practice and Advocacy Section of the State Bar of Texas held its quarterly meeting. One of the issues that we discussed was the proposed change in the Texas Supreme Court briefing practice. In particular, we discussed Pam Baron's letter of November 21, 1995, which was addressed to you, and sent to all members of the Court. The Council agreed that we share Pam's concerns, and that we think that her proposed alternative is the best compromise solution that we have seen. Accordingly, the Council voted unanimously to endorse Pam Baron's letter of November 21, 1995.

Thank you for your consideration of this matter.

Very truly yours,

Kevin Dubose, Chair
Appellate Practice and Advocacy Section

KHD/glm
c: Honorable Thomas R. Phillips
Honorable Raul A. Gonzalez
Honorable Jack Hightower
Honorable John Cornyn
Honorable James A. Baker
Honorable Craig Enoch
Honorable Rose Spector
Honorable Priscilla R. Owen
Mr. Lee Parsley, Staff Attorney

3RD00508

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*LESLIE C. TAYLOR
*DAVID M. GUNN
*BOARD CERTIFIED
CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL
SPECIALIZATION

November 28, 1995

Honorable Nathan L. Hecht
Supreme Court of Texas
209 West 14th Street
Austin, Texas 78701

Dear Justice Hecht:

The proposed adoption of a certiorari-type briefing practice is an attractive idea, but I hope the Court gives full consideration to the law-of-unintended-consequences.

A certiorari petition practice might:

- give an advantage to full-time appellate lawyers over the rest of the bar,
- eventually reshape the character of the Supreme Court docket with more emphasis on policy making and less on error correction,
- lead to more improvident grants, and
- give increased finality to outrageous Court of Appeals decisions where the Court of Appeals badly mistreats the facts and the record.

Rather than write at length, I would simply associate myself with Pam Baron's letter of November 21, 1995. Thank you for your consideration.

Respectfully submitted,

David M. Gunn

DMG/pk

02-28-96
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Vant

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
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February 27, 1996

HHD
Std Agenda
Soules
SBOT Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

TRAP 130-136
Petition for Review

Dear Luke:

Enclosed are copies of letters from Oldham & Associates and Thomas Gendry regarding the proposed discovery rules and from Robert Cain regarding the Court's breifing practices.

I would appreciate your bringing these to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

ZELESKEY, CORNELIUS, HALLMARK, ROPER & HICKS L.L.P.

ATTORNEYS AT LAW

RALPH M. ZELESKEY
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KENZY D. HALLMARK
STEVE ROPER
JACK D. HICKS
WILLIAM R. RICKS
SAMUEL D. GRIFFIN, JR.
JAMES J. ZELESKEY
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PAUL E. WHITE
ROBERT ALDERMAN, JR.
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1616 SOUTH CHESTNUT STREET
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February 23, 1996

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

In re: Proposed changes in Supreme Court Briefing Practices

Dear Justice Hecht:

I would like to echo the concerns that Pam Baron expressed in her letter to you of November 21, 1995, as reprinted in the January issue of *The Appellate Advocate*.

In particular, I hope that any change in writ of error practice at the Supreme Court will not destroy the Court's effective use of per curiam opinions. The Court issued nine per curiam opinions on February 9, as shown in the February 10 edition of *The Texas Supreme Court Journal*. The benefits of of this expedited and efficient review to the bar and to litigants cannot be overstated.

Thank you for considering these comments. I deeply appreciate all of the hard work that has gone into revising the civil and appellate rules.

Yours truly,

Robert T. Cain, Jr.

RTC/jb

cc: Chief Justice Thomas R. Phillips
Justice Raul A. Gonzalez
Justice James Baker
Justice Greg Abbott
Justice John Cornyn
Justice Craig Enoch
Justice Rose Spector
Justice Priscilla R. Owen

3RD00511

CHARLES A. SPAIN, JR.
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Research Attorney
Telephone: (713) 655-2742

HHD,
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✓ Appellate SubC
COA Staff
J. Hecht.
L. Parsley
Jhg

TRAP 180(a)(6)

August 30, 1996

Mr. Luther H. Soules III, Chair
Supreme Court Advisory Committee
Soules & Wallace
100 West Houston Street, Suite 1500
San Antonio, Texas 78205-2230

Re: Proposed Texas Rule of Appellate Procedure 180(a)(6)

Dear Luke,

I wanted to pass on some thoughts about proposed Texas Rule of Appellate Procedure 180(a)(6). I'm not sure I actually advocate any modification to the proposed rule, but I did want to share my opinion that proposed TRAP 180(a)(6) greatly expands the supreme court's power over judgments.

Proposed TRAP 180(a)(6) codifies the supreme court's ruling that it has the power to vacate judgments without first finding reversible error. *See Fletcher v. Blair*, 849 S.W.2d 344 (Tex. 1993). The court based its ruling on a reading of current TRAP 180:

> In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court of appeals should have rendered, **or remand the cause to the court of appeals**, or reverse the judgment and remand the cause to the trial court, if it shall appear that the justice of the cause demands another trial.

Fletcher, 849 S.W.2d at 346. *Fletcher* changed how many people read TRAP 180. I always thought the rule read:

> In each cause, the Supreme Court shall either [(1)] affirm the judgment of the court of appeals, or [(2)] reverse and [(a)] render such judgment as the court of appeals should have rendered, or [(b)] remand the cause to the court of appeals, or [(3)] reverse the judgment and remand the cause to the trial court, if it shall appear that the justice of the cause demands another trial.

Under the reasoning of *Fletcher*, the phrase "or remand the cause to the court of appeals" serves double duty as both (1) the reverse and remand to the court of appeals disposition and (2) the [vacate and] remand to the court of appeals disposition.

It turns out that TRAP 180 is based on Texas Rule of Civil Procedure 505, which originally read:

> In each case, the Supreme Court shall either affirm the judgment, or reverse and

> render such judgment as the Court of Civil Appeals should have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial, subject to the provisions of Rules 503 and 504 relating to reversals.

TRCP 505 in turn was based on former Revised Statutes article 1771, which read:

> In each case, the Supreme Court shall either affirm the judgment, or reverse and render such judgment as the Court of Civil Appeals should have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial.

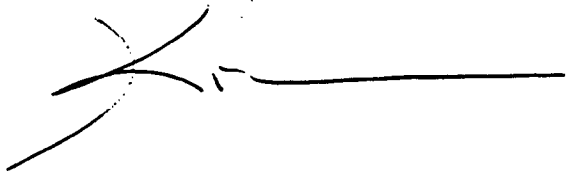
The plain meaning of former article 1771 demonstrates the legislature only gave the supreme court the power to affirm and reverse judgments, not vacate them.

In my opinion, proposed TRAP 180(a)(6) explicitly expands the supreme court's authority over lower court judgments by allowing the court to remand causes without first finding reversible error. I am not suggesting this is an impermissible expansion of the authority originally granted by the legislature in former article 1771, but it is an interesting question whether the court's rulemaking authority under Government Code sections 22.003 and 22.204 grants the court the power to expand its authority over judgments in this matter.

As an aside, the United States Supreme Court and the federal courts of appeals have explicit statutory authority to vacate lower court judgments. 28 U.S.C. § 2106 (1994) ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, *vacate*, set aside or reverse any judgment, decree, or order of a court lawfully brought it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."); *see Fletcher v. Blair*, 843 S.W.2d 601, 603 n.4 (Tex. App.—Austin) ("[W]e are [not] aware of any specific authorization in either the Federal Rules of Appellate Procedure or the Rules of the Supreme Court for the actions of the United States Supreme Court"), *rev'd*, 849 S.W.2d 344 (Tex. 1993). Interestingly (at least to me), Justice Scalia has recently criticized the United States Supreme Court for issuing "no fault" "GVR" (grant, vacate, and remand) orders. *See Stutson v. United States*, 116 S. Ct. 611, 612 (1996) (Scalia, J., dissenting).

I think there is more to proposed TRAP 180(a)(6) than a casual reading would reveal, but perhaps the ultimate response is "So what?" With that in mind, I'll quit pontificating . . . .

Sincerely,



10/31/96
4513.001
CC: LHS
Orig: hhd

LAW OFFICES OF
Sharpe & Tillman
A PROFESSIONAL CORPORATION

J. Shelby Sharpe
Stan Tillman

2400 BANK ONE TOWER
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102
(817) 338-4900
(817) 429-2301 METRO
(817) 332-6818 FAX

October 29, 1996

TRAP 84
TRAP 182(b)

Mr. Lee Parsley
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Re: Revisions to Rules 84 and 182(b)

Dear Lee:

Enclosed you will find revisions to Rules 84 and 182(b) which have been circulated among the members of the Subcommittee on Frivolous Appeals. Any suggestions made by subcommittee members have been incorporated into the proposed revisions.

Very truly yours,

J. Shelby Sharpe

JSS:jm

cc: O.C. Hamilton, Jr.
Luther H. Soules, III

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF APPELLATE PROCEDURE

I. Exact Wording of Existing Rule:
RULE 182(b). Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may award each prevailing respondent an appropriate amount as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not bee otherwise properly preserved or presented for review.

II. New Rule:
RULE 182(b). Frivolous Appeal.

(1) **Certification to Court.** The signing of an application for writ of error constitutes a certificate by the signatory that to the signatory's best knowledge after reviewing the record of the case and the applicable law that:

(a) each point of error is warranted by existing law or by a logical argument for the extension, modification, or reversal of existing law or the establishment of new law; and
(b) the signatory has filed or made a good faith effort to file the necessary record for the court to decide each point of error asserted.

(2) **Violation.** This rule is violated if the certification is untrue. The signatory who violates this rule may be required to pay damages and/or be subject to sanction.

(3) **Procedure.** Any appellee or respondent who believes subdivision (a) has been violated shall file a motion specifying each alleged violation and serve a copy on the signatory of the brief or petition believed to be in violation of the rule. The court on its own initiative may invoke this rule by giving written notice to the signatory of the brief or petition believed to violate subdivision (a) which shall specify each alleged violation of the rule. The signatory shall have fifteen days from receipt of the motion or notice to file a written response. The court shall thereafter rule on the motion or notice after reviewing the brief or petition, the record, and any response of the signatory.

(4) **Order.** The court shall sign an appropriate order. If the court finds that this rule has been violated, the court's order shall specify the particular violation(s) found,

findings to support the violation(s), state the amount of damages, if any, as may be appropriate to each injured party and/or assess any sanctions deemed appropriate. Any order of sanction shall specify to whom any sanction is to be paid.

(5) **Remedies.** When damages are awarded the court should consider reasonable and necessary attorneys fees and reasonable and necessary costs in addition to such other economic damage found by the court to have resulted from the violation. In making a determination for sanctions, the court shall take into account the severity of the violation, whether bad faith was involved, and whether or not the offending party has a history of previously violating the rule.

III. Brief Statement of Reasons for New Rule:

Existing Rule 182(b), T.R.A.P., has several major deficiencies. Its title does not accurately describe the objective of the rule. The rule also fails to clearly define for the courts and counsel conduct which constitutes a frivolous appeal. It is very inadequate in providing for damages to fit the consequences of a frivolous appeal. And, finally, due process protections are totally absent.

The proposed new rule has a more descriptive title. Subdivisions (1) and (2) clearly set out what is required of those who would seek appellate court review. Subdivisions (3) and (4) provide due process protections for a signatory who becomes a subject of enforcement of the rule. Subdivision (4) also provides the court with the opportunity to have a sanction payable either to a party or the registry of the court because of economic harm to the judicial system or both. The order may be reviewable by the supreme court.

Respectfully submitted,

J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

Dated: October 22, 1996

12/16/96

MORRIS ATLAS
ROBERT L. SCHWARZ
GARY GURWITZ
E.G. HALL
CHARLES C. MURRAY
A. KIRBY CAVIN
MIKE MILLS
MOLLY THORNBERRY
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December 12, 1996

HHP
Issued.

TRAP
84
121
182

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rule 121(a)(2)(B) and Appellate Rules 84 and 182(b)

Dear Justice Phillips:

The Court Rules Committee has approved suggested changes to Rules 121(a)(2)(B), Texas Rules of Civil Procedure and Appellate Rules 84 and 182(B), copies of which I am enclosing herewith for the Supreme Court's consideration.

Sincerely,

By: O C Hamilton

O. C. Hamilton, Jr.

OCH/sam

Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
Soules & Wallace
Fifteenth Floor, Frost Bank Tower
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF APPELLATE PROCEDURE

I. Exact Wording of Existing Rule:
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RULE 182(b). Frivolous Appeal.

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(a) each point of error is warranted by existing law or by a logical argument for the extension, modification, or reversal of existing law or the establishment of new law; and
(b) the signatory has filed or made a good faith effort to file the necessary record for the court to decide each point of error asserted.

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(3) **Procedure.** Any appellee or respondent who believes subdivision (a) has been violated shall file a motion specifying each alleged violation and serve a copy on the signatory of the brief or petition believed to be in violation of the rule. The court on its own initiative may invoke this rule by giving written notice to the signatory of the brief or petition believed to violate subdivision (a) which shall specify each alleged violation of the rule. The signatory shall have fifteen days from receipt of the motion or notice to file a written response. The court shall thereafter rule on the motion or notice after reviewing the brief or petition, the record, and any response of the signatory.

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findings to support the violation(s), state the amount of damages, if any, as may be appropriate to each injured party and/or assess any sanctions deemed appropriate. Any order of sanction shall specify to whom any sanction is to be paid.

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The proposed new rule has a more descriptive title. Subdivisions (1) and (2) clearly set out what is required of those who would seek appellate court review. Subdivisions (3) and (4) provide due process protections for a signatory who becomes a subject of enforcement of the rule. Subdivision (4) also provides the court with the opportunity to have a sanction payable either to a party or the registry of the court because of economic harm to the judicial system or both. The order may be reviewable by the supreme court.

Respectfully submitted,

J. SHELBY SHARPE
2400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102

Dated: October 22, 1996

01-31-96
4543.001
cc: LHS
hhd
Vanf

THE SUPREME COURT OF TEXAS

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January 29, 1996

HHP,
Supp Agenda
✓ Ltr. Subj
SBOT Staff

MISC. TRCE

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Some Members of the Court are interested in whether the Advisory Committee would recommend adoption of a rule like Rule 706 of the Federal Rules of Evidence, which allows a trial court to appoint an independent expert. Please refer this to the appropriate subcommittee.

Cordially,

Nathan L. Hecht
Justice

NLH:sm

03-22-96
4543.001
cc: ~~LHS~~
hhd Vamp

THE SUPREME COURT OF TEXAS

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HHD
SCAC Agenda
✓ SubC
SBOT Staff.
misc.
TRCE

Doris Stella Ramirez
3802 Athens
Pasadena, Texas 77505

Dear Ms. Ramirez:

I am in receipt of your letter of March 14, 1996.

The Supreme Court Rules Advisory Committee debated proposed changes to the Texas Rules of Civil Evidence on Friday, March 15, 1996. It did not consider any proposals relating to the compensation of experts at that time.

The Advisory Committee may again consider the Rules of Evidence at its next two regular meetings — May 11, 1996 and July 19, 1996. The meetings are held at the Texas Law Center in Austin, and commence at 8:30 a.m. You are welcome to attend, but only members of the committee participate in the debate.

I am forwarding your letter to the chairman of the Advisory Committee so that the Committee may consider your suggestion in its work.

Thank you for your letter.

Sincerely,

E. Lee Parsley
Rules Staff Attorney

c: Mr. Luther H. Soules, III
Chairman, Supreme Court Advisory Committee

Justice Nathan L. Hecht
Supreme Court of Texas

01-31-96
4543.001
cc: LHS
hhd
Vanf

THE SUPREME COURT OF TEXAS

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January 29, 1996

HHP,
Supr Agenda
✓ E.I. Subc
SBOT Staff

MISC. TRCE

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

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Cordially,

Nathan L. Hecht
Justice

NLH:sm

03-22-96
4543.001
cc: ~~LHS~~
hhd Vamf

THE SUPREME COURT OF TEXAS

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HHD
SCAC Agenda
✓ SubC
SBOT Staff.
misc.
TRDE

Doris Stella Ramirez
3802 Athens
Pasadena, Texas 77505

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I am forwarding your letter to the chairman of the Advisory Committee so that the Committee may consider your suggestion in its work.

Thank you for your letter.

Sincerely,

E. Lee Parsley
Rules Staff Attorney

c: Mr. Luther H. Soules, III
Chairman, Supreme Court Advisory Committee

Justice Nathan L. Hecht
Supreme Court of Texas

3RD00521

Doris Stella Ramirez
3802 Athens
Pasadena, Texas
77505

March 14, 1996

The Supreme Court of Texas
Mr. Lee Parsley
P.o. Box 12248
Austin, Texas 78711

Dear Mr. Parsley:

I was told by Mr. William L. Willis that you are in charge of the Supreme Court hearings in regard to Senate Bill 33. I am very interested in giving my output, justice can not be surve if witnesses are bought, like in my husband's case.

Dr. Robert Erseck from Austin (a Plastic Surgeon) was paid $10.000 A DAY to testify against my husband and the other doctors that were involved in the FLESH EATING BACTERIA case. First in Texas.

Would you please let me know, when this hearing is going to take place. Thanking you in advance.

Sincerely yours,

Doris Stella Ramirez

February 27, 1995

Mrs. Doris Stella Ramirez
3802 Athens
Pasadena, Texas 77505

Dear Mrs. Ramirez:

Your letter to Chief Justice Phillips has been given to me for reply.

I am informed that the Supreme Court is of the opinion that the matters covered in Senate Bill 33 (a copy of which is enclosed) would be more appropriately handled by amendments to the Texas Rules of Civil Evidence, which are promulgated by the Supreme Court.

I am also informed that there will be public hearings this Fall on the need for revisions in the Rules of Civil Evidence.

Sincerely,

William L. Willis
Executive Assistant

3RD00523

A: Approximately '86 or '85. I don't know exactly.
Q: You have an approximation for how many hours you have spent reviewing the records in this case?
A: Oh, five or six days.
Q: Would that be like five or six forty-hour day—

I'm sorry, eight-hour days?
A: Yes, eight or ten-hour days, yes.
Q: What are you charging to review records, medical records?
A: I think it's $5,000 a day.
Q: Do you charge on a daily basis as opposed to hourly?
A: Yes, I think it's $10,000 a day. —
MS. BRYAN: I apologize, Dr. Ersek, is that to review records, is that $10,000?
A: Well, that's for the time that I spend, whether it's here or there or in court or wherever I am.
Q: That was — That was my next question. I take it you charge that per day whether you're reviewing records, testifying by deposition or testifying in court.
A: Yeah. My office is an operating room, and I'm a little mini-hospital. I have my own facilities, and I have about a half a dozen employees, so whether I'm doing this or doing cases, you know, my overhead continues the same.
Q: I understand that. I'm just trying to make sure.
A: $10,000 a day is — doesn't cost me quite that to run a place, but on a good day, I bring in more

than that.
Q: Okay. That's fine, Doctor, I'm just trying to make sure.
A: Sure.
Q: The amount you charge, $10,000 a day, is the same whether you're reviewing records, testifying in this deposition today or testifying at trial?
A: Yes.
Q: Okay. Have you ever seen a patient in your practice that has had a surgical wound infection after liposuction surgery?
A: Yes.
Q: On how many occasions?
A: Three.
Q: By the way, do you use antibiotics before —
A: Yes, I do.
Q: — performing liposuction surgery on a surgery?
A: Yes.
Q: These patients that had wound infections after liposuction surgery, how did they present? Was it the same for each patient?
A: Well, each one is a little different, of course.
Q: Okay. Let's start with the first patient you had that had a wound infection after liposuction surgery.

MR. WATSON: Wait a minute, wait. Let's make sure our question's clear. And you're talking about people he was treating post-liposuction that presented with postsurgical wound infection as opposed to the way you phrased your question?
MR. SHEPPERD: Yeah, let me — that's a good point. Let me reask the question.
Q: I want to know the number of patients that you had that you performed liposuction surgery on that subsequently had surgical wound infection and it's my understanding you had three. Is that right?
A: No. I had two.
Q: Oh. I'm sorry, just two. And the third patient is — was that Dr. Ramirez' patient that you subsequently saw?
A: Patient A, I saw.
Q: Okay. The two patients that you had, when was the — the first instance?
A: I don't recall. Probably '84.
Q: And how did that patient present?
A: Pain, tenderness, fever.
Q: Where was this — On what part of the body was this liposuction procedure performed?

A: Neck.
Q: Was there discoloration?
A: Yes.
Q: By the way, is there discoloration after liposuction surgery?
A: Usually is.
Q: And is that the form of bruising?
A: Yes.
Q: And what color is the discoloration?
A: Ranges from a dark yellow to a bluish, reddish.
Q: I guess it would be a multitude of colors, then. Is that fair?
A: Yes.
Q: When did this pain and tenderness first start in this patient?
A: Three or four days after surgery.
Q: And was the pain and tenderness localized to the liposuction site?
A: Yes, it was.
Q: What other symptoms did this patient have?
A: Fever.
Q: Was there any swelling?
A: Yes.
Q: Did she have any — Was it a he or she?
A: I had one of each.

Q: Okay. The first patient that you did the liposuction on the neck that had the surgical wound infection afterwards, was that a woman?
A: Yes.
Q: And did she have any problems with disorientation or —
A: No.
Q: Did she have discoloration beyond what you would have expected after a liposuction procedure?
A: No.
MS. BRYAN: Joel, there's been a suggestion that we call these other patients Patients B, C.
MR. SHEPPERD: That sounds fair.
MS. BRYAN: Is that okay?
Q: Is that okay, doctor?
A: Sure.
Q: Can we refer to this woman as Patient B?
A: Okay.
Q: Did you have to perform any sort of incision and drainage on this Patient B?
A: Yes, I did.
Q: Did you first try to stabilize the patient or treat the patient with antibiotics?

A: Yes.
Q: Okay. Did you — Did her treatment require besides antibiotics followed incision and drainage?
A: No.
Q: How long did you instigate and use antibiotics prior to resorting to surgery?
A: Nanosecond.
Q: Literally sin... seriously, I take it.
A: Yes, sure.
Q: What sort of surgery did she require?
A: Incision and drainage.
Q: How much drainage was there, if you recall?
A: One or two cubes full.

Doris Stella Ramirez
3802 Athens
Pasadena, Texas 77505

Texas Supreme Court
Honorable Judge Thomas Phillips
P.O. Box 12248
Austin, Texas 778711

Honorable Judge Thomas Phillips:

My name is Doris S. Ramirez. My husband Dr. Hugo A. Ramirez was a respectable wellknown physician, with the biggest practice in Pasadena. His colleagues had elected him to be Chief of Staff and Chief of the OBGYN Department for several years, at Humana Southmore Hospital. He was the first Doctor in Texas that opened up the first Birthing Center, where he delivered over 400 babies without complications, he was also doing 2 Liposuctions a day, where his competitors where doing 3 to 5 a month due to their fees, my husband chardged $1,700, where his competitors charged $5,000 to $7.000, for the same prosedure.

On March of 1987, he had the unfortunately experience of doing 2 Liposuctions on 2 ladies who developed the now well known "Flesh EAting Bacteria", this were the first two cases in Texas, according to Dr. Ericson, from Baylor.

During the Plaintiffs 4 years of investigations, they were not able to find out where the source of the infection came from. The Texas State Board of Medical Examiners took his license within 3 days. On the day of the hearing his competitors jumped on the ban wagon, made up false accusations, and since then, he has not been able to practice Medicine. He goes to Colombia several times a year to do a few prosedures to keep in touch with the profession that he loves.

3RD00525

During the Emergency meeting 2 Plastic Surgeons testified against Dr. Ramirez, one of them had had a patient died in the operating room table, the other has a record of going after his competitors and he also charged $10,000, a day to testified against my husband and the other Doctors who were involved in the Flesh eating bacteria case. They both lied. Another Plastic Surgeon that gave slanderous testimoney's to the State Board of Medical Examiners was a local Doctor, whose lies included that were were part of "The Colombian Connection", and that my husband was under investigation by Dr. Rogers (a local Pathologist). In Doctor's Rogers deposition, he denied such an accusation. During my husband's 23 years in practice he was never called by any Deciplinary Commettee from any of the

8 hospitals, where he work due to any complain.

Last mounth Lulac sent a letter to Senator Patterson and all the members of the Health and Human Services Committee, to see if a Legislation could be introduced in order to stop, such a corruption. The Fee of $10,000 A DAY is out of proportion, specially when you are doing this just to get even with your competitors. This is inmoral and it is my believe that this actions should be punish.

Yesterday, I received a call from Senator Brown's office, and they made me aware of your request to withdraw Bill #33, Senator's Browns aid had told me that, he was going to ammend Bill #33, to include some control as to how much an expert witness should get pay in a mal practice lawsuit.

Your Honor, I have 5 kids, a seven year old girl, a 20 year old son and a 24 year old daughter which are majored in Pre-Med, and a 18 and 23 year old sons that have taken my husbands case very hard. Their father was a hero at their school, and everywhere they went, and suddenly he became the murderer of Pasadena and Deer Park. Both 18 and 23 year old sons were hospitalized in Mental Institutions for emotional disorders. As you can see vicious and corrupted physicians can distroy good healthy families. My career as a Land Developer, Psychologist, Realtor and builder was also distroyed but my will to seek justice has not been distroyed.

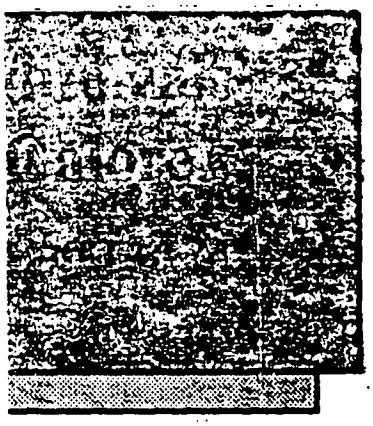
I do not want this to happen to anybody else. Please, your Honor, when you start making your revice form as far Expert Witnesses is concern, please remember this case and put some type of control as far as how much an expert witness should get pay

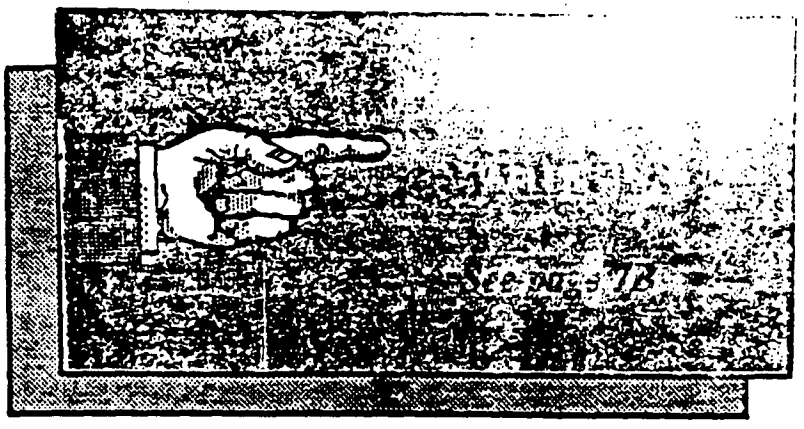
I am thanking you in advance for your time and may God Bless you.

Sincerely yours,

Doris Stella Ramirez

3RD00526





Board denies Dr. Ramirez's request

Dr. Hugo Ramirez and his wife went to Austin Saturday to appear before the medical examiner's board in an effort to have Ramirez's medical license reinstated.

"We were under the pressure of the legislators ... they didn't want to listen," said Doris Ramirez.

The board denied Ramirez's request to reinstate his Texas medical license which was taken away after a patient of his died following liposuction surgery and another patient became ill after liposuction.

Mrs. Ramirez said that she and her husband appeared before the board Saturday, with letters from other doctors. Some of the letter stated, "I feel that Dr. Ramirez's in depth medical knowledge an many years of practice reveal hi concern for the well being of hi patients," and "He (Dr. Ramirez has superior medical knowledg and is highly qualified in his fiel of Obstetrics and Gynecology. must further express to you that believe he is a man of good charac ter and his professional ethics ar of the highest quality."

Another doctor wrote of Dr Ramirez, "I have been associate with him in the treatment of mutua patients. I have also had the occa sion to be familiar with some of hi work since I served on the execu tive committee the entire time h was on staff ... I am not aware o any problems with his OB/Gyn practice and know of no discipli nary action with regards to hi specialty."

Still another doctor stated, "I one were to compare Dr. Ramirez' clinical outcomes with othe obstetricians and gynecologists ir the Pasadena area, Dr. Ramirez would stand out as having far fewe complications in the area o obstetrics and gynecology than other physicians in the com- munity." 3RD00527

Ramirez feels the board was being pressured by the legislators not to reinstate his license.

Mrs. Ramirez added, "We were misrepresented from the begin

Photo by Mary Ellen Wilson

Proclaiming Joey Lara day

Mayor Jimmy Burke signs a document proclaiming May 22, 1989 to be "Joey Lara Day" in Deer Park. Lara has been selected to represent Deer Park in the European Select Cup Tour VI because of his

The Hugo Ramirez Story Part II

The making of a scapegoat

by Gene Mitchell 817 - 429917

The dawning of a new year, 1987, was very auspicious for Dr.Hugo Ramirez. The same dawning, if that is the right word, was very suspicious for the Texas State Board Of Medical Examiners.

Little could anyone have guessed that only three months into 1987 the fortune and future of each would be inextricably intertwined.

The medical career of Dr. Ramirez, born and educated in Colombia, had been marked by one success after another. Following the emigration to the United States, and after completed his internship, he entered into a residence program in Obstetrics and Gynecology at Cambridge City Hospital (affiliated to Harvard University), in Massachusetts.

He relocated in Texas, and over a period of 13 years had built a Medical practice second to none in his adopted town of Pasadena. He was appointed Chief of the Medical Staff and Chairman of the Obstetrics and Gynecology Department at Southmore Medical Center in Pasadena.

So sought after was Dr. Ramirez in his obstetrical practice (even other doctors sent their wives to him for the care and birthing of their babies) that he was able to open a specialized "birthing center" across the street from Southmore Hospital. Not only did the home like atmosphere of the birthing center become one of the most popular places in Pasadena in which to be born, but Dr. Ramirez's surgical skills with obstetric and gynecological problems made him one of the most sought after surgeons in the area for handling difficult cases.

In addition, Dr. Ramirez only two years before he added the skills of liposuction (removal of excess pockets of fat throughout the body) to his surgical repertoire. As an outpatient procedure, due to the extremely small incisions, the birthing center was also ideally equipped for this technique, and the lower cost made possible use of the birthing center facilities, the year 1987 opened with a record number of patients socking appointments for the procedure.

There was one more happy event scheduled for 1987. Dr. Ramirez's wife. Doris, was pregnant with her fifth child.

On the other hand, the Texas State Board of Medical Examiners had an abundance of problems. Critics, such as judges, the news media, legislators and others had proliferated in the latter part of 1986. Hearings before a Committee of the Texas Legislature, in August 1986, had created reams of adverse publicity about the board's failure to protect the public from "bad doctors".

The Texas Senate with held approval of new appointments to the board for more than a month, finally agreeing only after the designation of a Senate committee, chaired by State Sen. Chet Books of Pasadena, to conduct oversight of the board's operations. 3RD00528

However, State Sen. Hector Uribe withheld approval of the reappointment of board president Dr. Carlos Godinez for several weeks more. Senator Uribe then introduced legislation in the upcoming legislative session to transfer the investigation, prosecution, and judging duties from the board to the state attorney general's office. Sen. Uribe also wanted installed an 800- number "hotline" to make it easier to health consumers to register complains about doctors.

Others, including Sen. Chet Edwards joining with Sen. Brooks, also introduced proposed legislation to drastically change operations of the medical board and to make the board more accountable to the public.

Then, on the last day of 1986, a 20 million dollar antitrust lawsuit was filed against medical board members personally by a group of acupuncturist and acupuncture patients. The lawsuit grew out of the fact that, even though the board failed to focus on bad practice caused by some medical doctors with their patients, that the board staff and leadership had found time to arrest and jail acupuncturists and natural healing providers.

In January, 1987, two weeks after the lawsuit was filed, and after adverse legislation was introduced, Dr. Godinez resigned as board president and he resigned from the board as well-despite having just gone through several months of tough campaigning to get reappointed.

Board members, stung by the criticism, adverse publicity, and the lawsuit, blamed the previous board leadership and board attorneys for these developments. They appointed a new chief attorney, Paul Gavia, to take over the job of defending the board from its critics.

Faced with the possible loss of power, and even their jobs, board staffers began looking for ways to shore up the board's image and deflect the proposes changes. A crucial hearing on the new legislation was scheduled for Tuesday, April 7, before the Senate committee. In the week before the Senate hearing Gavia and medical board members spent time working on their arguments to be presented before the senate committee.

However, at 6 p.m. the previous Monday, March 30, following a bizarre chain of events, a liposuction patient of Dr. Ramirez's died in a Houston Hospital.This was reported on Houston T.V. news programs at 6 p.m. the next day, Tuesday, March 31.

At 1 p.m. Wednesday, April 1, a medical board called Dr. Ramirez's office, wanting records on the patient who had died. At 5 p.m. the same day, a representative of the medical board picked up the records at Dr. Ramirez's clinic.

At 2:30 p.m. the next day, Thursday, the medical board called Dr. Ramirez and set an emergency hearing on Dr. Ramirez's license for 3 p.m. the following day, Friday, April 3.

Under state law, the medical board has the power to suspend a doctor's license on an emergency basis without giving notice to the doctor in advance. Previously, whenever this law had been used by the board, it had been done in secret and the doctor was notified only after the fact. A Condition of the law is, however, that a formal hearing on the matter has to be held within 10 days following the emergency suspension.

The fact that Dr. Ramirez was notified of the proposed emergency suspension, that he and his attorney were invited to the meeting, that the hearing was to be held in public-all were a complete departure from the way such hearing had been conducted in the past. Also, unprecedented was that the board notified press and television of the event.

Then, the following Tuesday, before the Senate committee, Gavia was able to tell the Senators, "We don't need these new laws, we are doing our job. Why, just last Friday we suspended the license of a "bad doctor."

Attorneys for Dr. Ramirez objected that there had not been enough time to adequately investigate the cause of the death and that, if the board would agree, Dr. Ramirez would stop liposuction until the full facts and responsibility were determined. All such pleas fell on deaf ears.

The board had its scapegoat "bad doctor"-and they meant to hang him for their own dear life. O

NEXT ISSUE: What Really Happened.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Dr. Keno Vasquez, President
P.O. Box 1
South Houston, TX 77587
(713) 947-9533

PRESS RELEASE

ITS TIME FOR THE NEW BOARD MEMBERS AND STAFF TO CLEAN UP THE DIRTY MESS LEFT BEHIND BY THE OLD MEMBERS OF THE TSBME.

This is a troubling case.

So wrote F. Scott McCown, Judge of the Travis County 345th District Court, to the Texas State Board of Medical Examiners on June 4, 1992. He was referring to a case before him brought by Hugo Ramirez, M. D., a Pasadena Obstetrician appealing a decision of the board to deny him, for the fifth time, reinstatement of his medical license. The board had originally revoked the license April 3, 1987.

"I am concerned about whether Dr. Ramirez's application for reinstatement was given fair and thoughtful consideration," Judge McCown wrote. "But I have no jurisdiction to inquire further. Dr. Ramirez is, of course, free to apply again for reinstatement. If he does so, I hope that the Board will act promptly and wisely on his petition." The next time Dr. Ramirez went before the board, they gave him 10 minutes to defend himself.

The case troubled Houston Federal Judge Lynn Hughes also. Immediately after the revocation, Judge Hughes overturned the board's action and restored the license on the grounds that Dr. Ramirez had not been treated fairly. The board appealed Judge Hughes's decision to the 5th Circuit Court of Appeals in New Orleans.

There, the court reversed Judge Hughes on the grounds that, even if it was a troubling case, the federal courts have no jurisdiction over the practice of medicine- "which is a province of the states."

The case troubled the 1993 session of the Texas Legislature who at least took the time to correct Judge McCown's lack of jurisdiction by providing for court appeals from board denials of reinstatement requests.

For that reason, the case is back in Judge McCown's court Monday, April 3, exactly eight years after the day from the original revocation. This time Judge McCown will have jurisdiction to "inquire further" and to make a decision as to the propriety of the board's actions.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Dr. Keno Vasquez, President
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Merits of the case also troubled Mr. Gene Mitchell, President of the Wellness Council of Texas, a nonprofit health consumer association. The organization has monitored all medical board meetings for the last 15 years, for the purpose of trying to determine whether or not board actions are always in the best interest of health consumers.

He said that the Board took short cuts and broke its own rules, in its haste to revoke Dr. Ramirez's license. He concluded that the Board was in a hurry because only four days later on April 7, 1987 the board had to face a Texas senate inquiry about its failure to adequately police doctors.

The senate inquiry had the potential of taking away some of the board's powers and costing board and staff members their jobs. Therefore they needed and used Dr. Ramirez as a "scapegoat"- Mr. Mitchell so testified under oath to the board itself during Dr. Ramirez' 1994 reinstatement hearing.

This case is troubling the League of United Latin American Citizens (LULAC). We wonder if the board oversensationalized this case (and caused two judges to wonder about the board's fairness) because Dr. Ramirez is a Hispanic.

Both LULAC and Mr. Mitchell are troubled that the board did not do a professional job of investigating the infection (FLESH EATING BACTERIA) which brought Dr. Ramirez to the attention of the board.

By so conveniently labeling Dr. Ramirez as the cause of the infections, without any reseach or proof, the board failed to discover what has since been determined: that the infectious agent (the so called FLESH EATING BACTERIA) was highly unpredictable and dangerous and had surfaced for the first time in Texas in 1987.

Many more such cases involving several deaths and loss of limbs have been reported in Texas hospitals and clinics since 1987. Could a more thorough and unbiased board investigation have made this problem public sooner? We believe that the board should have at least tried.

In any event, despite all these new cases, the jury declared culpability of the other doctors and hospital associated with the original case. (Neither Dr. Ramirez nor his collegues were found GROSS NEGLIGENT). Hugo Ramirez remains the only Texas doctor prosecuted by the board for this type of infection. So, again, we ask, why?

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LHS
HHD
vcmf

November 15, 1995

HHD, Scott Ayende, Bob C. (Evidence) ✓ SBOT staff

MISC. TRCE

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Bob Martin regarding the Texas Rules of Civil Evidence.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

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November 8, 1995

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

RE: Article VII - Opinions and Expert Testimony - Texas Rules of Civil Evidence - Rule 706 of the Federal Rules

Dear Justice Hecht:

The decisions by the United States Supreme Court in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*** and by the Texas Supreme Court in ***E. I. Du Pont DeNemours and Co., Inc. v. C. R. Robinson, et al.*** provided me with an incentive to prepare an article on the subject of expert testimony and submit it to the Texas Bar Journal. It will be published in January, 1996. A copy is enclosed to explain why I am writing this letter recommending future consideration in this area, with respect to amendments to the Texas Rules of Civil Evidence. You will find nothing new in my discussion of *Daubert* and *Du Pont v. Robinson*, but the *Renaud* case illustrates the reason for writing this letter. I am directing this suggestion to you, since I assume you are still the liaison for Rulemaking by the Court.

For your convenience, I am enclosing a copy of Rule 706 from the Federal Rules of Evidence. I assume that it was deliberately left out of the Texas Rules (both civil and criminal) for some perceived reason. It seems to me that it was most useful in the *Renaud* case, however, and it seems worthy of consideration by the Texas Supreme Court for use in the future, in view of the dissent by Chief Justice Rehnquist and by Justice Cornyn in the cases mentioned above, to the effect that judges should not play "amateur scientist."

While I would rather have a judge to scrutinize the evidence under Rule 104(a), than to have a jury making the determination of "scientific reliability," there may be

considerable validity to the "amateur scientist" comment in certain cases. Federal Rule 706 gives the judge some specific authority to seek assistance.

When the *Renaud* case was going on in Denver, I had considerable personal familiarity with the proceedings, and it is interesting what Judge Weinshienk did in that case. Although the Rule speaks in terms of letting the parties examine court-appointed experts, apparently in an effort to keep costs down, she advised the parties that she was going to be the person, and the only person, talking to these experts. She actually got on the telephone and did the calling to undertake the engagement of these experts. It was her position that they were advisors to the court and that her purpose was to decide whether or not the methodology of the experts of the parties (particularly the hydrogeologist) was "of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject." (Rule 703). In a way, you can say that Judge Weinshienk perceived the need for "scientific reliability" indicated by Justices Blackmun and Gonzales in their opinions. She felt that it was not necessary to expose these experts to cross examination. Whether or not she followed the strict language of the Rule did not seem to be an issue in the 10th Circuit, and they affirmed her actions at the trial level.

As to when a trial judge needs help, it is necessarily up to that particular jurist. As far as I can tell at the time of the *Renaud* decision in 1990, Judge Weinshienk was pretty suspicious of the fact that the plaintiff's hydrogeologist took only one water sample in 1985 and projected backward an 11-year pollution estimate. It is conceivable to me that she could have decided right then and there that one sample did not constitute sufficient data to make such a determination or express such an opinion. There was also a question of whether or not the sample came from clear water or from sludge in the bottom of a settling pit. To be absolutely certain, apparently, that her exclusion was based on the methodology required by experts in the field, she appointed an expert hydrogeologist. As a result, she never needed to talk to the other two experts which she had chosen (an epidemiologist and a toxicologist).

If it is appropriate to circulate the sort of suggestion that I have made here, among other members of the Court, I certainly have no objection to your doing so. Also, I can make the trial court opinion by Judge Weinshienk available. I have it in typewritten form. The discussion illustrates a great deal of thinking about the problem; if that is of any interest, I will be glad to make a copy of it and send it to you.

It may be that the appointment of an expert by a trial judge in Texas is within some sort of inherent powers, but as we all know, trial judges are a great deal more amenable to taking action if there is a specific rule authorizing what they propose to do.

There must be some history explaining why Federal Rule of Evidence 706 was not adopted in Texas, but I am not familiar with it. In any event, the advent of *Daubert* and *Du Pont* might suggest that consideration of such a rule would be justified, not only to provide an avenue to meet the dissenting views, but also to provide a tool where the decision to be made by the trial judge under Rule 104(a) really does require that he or she get some assistance.

Very truly yours,

Robert M. Martin, Jr.

RMM:th/kt

Enclosures

E:\M\MARTIN\HECHT.LTR

RULE 706. COURT APPOINTED EXPERTS

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of Appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

[Amended March 2, 1987, effective October 1, 1987.]

Expert Testimony - The New Buzzword "Gatekeeping"

Twenty years ago, expert witnesses in a trial were almost a rarity. In condemnation cases, lawyers used real estate appraisers, and in personal injury cases, the testimony of medical doctors was widely used. Today, experts on every conceivable subject are used, and it is unusual to find a litigated case of any magnitude that does not involve expert testimony. The codified Rules of Evidence (Rules 701 - 705), substantially identical in federal and state rules, cover the subject. Rule 704 states that in civil cases, the fact that the expert's testimony embraces the ultimate issue does not render it objectionable. In other words, the expert can say that the conduct of an actor in the scenario before the court was or was not reasonably prudent, customary, or in conformity with some standard. This is a far cry from the function of expert witnesses in the years before 1974.

With regard to expert testimony, criticism began to be heard from the courts. The first noteworthy case was ***In re Air Crash Disaster***, 795 F.2d 1230 (1986), where Judge Higginbotham stated (p. 1234):

> "We know from our judicial experience that many such able persons present studies and express opinions that they might not be willing to express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review. We think that is one important signal, along with many others, that ought to be considered in deciding whether to accept expert testimony. Second, the professional expert is now commonplace. That a person spends substantially all of

> his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an "expert."

Some writers began to describe certain expert testimony as "junk science." Merrell Dow Pharmaceuticals, Inc. can probably be credited for bringing the issue of unbridled expert testimony to the Supreme Court of the United States in connection with one of its products, an anti-nausea drug called Benedectin. Of three cases in process, the *Daubert* case reached the Supreme Court of the United States in 1993 - ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 113 S. Ct. 2786, 125 L.Ed 2nd 469.

The precise question before the court was whether or not the district court erred in granting Merrell Dow's Motion for Summary Judgment because plaintiffs failed to establish that the principle upon which their experts based their opinions was "generally accepted" by the relevant scientific community. In 1923, a Court of Appeals for the District of Columbia decided a case styled ***Frye v. United States***, 293 F. 1013 which announced the rule of "general acceptance." The plaintiffs urged the Supreme Court to hold that the Federal Rules of Evidence (701 - 705, in particular 702) replaced the standard of the *Frye* case. The Supreme Court held that the Rules of Civil Evidence did replace the *Frye* rule, and that Rule 702 permitted testimony by a witness qualified as an expert by knowledge, skill, experience, training or education, without the requirement that his or her opinion be "generally accepted."

Some writers discussing the *Daubert* opinion believe that the Supreme Court should have stopped at that point. However, Justice Blackmun, in his final major opinion on the Court, did not limit the decision to the precise holding.

In Section II B of the opinion, the first paragraph announces the "gatekeeper" decision in the following words:

> "That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

Justice Blackmun did not use the word "gatekeeper", but it has been used many times since and it is an apt expression. He goes on to expand on the two standards which the testimony must meet: it must be relevant and it must be reliable. He invokes Rule 104(a) of the Federal Rules of Evidence (identical with the Texas Rule of Civil Evidence) for the authority and the duty of a trial judge to make the determination that the proffered testimony is both relevant and reliable.

The major criticism of Justice Blackmun's opinion relates to the reliability standard. There has not been much argument concerning relevancy, but as stated in Chief Justice Rehnquist's dissent, there is a difference of opinion and there will be considerable argument over the fitness of trial judges to make the determination of whether or not under the scientific standards involved, the proffered testimony is "reliable," which he

calls the "gatekeeping responsibility." A thorough reading of Justice Blackmun's opinion expands the word "reliable" to mean "scientifically reliable." His comment on the difference of opinion with Chief Justice Rehnquist about the ability of trial judges reads as follows:

> "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review.".

Justice Blackmun states that he does not presume to set out a definitive checklist, but he makes general observations. His primary criteria is whether or not the theory or technique is one that can be "tested." He points out that peer review and publication, and for that matter, general acceptance, are still in the picture and that they are elements of whether or not the proffered testimony has scientific reliability.

The dissent by Chief Justice Rehnquist comments, quite simply, that Rule 702 does not talk about "reliability", and further, that he feels that some federal trial judges may be at a loss to know how to apply the scientific reliability test.

The Supreme Court of Texas was not too far behind, and in ***E. I. Du Pont DeNemours and Co., Inc. v. C. R. Robinson, et al.***, (94-0843) decided June 15, 1995, the court adopted the standard enunciated by Justice Blackmun. In the opening paragraph, the opinion says:

"We hold that Rule 702 requires expert testimony to be relevant and reliable."

In the next sentence, the court holds that the proponent of the testimony offered "failed to establish that the proper testimony was scientifically reliable" (*emphasis added*), and that the trial court did not abuse its discretion by excluding the testimony of the expert witness.

The *Du Pont* case involved the opinion of Dr. Carl Whitcomb, the holder of various degrees, including a doctorate from Iowa State University in Horticulture, Plant Ecology and Agronomy. His testimony was to the effect that Benlate 50 WF, a fungicide manufactured by Du Pont, because of contaminants, caused damage to the pecan orchard of C. R. and Shirley Robinson. In Section I, Justice Gonzales, who wrote the majority opinion of the Court, recited Dr. Whitcomb's testimony in detail; in Section III, the Court examined the bases for the expert's opinion; and the opinion concluded in Section IV that the trial judge was correct in excluding the testimony.

Section II of the majority opinion deals with the legal reasoning which leads the court to hold that the decision in *Daubert* is correct and essentially is adopted by the Supreme Court of Texas. One of the cases cited by Justice Gonzales is a criminal case called *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). The case dealt with DNA identification, and the Court of Criminal Appeals expressed the opinion that scientific evidence is reliable "if the underlying theory and technique in applying it are valid and the technique was properly applied on the occasion in question." The opinion then goes on to list the factors to be considered as follows:

(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 Weinstein & Berger, supra, ¶ 702[03];

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.[1]

Justice John Cornyn, joined by three of the justices (Hightower, Gammage and Spector) dissents. The dissent is based on two grounds. Justice Cornyn joins Chief Justice Rehnquist in arguing that a trial judge will have to make a determination of whether or not an expert witness' opinion is "scientifically reliable." He expresses the belief that such scientifically reliable determination invades the jury's provence as "sole judge of the credibility of the witness and the weight to be given their testimony." Justice Cornyn also argues that there was, at the trial level, in his opinion, a "lack of any evidence to controvert Dr. Whitcomb's testimony that his opinion has been grounded in good science." Needless to say, as a lawyer reads the opinion, the record of trial is not before him, and whether or not Du Pont put on experts to demonstrate that Dr. Whitcomb's methods were not scientifically reliable is really unknown. The statement in the majority opinion, however, makes two statements about Dr. Whitcomb's testimony that are rather compelling. First, Dr. Whitcomb admitted that Benlate in its uncontaminated form was

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[1]"That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science." *Daubert*, 43 F.3d at 1317 (upon remand) (citing *Huber, Galileo's Revenge* 206-09 (1991)).

harmless to pecan trees. He stated that there were some contaminants which caused the damage. He then conducted tests, and the majority opinion *emphasis* the following statement:

"The tests did not reveal the presence of SU contaminants."

In other words, the majority opinion was based on the fact that cross-examination of Dr. Whitcomb revealed deficiencies in his approach which did not require an opposing expert to take the stand and say, for example, that the lack of contaminants rendered Dr. Whitcomb's opinion invalid for the purpose of establishing the causation of the damage to the pecan trees. This difference of opinion on the Texas Supreme Court, however, would tell a cautious lawyer to make a very good record, in opposing expert testimony, that the testimony sought to be excluded is not scientifically reliable.

The difference of opinion between the majority and the dissent in both the Supreme Court of United States and the Supreme Court of Texas deserves a comment. Both Justices Rehnquist and Cornyn expressed some doubt as to the competency of trial judges to decide the question of "scientific reliability." Justice Rehnquist said that deciding whether to admit or exclude such evidence requires the trial judges to become "amateur scientists." Justice Cornyn echoes this concern, using the phrase coined by Justice Rehnquist.

There is a case out of the United States District Court for the District of Colorado, Civil Action No. 87-Z-42, ***Renaud, et al. v. Martin Marietta Corp., et al.*** which illustrates an imaginative approach by the United States District Judge Zita L. Weinshienk, to meet this criticism. Faced with completely contradictory expert opinion on the tendency of underground fluids to travel from one point to another (a question of

hydrogeology) and medical causation, she appointed three experts, which she selected herself to aid her in the determination of whether or not the experts for both sides of the lawsuit had proceeded along appropriate lines. She did not use the words "scientifically reliable" as used in *Daubert* and *Du Pont*, (since those cases were subsequent to her 1990 decision) but opined that she was required under Rule 104(a) to determine whether or not the "underlying data is of a kind that is reasonably relied upon by experts in a particular field in reaching conclusions." The experts employed by the Court were provided with the opinions of the experts on both sides of the lawsuit, and they reported only to the judge. The parties were instructed not to contact the Court's experts and they were not permitted to examine them in open court or upon deposition. The expenses of the experts were charged as court costs, presumably assessed to the losing party. As the Tenth Circuit Court said on appeal, they were "the Court's experts." The court's hydrogeology expert criticized the methodology of the Plaintiffs' expert's sampling of the alleged water contamination and the decay factors which were applied to calculate residual contamination at the point where human beings were exposed to the water. Although Judge Weinshienk appointed two additional experts (an epidemiologist and a toxicologist), she apparently did not employ them to examine the opinions of Plaintiffs' experts, because the Plaintiffs' expert on the subject of hydrogeology totally failed to meet accepted standards of reliability to establish that contaminated water ever reached the Plaintiffs. The case is reported in 749 F. Supp. 1545 and on appeal at 972 F.2d. 304.

It is interesting to note that, although it has not excited much attention, on the same day that the Supreme Court of Texas decided the *Du Pont* case, June 15, 1995, it also decided *Burroughs Wellcome Co. v. Robert N. Crye, Independent Executor*, where the

court unanimously agreed that experts' testimony concerning the refrigerating effect of a medicine aerosol spray on the toes of a patient constituted "no evidence" that Crye sustained a frost-bite injury as a result of using the spray. The opinion does not deal with the gatekeeping function, but simply holds that there is a failure to establish causation. In short, it is a "legal deficiency of the evidence" decision.

Daubert and its progeny have thus far been considered bad news for plaintiffs. The reported cases thus far would perhaps sustain this conclusion, but there is absolutely no reason to assume that experts' testimony on behalf of the defendants cannot be attacked on the bases of lack of relevancy or scientific reliability. While the gatekeeping function seems to be firmly established, and motions in limine to exclude expert testimony will probably proliferate, the real effects will depend upon the willingness of a particular trial judge in a particular case to exercise the gatekeeping function. Needless to say, the bulk of the contests over the admissibility of evidence will occur with respect to emerging scientific theories. Established scientific theories on the toxicity of many products will not be effectively questioned; on the other hand, such things as neutron activation analysis, sound spectrometry (voice transferences), psycholinguistics, atomic absorption, remote electromagnetic sensing, bite mark comparisons and some variations of DNA evidence will perhaps be hotly contested, as indicated by the majority opinion in *Du Pont*.

Robert M. Martin, Jr.

MEMORANDUM

SCAC Agenda
SCOC
SCOT Staff
J. Hecht

TO: LHS

FROM: HHD

DATE: February 5, 1997

RE: Telephone conference with Paul Gold regarding Texas Rule of Civil Evidence 503

Paul Gold asked that I inform you that a Senator at the legislature is being lobbied to carry a bill to implement the Upjohn standard regarding attorney-client privilege because it took the Supreme Court Advisory Committee two years to get to it and then only 15 of 36 people voted. And voted 8 to 7 against it.

Pamela K. BUCHANAN, Relator.

v.

Honorable Alan MAYFIELD, Judge, 74th District Court, McLennan County, Texas, Respondent.

No. 10-95-313-CV.

Court of Appeals of Texas, Waco.

June 12, 1996.

Patient, who brought negligence action against dentist claiming that due to his assistant's negligence she drank out of first patient's "spit cup," filed petition for mandamus relief from order of the 74th District Court, McLennan County, Alan Mayfield, J., which denied her motion to compel discovery of first patient's identity. The Court of Appeals, Cummings, J., held that: (1) dentist properly raised physician-patient privilege in answer to interrogatory; but (2) dentist was not "physician" under Texas law, and thus could not claim statutory privilege; and (3) mandamus relief was warranted.

Writ conditionally granted.

1. **Pretrial Procedure ⇐251.1**

Failure to timely object to interrogatories requesting privileged information constitutes waiver of privilege.

2. **Pretrial Procedure ⇐251.1**

Dentist's raising of physician-patient privilege in response to interrogatory specifically inquiring into identity of patient who allegedly used "spit cup" was sufficient to raise and preserve issue in action against dentist by another patient who claimed she mistakenly drank from that cup; fact that dentist did not raise privilege in response to general inquiry into identity of people who had knowledge of cause, in anther interrogatory, did not eviscerate effect of raising privilege in prior answer.

3. **Witnesses ⇐208(3)**

Dentist was not "physician", under Texas law, and thus could not invoke statutory claim of physician-patient privilege to keep communications between him and his patients confidential, notwithstanding fact that some functions performed by dentist were common to both dentists and medical doctors. Rules of Civ.Evid., Rule 509(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

4. **Physicians and Surgeons ⇐15(9)**

Dentist's obligation under Dental Practice Act to maintain confidences did not permit dentist to withhold identity of patient in action by another patient who claimed that, due to negligence of dentist and his assistant, she mistakenly drank out of first patient's "spit cup" since plaintiff patient was not seeking records of diagnosis made or treatment performed for and on first patient. Vernon's Ann.Texas Civ.St. art. 4549-2.

5. **Physicians and Surgeons ⇐15(9)**

Confidentiality provisions of Health and Safety Code, designed to protect as much as possible identity and other information provided to blood bank by blood donor, was inapplicable to case in which dental patient sought to discover identity of prior patient who had allegedly used "spit cup" prior to her; first dental patient could not expect same privilege of confidentiality. V.T.C.A., Health & Safety Code § 162.003.

6. **Physicians and Surgeons ⇐15(9)**

Communicable Disease Prevention and Control Act provision, allowing any person to require another person to undergo human immunodeficiency virus (HIV) test whenever person is accidentally exposed to blood or other bodily fluids of another, did not allow dentist to keep patient's identity secret in action by another patient claiming that, due to dentist's negligence, she drank from first patient's "spit cup." V.T.C.A., Health & Safety Code § 81.102(a)(5)(D), (c).

7. **Physicians and Surgeons ⇐15(9)**

Communicable Disease Prevention and Control Act reporting requirement for dentists when they either know or suspect that patient has "reportable disease" did not allow dentist to protect identity of patient from another patient who brought action against

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dentist claiming she drank from first patient's "spit cup" because of dentist's negligence where there was no particularized suspicion that first patient was infected with human immunodeficiency virus (HIV). V.T.C.A., Health & Safety Code §§ 81.041, 81.042, 81.046, 81.052.

8. **Pretrial Procedure** ⇐40

Trial court did not act within its discretion, "in the interest of justice," in refusing to order dentist to disclose patient's identity in action by another patient who claimed she drank from first patient's "spit cup" due to dentist's negligence. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 5.

9. **Mandamus** ⇐4(3), 12

Mandamus will issue only to correct clear abuse of discretion for which there is no other adequate remedy by appeal; appeal will not be adequate where party's ability to present viable claim or defense at trial is vitiated or severely compromised by trial court's erroneous discovery ruling, including denial of discovery.

10. **Mandamus** ⇐32

Mandamus will properly lie when trial court has denied party's discovery request for evidence that goes to heart of his case.

11. **Mandamus** ⇐32

Mandamus relief was warranted with respect to trial court order that denied patient's motion to compel dentist to disclose identity of first patient, in patient's action against dentist claiming that, due to his negligence, patient drank from first patient's "spit cup" since identity of first patient was essential to patient's action.

Matthew C. Witt, Cowles & Thompson, Dallas, for relator.

Alan Mayfield, Waco, for respondent.

Thomas J. Blankenship, Waco, for real parties in interest.

Before CUMMINGS and VANCE, JJ.

OPINION

CUMMINGS, Justice.

This is an original mandamus proceeding instituted by Pamela K. Buchanan, relator, against respondent, Alan Mayfield, Judge of the 74th District Court in McLennan County. Buchanan seeks a writ of mandamus directing Judge Mayfield to rescind his order of October 23, 1995, and further directing Judge Mayfield to allow Buchanan to obtain from the real party in interest, W. Russell Ross, D.D.S., the name of a patient (hereafter referred to anonymously as "Jane Doe") who allegedly used a "spit cup" from which Buchanan later drank. We conditionally grant the writ.

I. Procedural and Factual Background

According to Buchanan, she visited Dr. Ross, a dentist, on October 7, 1993, to have her teeth cleaned and her braces removed. During the course of her visit Buchanan was attended to in two different examination rooms. As a result of her changing rooms, Buchanan mistakenly drank from a cup that, according to Buchanan, was used by Jane Doe. Dr. Ross denies that Buchanan used any cup but her own.

Buchanan sued Dr. Ross under a vicarious liability theory for the allegedly negligent acts of his assistant in failing to make certain that Buchanan did not drink from anyone else's cup. She also alleged that Dr. Ross was directly negligent in failing to have a policy in place to ensure that patients do not drink from another patient's cup, in hiring his assistant, in failing to discipline his assistant for previous careless behavior, and in failing to provide Buchanan with promised information apparently on the possibility of contracting the human immunodeficiency virus (HIV), the virus which causes AIDS, by drinking the saliva and blood of a person who has tested negative for the presence of HIV in his system.[1]

Buchanan's petition before the trial court demonstrates that she is primarily concerned

1. We express no opinion on whether Buchanan sued Dr. Ross for any intentional torts committed either by him or an employee.

with the possibility of having contracted HIV. The record indicates that Jane Doe has twice been tested for HIV and Hepatitis B, on October 12, 1993, and on August 11, 1995. She tested negative each time.

II. Buchanan's Waiver Argument

Buchanan first argues that Dr. Ross waived his objection to her discovery request. She contends that she propounded two different interrogatories to Dr. Ross on the identity of Jane Doe but Dr. Ross only claimed the physician-patient privilege in response to one of them, thereby waiving the privilege. The two interrogatories along with Dr. Ross's answers are indicated below.

Interrogatory Number Eight

> Provide the name, address, and telephone number of the patient that you had tested for the HIV virus and Hepatitis B in conjunction with Plaintiff's episode at your offices which occurred on October 7, 1993. Explain why you believed such testing to be necessary.
>
> Answer: Defendant objects to Interrogatory No. 8 for the reason that it seeks confidential information and such a request violates the Physician/Patient Privilege. Without waiving that objection, the testing was done to ease any concerns on the part of Pamela Buchanan, i.e. to show that even if we assumed she had drunk from someone else's cup, she hadn't been exposed to any communicable diseases.

Interrogatory Number Ten

> Provide the names, addresses, and telephone numbers of all persons with knowledge of facts relevant to this cause. Provide a brief statement with regard to each of these persons giving what knowledge that person has.
>
> Answer: Defendant objects to Interrogatory No. 10 to the extent it requires this Defendant to state with specificity the particular knowledge each person possesses and any opinions of the person inquired about in Interrogatory No. 10. Such a request exceeds the scope of discovery allowed for and permissible under the Texas Rules of Civil Procedure. Moreover, such request calls for the production of information protected by the work product privilege, witness statements privilege, party communications privilege, post-accident investigation privilege and attorney-client privilege....

Dr. Ross in his answer to Interrogatory Number 10 then listed the requested information on a number of people who might have information about Buchanan's complaint, but information on Jane Doe was not included.

[1, 2] The failure to timely object to interrogatories requesting privileged information constitutes a waiver of the privilege. *Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) (orig. proceeding). Buchanan contends that Dr. Ross's failure to raise the physician-patient privilege in his answer to Interrogatory Number 10 waived the privilege. We disagree. Without question, Dr. Ross's raising of the privilege in response to the specific inquiry into the identity of Jane Doe in Interrogatory Number 8 was sufficient to raise and preserve the complaint. Dr. Ross's failure to again raise the privilege in response to the general inquiry in Interrogatory Number 10 into the identity of people who had knowledge of the cause did not eviscerate the effect of Dr. Ross's raising of the privilege in his answer to Interrogatory Number 8. Buchanan's waiver argument is without merit.

III. Whether a Dentist-Patient Privilege Exists Under Rule of Civil Evidence 509

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The issue to be addressed at this juncture is whether Dr. Ross may properly invoke the physician-patient privilege on the behalf of Jane Doe to prevent the disclosure of her identity. Rule 509 of the Rules of Civil Evidence provides that "[c]onfidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed." Tex.R. Civ. Evid. 509(b)(1). Rule 509(c)(2) allows physicians to invoke the privilege on the behalf of their patients.

TEX.R. CIV. EVID. 509(c)(2). The parties agree that Dr. Ross invoked the privilege on the behalf of Jane Doe and that the identity of Jane Doe would be confidential information under the rule. *See* TEX.R. CIV. EVID. 509(b)(2). The only disputed question is whether Dr. Ross, as a dentist, is entitled to this privilege expressly reserved by the rule to "physicians."

[3] A physician is defined in rule 509 as "a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be." TEX.R. CIV. EVID. 509(a)(2). The Medical Practice Act is the statutory scheme that governs the licensing of physicians in Texas. *See* TEX.REV.CIV. STAT. ANN. art. 4495b (Vernon Pamph.1996). Dentists who confine their practice strictly to dentistry are specifically excluded from application of the Medical Practice Act. *Id.* at § 3.06(b)(1). Dr. Ross is licensed to practice dentistry under the Dental Practice Act, and the record indicates that Dr. Ross's practice is exclusively in dentistry. *See* TEX.REV.CIV. STAT. ANN. arts. 4543–4551*o* (Vernon 1976 & Pamph.1996). Therefore, Dr. Ross is not a physician under Texas law, and consequently, he may not claim a privilege under rule 509 to keep any communications between him and his patients confidential.

a. Dr. Ross's Performance of Physician–Like Procedures

Nevertheless, Dr. Ross argues that he should be considered a physician for rule 509 purposes because (1) he, while not a medical doctor, is a doctor of dental surgery, (2) he can prescribe drugs, and (3) he can perform oral surgery. All of these functions are properly within the province of dentistry. *See* TEX.REV.CIV. STAT. ANN. arts. 4551a(1), 4551a(7) (Vernon Pamph.1996). The fact that these functions may be common to both dentists and medical doctors, however, does not make Dr. Ross a physician. Dr. Ross's arguments that he should be considered a physician under rule 509 because he performs some of the functions of a medical doctor are without merit.

b. A Dentist's Obligations Under the Dental Practice Act to Maintain Confidences

[4] Dr. Ross next argues that he is obliged by article 4549–2 of the Dental Practice Act not to disclose the identity of Jane Doe. *Id.* art. 4549–2. Article 4549–2 reads:

> Records of the diagnosis made and the treatment performed for and on a dental patient shall be the property of the dentist who performs the dental service and may not be sold, pledged as collateral, or otherwise transferred to any person other than the patient unless the other person is a dentist licensed by the Board and the transfer is made in compliance with rules relating to the transfer of records as may be adopted by the Board. Nothing herein shall prevent the voluntary submission of records to insurance companies for the purpose of determining benefits.

Id. Buchanan, however, is not seeking the "[r]ecords of the diagnosis made and the treatment performed for and on" Jane Doe. Buchanan is seeking only the identity of Jane Doe so that she may depose her on what knowledge she may possess in the cause. Dr. Ross's argument that article 4549–2 applies is without merit.

c. Dr. Ross's Other Statutory Arguments

Dr. Ross makes several arguments based upon three different statutory units of the Health & Safety Code. The first argument is based upon chapter 162 of the Code which provides for the confidentiality of blood donors. *See* TEX. HEALTH & SAFETY CODE ANN. § 162.001–.015 (Vernon 1992 & Supp.1996). Chapter 162 requires blood banks to test each potential donor for the presence of HIV, AIDS, hepatitis, and other infectious diseases. *See* TEX. HEALTH & SAFETY CODE ANN. § 162.002(a) (Vernon 1992). The test results, however, are confidential, and they, along with the identity of the blood donor, generally cannot be disclosed. *See id.* §§ 162.004–.011. His second argument is derived from subchapter F of the Communicable Disease Prevention and Control Act. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.101–.109 (Vernon 1992 & Supp.1996). Subchapter F provides for instances when one person may

compel another person to undergo testing for the presence of HIV in that person's system. *See id.* And the third argument is based upon subchapter C of the Communicable Disease Prevention and Control Act which requires dentists, physicians, and veterinarians to report to designated authorities their suspicions that a patient might have a communicable disease, such as AIDS. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.041–.052 (Vernon 1992 & Supp.1996). Both subchapters F and C have confidentiality provisions. *See id.* §§ 81.046, .103. We disagree with each of Dr. Ross's arguments.

1. CHAPTER 162 OF THE HEALTH & SAFETY CODE

[5] Dr. Ross argues that if chapter 162 of the Health & Safety Code allows a blood donor to keep his name confidential then Jane Doe should be allowed to keep her name confidential as well. The flaw in Dr. Ross's argument is that blood donors arrive at the blood bank under a cloak of confidentiality. *See* TEX. HEALTH & SAFETY CODE ANN. § 162.003. This cloak may only be pierced in limited situations and only to the extent provided by chapter 162. *Id.* As we held above, a dental patient is not covered by the same cloak of confidentiality when he walks into his dentist's office. Therefore, the confidentiality provisions of chapter 162, designed to protect as much as possible the identity and other information provided to the blood bank by the blood donor, is inapplicable to the case before us where the dental patient cannot expect the same privilege of confidentiality. Dr. Ross's reliance upon chapter 162 is misplaced, and therefore his argument in this vein is without merit.[2]

2. SUBCHAPTER F OF THE COMMUNICABLE DISEASE PREVENTION AND CONTROL ACT

Subchapter F of the Communicable Disease Prevention and Control Act is also inapposite to the case before us. Section 81.102(a)(5)(D) of the Act appears to allow any person at any time in any situation to require another person to undergo an HIV-test whenever the person is accidentally exposed to the blood or other bodily fluids of another, notwithstanding any suspicion that the other person is infected with HIV. TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(5)(D) (Vernon Supp.1996).[3] Dr. Ross argues that when section 81.102(a)(5)(D) is invoked, the person requesting the test is entitled only to the test results and not to the identity of the person being tested. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.102(c), .107 (Vernon 1992). Dr. Ross concludes, therefore, that Buchanan is entitled only to Jane Doe's test results and not Jane Doe's identity.

[6] We disagree. Section 81.102(a)(5)(D) presumes that the person requesting the test already knows the identity of the person to whose bodily fluids he has been exposed. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(5)(D). Subchapter F provides a mechanism by which the person who fears contagion may require the other to undergo a test to determine whether that person is infected with HIV. *Id.* There is a reason that identity is mentioned only rarely throughout

2. Interestingly, chapter 162 of the Health & Safety Code provides for the taking of discovery from these anonymous donors in a manner that preserves the donors' anonymity. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 162.010(e), .011(e) (Vernon 1992).

3. Section 81.102(a)(5)(D) is worded as follows: "A person may not require another person to undergo a medical procedure or test designed to determine or help determine if a person has AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS unless ... the medical procedure or test is necessary ... to manage accidental exposure to blood or other bodily fluids, but only if the test is conducted under written infectious disease control protocols adopted by the health care agency or facility[.]" TEX. HEALTH & SAFETY CODE ANN. § 81.102(a)(5)(D) (Vernon Supp.1996). The wording of section 81.102(a)(5)(D) suggests that its scope may not be as wide-reaching as Dr. Ross argues but may be restricted to situations where a management system is in place at medical facilities where the accidental exposure to another's bodily fluids is likely. *See id.; see also* Julie Edwards, Note, *Controlling the Epidemic: The Texas AIDS Reporting Statute*, 41 BAYLOR L. REV. 399, 408–09 nn. 68–69 (1989). For the purposes of this opinion, we will assume, without deciding, that section 81.102(a)(5)(D) applies to everyone who, in any situation, may have accidentally been exposed to the bodily fluids of another.

subchapter F, and that is because subchapter F addresses situations where the person fearing contagion already knows the identity of the person to whose bodily fluids he has been exposed. That person is only concerned thereafter with whether the other person was infected with HIV. This is the reason subchapter F provides that the identifying information of the test results, although not the test results themselves, will be destroyed only *after* the test results have been disclosed *to the person requesting the test. See id.* § 81.107(b)(2).

Of course, we can envision a scenario, such as the one before us, where the identity of the other person to be tested is not known to the person who fears contagion and the person fearing contagion must then go through an intermediary, such as Dr. Ross, to learn the identity of the person to be tested. But the fact that subchapter F provides only for the disclosure of HIV-test results and not the identity of the person being tested does not mean the intermediary can keep the identity of the person to be tested a secret. *See id.* Under the facts in this case, Dr. Ross has denied that Buchanan drank from Jane Doe's cup. Jane Doe possesses information directly relevant to this issue, and subchapter F does not operate to allow Dr. Ross to keep Jane Doe's identity from Buchanan. Moreover, we are aware of no other relationship between Dr. Ross and Jane Doe or obligation imposed upon Dr. Ross that will serve to keep the identifying information confidential, and neither has Dr. Ross plead any. Dr. Ross's argument under subchapter F of the Communicable Disease Prevention and Control act is without merit.

3. SUBCHAPTER C OF THE COMMUNICABLE DISEASE PREVENTION AND CONTROL ACT

[7] In his third statutory argument Dr. Ross contends that subchapter C of the Communicable Disease Prevention and Control Act can be read to preclude him from disclosing Jane Doe's identity. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.041–.052. Subchapter C, however, has no application to this case. Subchapter C lists reporting requirements for dentists, physicians, and veterinarians when they either know or suspect that a patient (or an animal in the case of a veterinarian) has a "reportable disease," as determined by the Texas Board of Health. TEX. HEALTH & SAFETY CODE ANN. §§ 81.041–.042 (Vernon 1992). The reports are confidential and the information contained therein, including any identifying information, may only be disclosed in a few limited circumstances and then only to a limited list of people. TEX. HEALTH & SAFETY CODE ANN. § 81.046 (Vernon 1992 & Supp.1996). There is no particularized suspicion on the part of Buchanan that Jane Doe is infected with HIV. Indeed, Jane Doe has twice tested negative for the presence of HIV in her body. The obligations of dentists, physicians, and veterinarians to make confidential reports on their patients (or animals) who either have or are suspected of having certain communicable diseases are simply irrelevant to the case before us where a third party is trying to learn whether a dentist's patient may be infected with a contagious disease. Dr. Ross's argument based upon subchapter C of the Communicable Disease Prevention and Control Act is without merit.

d. Public Policy Considerations

Dr. Ross argues at length that there is no meaningful distinction between a dentist and a physician for rule 509 purposes because both are in the profession of healing and the purpose of rule 509 is to encourage patients to be completely open in discussing their medical conditions with their physicians so that they may be properly treated. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380a (1961). Our holding, however, is demanded by the wording of rule 509 and the statutory provisions of the Medical Practice Act and the Dental Practice Act. Dr. Ross may be correct in his assessment of the public policy considerations at issue, but his recourse is not with this court but with the Supreme Court as the author of the Texas Rules of Civil Evidence or with the legislature. His public policy argument is misdirected.

e. Refusal to Disclose in the Interest of Justice

[8] As a final argument, Dr. Ross contends the trial court did not err in refusing to

order Dr. Ross to disclose Jane Doe's identity because his decision was made in the interest of justice. Rule of Civil Procedure 166b(5) provides the rule on protective orders for discovery:

> On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:
>
> a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.
>
> b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.
>
> c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted....

TEX.R. CIV. PROC. 166b(5). We decline to conclude that the trial court was within its discretion, "in the interest of justice," to completely preclude Buchanan from learning the identity of Jane Doe. If the trial court should hereafter decide to issue a protective order to prevent Buchanan from disclosing Jane Doe's identity to anyone else, rule 166b(5) provides him that authority. But the rule does not allow the trial court to keep Jane Doe's identity from Buchanan. Dr. Ross's argument is without merit.

IV. WHETHER MANDAMUS RELIEF IS PROPER

[9, 10] We will now address the question of whether mandamus will properly lie in this case. Mandamus will issue only to correct a clear abuse of discretion for which there is no other adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex.1992) (orig. proceeding). An appeal will not be adequate where a party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's erroneous discovery ruling, including the denial of discovery. *Montalvo v. Fourth Court of Appeals*, 917 S.W.2d 1, 2 (Tex.1995) (orig. proceeding); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex.1995) (orig. proceeding); *Walker*, 827 S.W.2d at 843. In other words, mandamus will properly lie when the trial court has denied a party's discovery request for evidence that goes to the heart of his case. *Able Supply*, 898 S.W.2d at 772.

[11] Essential to Buchanan's cause of action is the identity of the person who used the "spit cup" prior to her, whether Jane Doe, some other party, or Buchanan herself. Dr. Ross has affirmatively denied that the cup at issue was used by Jane Doe. Buchanan has sought the identity of Jane Doe to learn from her facts relevant to the issue of whether she used the cup, such as, the physical characteristics of the cup, whether she left any blood on the cup (Buchanan contends there was blood on the cup she used), and whether she saw Dr. Ross's assistant dispose of the cup after she used it. The information sought by Buchanan directly impacts her ability to demonstrate that Jane Doe was the party who used the same cup from which she drank. We find that Buchanan's inquiry into the identity of Jane Doe was reasonably calculated to lead to the discovery of admissible evidence. *See* TEX.R. CIV. P. 166b(2)(a). Because Buchanan has been denied the discovery of information that goes to the heart of her case, she does not have an adequate remedy by appeal. Therefore, mandamus will properly lie.

3RD00553

V. ATTORNEY'S FEES AND COSTS

As a final matter, Buchanan argues that the trial court erred in failing to award her expenses, including attorney's fees, for the prosecution of her Motion to Compel Discovery and for Sanctions. Rule of Civil Procedure 215(1)(d), however, restricts the review of such orders to appeals from the final

judgment. *See* TEX.R. CIV. P. 215(1)(d). Therefore, we will not consider Buchanan's complaint.

We conclude the trial court's denial of Buchanan's Motion to Compel Discovery was a clear abuse of discretion that left Buchanan with no adequate remedy by appeal. Therefore, mandamus is an appropriate remedy. We are confident that the trial court will promptly set aside its order denying Buchanan's motion and will enter an alternative order allowing Buchanan to learn Jane Doe's identity or provide some other suitable relief.[4] The writ will issue only upon its failure to do so.

The writ is conditionally granted.

STATE of Texas, Appellant

v.

Bryon Autry PRESTON and Glenda Preston, Appellees.

Nos. 11-95-321-CR, 11-95-322-CR.

Court of Appeals of Texas, Eastland.

June 13, 1996.

Defendants charged with hindering apprehension of third party who was arrested inside their home filed motion to suppress. The District Court, Comanche County, James E. Morgan, J., granted motion, and State appealed. The Court of Appeals, Wright, J., held that: (1) plain view exception to warrant requirement did not apply to police officers' warrantless entry into defendants' home while trying to execute arrest warrant for third party, but (2) suppression order was overly broad.

Affirmed as reformed.

1. Criminal Law ⇐394.6(5), 1158(4)

At hearing on motion to suppress, trial court is sole and exclusive trier of fact and is judge of credibility of witnesses and weight to be given to their testimony; if they are supported by the record, trial court's findings will not be disturbed.

2. Criminal Law ⇐1153(1)

Absent abuse of discretion, trial court's ruling on motion to suppress will be upheld if it is correct on any theory of law applicable to case.

3. Criminal Law ⇐394.4(3)
Searches and Seizures ⇐24

Searches without warrants are per se unreasonable, and objects seized are inadmissible absent certain well-recognized exceptions. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐68(10)

Absent consent or exigent circumstances, officers who are seeking to arrest suspect in home of third parties must obtain search warrant. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐47.1

Exception to search warrant requirement exists in those situations in which evidence sought to be suppressed is in plain view. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐47.1

Under "plain view" doctrine, if officers are lawfully present at place from which they observed evidence which is sought to be suppressed, then there was no search. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. This opinion should not read to mandate that the disclosure of Jane Doe's identity to Buchanan is the only solution to Buchanan's problem. In her mandamus petition, Buchanan asserts that she only wants to know Jane Doe's identity so that she can learn from her information about the cup and whether she had ever been told the reason she was tested for HIV. Deposing Jane Doe, or conducting some other form of discovery, in a manner that allows her to continue to conceal her identity may be a workable solution agreeable to both parties. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 161.010(e), .011(e).

10-23-95
4543.001
(c: LHS)
(COVER LTR. ONLY)
hhd

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TRCE 702 — Vanf

H&D
SCAC Agenda Subc
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Tex

October 18, 1995

All Members of the Supreme Court Advisory Committee

Ladies and Gentlemen:

Something needs to be done by this committee to eliminate the needless waste of time and energy that has been created by virtue of the court's recent decision in Robertson v. DuPont. Enclosed for your consideration are Daubert/DuPont motions that were recently filed in one of my cases regarding experts who were eminently qualified and regarding whom no motion was sustained. The motions opposed the qualifications of Ph.D.'s/M.D.'s in pharmacology, toxicology, pathology, and rheumatology.

We had to expend hundreds of hours of lawyer time and court time dealing with issues that are easily, as Justice Renquist said, taken care of during voir dire examination or cross examination. These motions have imposed a new level of preliminary hearings that frustrate and lengthen the orderly disposition of cases. It is, I contend, an ill-conceived idea which was born in the minds of those who, while striving to improve the litigation process, actually created a situation which has quickly become intolerable.

Sincerely,

Michael T. Gallagher

MTG/kh
enclosure

P.S. Some of these experts were being challenged for the third and fourth time even though prior challenges were all overruled.

11/21/96
4543.001
cc: HB
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November 21, 1996

This fax transmission consists of 5 pages. If transmission is not complete, please call.

TRCE 702

BY TELEFAX AND U.S. MAIL

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Re: SCAC Agenda on *Robinson* as applied to social sciences

Dear Luke:

I am enclosing a copy of Justice Gonzalez's concurring opinion in *S.V. v. R.V.*, 40 TEX. SUP. CT. J. 114 (Nov. 15, 1996), in which Justice Gonzalez suggests that the SCAC consider alternative standards for the admissibility of social science evidence, as opposed to trying to fit such evidence into the *Robinson* standards.

I would like to request that this item be added to the SCAC Agenda for 1997.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je
Enclosure

way if it is. Confidentiality is intended to facilitate the work of an appellate court, not determine the outcomes of cases. The decision in a case ought never to turn on the fact that individual JUSTICES are not obliged to explain their positions.

There is much less need for confidentiality in the votes on applications than in other aspects of the Court's deliberations. Appellate judges must have an opportunity to explore ideas with each other before taking public positions. I can scarcely imagine conducting our deliberations in the same environment as the Legislature, for example. But the need for candor in deliberations does not justify a lack of accountability in our decisions. This idea is neither novel nor renegade. Justice William O. Douglas discussed his views on the subject in his autobiography:

> When I came on the Court [in 1939] Hugo Black talked to me about his idea of having every vote on every case made public. In cases taken and argued, the vote of each Justice was eventually known. But in cases where appeals were dismissed out of hand or certiorari denied, no votes were recorded publicly. I thought his idea an excellent one and backed it when he proposed to the conference that it be adopted. But the requisite votes were not available then or subsequently. As a result he and I started to note our dissents from denials of certiorari and dismissal of appeal in important cases. Gradually the practice spread to a few other JUSTICES; and finally I ended up in the sixties noting my vote in all cases where dismissals or denials were contrary to my convictions.

WILLIAM O. DOUGLAS, GO EAST YOUNG MAN 452 (1974), *quoted in* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 113 n.2 (1975). Professor Karl Llewellyn has written:

> It is as well to remember that neither secrecy of the court's deliberation or later secrecy about what went on during that deliberation rests in the nature of things or in any ordinance of God. The roots of each are either practical or accidental, and it is only either ignorance or tradition which makes us feel that we have here something untouchable, a semiholy arcanum. We tend to forget that in common law history the centuries of the Year Books rest on a practice of conference, consultation, and decision going on in open court before ears and eyes of counsel, the bar at large, and the apprentices. . . . I personally suspect that our own secrecy practice began when decision began to be postponed beyond the close of argument, with an eye to avoiding misapprehension and disappointment, and then to avoiding financial speculation. And I suspect the carryover into later secrecy about past deliberations to represent partly a closing of ranks to protect the court from criticism or attack, and in later years a similar closing to allow free discussion with no possible repercussions in a re-election campaign. Thus the storied sanctity of the conference room represents to me as pragmatic and nonmystic a phase of appellate judicial work as the handling of the docket. Our modern fetish of secrecy reminds me of the shock German lawyers displayed at the notion of such dangerous things as published dissenting opinions.

KARL N. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 324 n.308 (1960) (citation omitted), *quoted in* Arthur S. Miller & D. S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFFALO L. REV. 799, 809–810 (1973).

I recognize the danger that publicly announcing votes on denied applications could lead an unscrupulous Justice to posturing for ulterior reasons. And I believe that CHIEF JUSTICE PHILLIPS' concern that the Court's time and resources not become too strained is valid. I believe that maintaining the confidentiality of votes on denied applications is generally the preferable approach. But when it allows decisions in cases which would not be made if public explanations were required, confidentiality becomes indefensible.

I would grant the application for writ of error in this case, set oral argument, and resolve the important issues presented after plenary consideration of the merits. To ensure accountability in our decisions, the Court should announce the votes to grant and those to deny in this and all other cases in which relief is denied.

NATHAN L. HECHT
Justice

OPINION DELIVERED: November 15, 1996

S. V.
vs. 3RD00557
R. V.

No. 94-0856

From Dallas County, Fifth District.

(Opinion of the Court of Appeals, 880 S.W.2d 804.)

Motion for rehearing of cause is overruled. Concurring opinion by Justice Cornyn delivered March 14, 1996 (39 Tex. Sup. Ct. Jour. 386) is withdrawn and the concurring opinion delivered this date is substituted therefor. Concurring opinion on motion for rehearing of cause by Justice Gonzalez.

CONCURRING OPINION

JUSTICE CORNYN, concurring.

I withdraw my prior concurring opinion and substitute this one in its place.

I concur in the Court's judgment. I question, however, whether the Court's extended discussion of the tragic and no doubt embarrassing facts of this case is necessary to conclude that the discovery rule does not apply. While it is true, as the Court's opinion notes, that when reviewing a directed verdict the evidence should be viewed in a light most favorable to the person suffering the adverse judgment, the only question the Court purports to answer is whether R.'s allegations of sexual abuse are objectively verifiable. Thus, only the evidence relating to that issue needs to be reviewed. Additionally, although it disclaims any intention of doing so, the Court's obvious concern for the lack of scientific consensus about the reliability of repressed memories necessarily raises questions, not only about the objective verifiability of R.'s allegations for purposes of its discovery rule analysis, but also about the admissibility of expert testimony on this subject under the Court's recent decision in *Robinson v. DuPont*, 923 S.W.2d 549 (Tex. 1995).

My first point needs little elaboration. The Court assumes without deciding that R. can satisfy one of the two elements required for the application of the discovery rule, the inherent undiscoverability element. The Court therefore addresses only the second requirement, that the allegations be objectively verifiable. _____ S.W.2d at _____. The plaintiff in this case, the Court observes, offers no objectively verifiable evidence: no confession by the abuser, criminal conviction, contemporaneous records or written statements of the abuser such as diaries or letters, medical records of the person abused showing contemporaneous physical injury resulting from the abuse, photographs or recordings of the abuse, objective eyewitness's account, or 'the like.' _____ S.W.2d at _____. I agree with this assessment, but having reached this conclusion, I see no need for an extensive discussion of the intimate details of the parties' lives when these ordinarily private matters can have no bearing on the objective verifiability inquiry.

My second point is that the centerpiece of the Court's opinion is the validity of expert testimony about repressed memory syndrome, and in assessing such testimony, the Court obliquely implicates the admissibility of this evidence under *Robinson*. The Court writes: "Because the second requirement for applying the discovery rule is an objectively verifiable wrong, the central determination that must be made is whether recovered memories meet this requirement. The question whether recovered memories are valid has elicited the most passionate debate among scholars and practitioners, and the consensus of professional organizations reviewing the debate is that there is no consensus on the truth or falsity of these memories." _____ S.W.2d at _____. Then, after a review of some of the available scientific literature, the Court concludes:

> In sum, the literature on repression and recovered memory syndrome establishes that fundamental theoretical and practical issues remain to be resolved. These issues include the extent to which experimental psychological theories of amnesia apply to psychotherapy, the effect of repression on memory, the effect of screening devices in recall, the effect of suggestibility, the difference between forensic and therapeutic truth, and the extent to which memory restoration techniques lead to credible memories or confabulations. Opinions in this area simply cannot meet the "objective verifiability" element for extending the discovery rule.

_____ S.W.2d at _____. If there were a "settled scientific view," the Court suggests, the objective verifiability element might be satisfied. _____ S.W.2d at _____. By contrast, the dissent argues that the testimony of a "qualified, reputable mental health expert[] should suffice" as verification. _____ S.W.2d at _____ (Owen, J., dissenting).

In *Robinson*, this Court followed the lead of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), by adopting six nonexclusive factors to determine admissibility of expert testimony under Rule 702. Four members of the Court dissented from that decision, *Robinson*, 923 S.W.2d at 560 (Cornyn, J., dissenting, joined by Hightower, Gammage, and Spector, JJ.), not because we

disagreed with the Court's desire to curb "junk science" in the courtroom, but because of the means the Court chose: usurpation of the jury's historic role as the exclusive judge of the credibility of a witness.

Aside from the role of amateur scientist that *Robinson* unfortunately thrust upon them, trial courts face additional problems in behavioral science cases like this one because these disciplines cannot be readily evaluated under the nonexclusive factors enunciated in *Robinson*. *See Robinson*, 923 S.W.2d at 557. Of the factors listed in *Robinson*, only the third (whether the theory has been subjected to peer review and/or publication) appears to have been satisfied in this case, and even this factor does not tip the scales either for or against admissibility because both champions and critics of repressed memory syndrome have published articles on this subject. JUSTICE GONZALEZ, the author of *Robinson*, goes so far as to argue in his concurring opinion that application of the *Robinson* standard will result in the exclusion of *all* expert testimony of uncorroborated repressed memories of child sexual abuse. Even though *Robinson* now plainly controls the admissibility of *some* expert testimony, it *cannot* reasonably be construed to control the admissibility of *all* expert testimony. There are some types of expert testimony to which the nonexclusive factors adopted in *Robinson* are clearly inapplicable. As one legal scholar has noted:

> Scientific evidence is only part of the larger domain of expert testimony. In addition to listing scientific testimony, Rule 702 expressly refers to "technical, or other specialized knowledge." There are numerous examples of technical but nonscientific experts whose credentials normally include substantial formal instruction in the techniques of a discipline. Attorneys, historians, and musicians fall into this category. There are also many nonscientific experts who have informally acquired specialized knowledge through practical experience. This category includes auctioneers, bankers, railroad brakesmen, businesspersons, carpenters, farmers, security guards, and trapshooters.

Edward J. Imwinkelried, *The Next Step After* Daubert: *Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2272, 2278 (1994) (footnotes omitted); *see also* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 84 (1994) (questioning applicability of *Daubert* to social sciences including psychology, economics, sociology and political science). Thus, JUSTICE GONZALEZ cannot be correct when he contends that under *Robinson* or *Daubert*, evidence from any discipline that is incapable of being "empirically tested" is categorically inadmissible. _____ S.W.2d at _____.

This case provides an example. Unlike some other scientific theories, theories or opinions about behavior, memory, and psychology depend largely on the subjective interpretation of the expert and usually do not have demonstrable rates of error. Scholars have observed that "the nature of certain social and behavioral science theories may be inherently inconsistent with *Daubert* criteria such as 'falsifiability' and 'error rates'" and that some new theories "have simply not been sufficiently developed as theories to allow for proper consideration of the guidelines offered by *Daubert*." Richardson et al., *The Problems of Applying* Daubert *to Psychological Syndrome Evidence*, 79 JUDICATURE 10, 11, 12 (1995).

That *Robinson* should not apply to all types of expert testimony may also be inferred from the dissent's conclusion that uncorroborated expert testimony about repressed memory can alone satisfy the objective verifiability requirement of the discovery rule. _____ S.W.2d at _____ (referring to psychiatry as the "penultimate gray area"). The dissent not only argues that expert testimony can satisfy the objective verifiability requirement of the discovery rule, but also assumes that such expert testimony would be unquestionably admissible at trial:

> In this case the defendant had the benefit of cross-examining R. V. and her experts and would have had the benefit of presenting his own expert testimony attacking the validity of recovered memories, if the trial court had not granted the motion for directed verdict at the conclusion of R. V.'s case in chief. These are all matters that would have been considered by the trier of fact in determining both when the plaintiff discovered that he or she was abused *and whether the underlying abuse actually occurred*.

_____ S.W.2d at _____ (emphasis added). Recognizing the difficulties for the jury in reconstructing events occurring during R.'s minority with the aid of expert testimony, the dissent argues that these difficulties may be overcome by "expert testimony cautioning the jury of the dangers which the

majority discusses and . . . present[ing] evidence that R. V.'s post-traumatic stress disorder stemmed from another traumatic event." ____ S.W.2d at ____. In my opinion, JUSTICE OWEN's argument would not be viable after *Robinson* if JUSTICE GONZALEZ is correct about *Robinson*'s scope.

As I have said before, I fear that the admissibility standard that the Court adopted in *Robinson* will prove unworkable in a wide variety of contexts in which Rule 702 of our Rules of Evidence is implicated, including cases like this one. *See Robinson*, ____ S.W.2d at ____ (Cornyn, J., dissenting). I believe the Court's opinion today demonstrates the inevitability of that conclusion.

JOHN CORNYN
Justice

OPINION DELIVERED: November 15, 1996

CONCURRING OPINION

JUSTICE GONZALEZ, concurring opinion on motion for rehearing.

The rule we adopted in *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), was guided by the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Supreme Court appears to have intended that *Daubert* provide the exclusive standard for evaluating the reliability of expert testimony about anything characterized as science. *See Daubert*, 113 S. Ct. at 2795 & n.8 (distinguishing science from "technical or other specialized knowledge" also subject to scrutiny under Federal Rule of Evidence 702). That was our intent in adopting the *Daubert* rule in Texas. *See Robinson*, 923 S.W.2d at 557 (adopting *Daubert* rule to guide trial courts in "determining the reliability of the scientific evidence" presented under Texas Rule of Civil Evidence 702). But many things commonly represented and accepted as science cannot meet the *Daubert-Robinson* standard because they do not qualify under the definition of "science" set forth in *Daubert*.[1] They are not testable under the scientific method. As I discussed in my concurring opinion in the present case, repressed memory syndrome, as that phenomenon is now understood, is one of these things.

As JUSTICE CORNYN correctly recognizes, this case foreshadows larger issues than the admissibility of repressed memory syndrome. Under *Robinson*, many social and behavioral disciplines will undoubtedly suffer the same fate. Thus, we need to develop a standard or filter apart from *Robinson* to judge the validity of expert testimony based on the social sciences. A recent commentator has aptly summarized the problem:

> Although the [view that *Daubert-Robinson* provides the exclusive standard for evaluating scientific expert testimony] is our preferred solution, it leaves no safe harbor for evidence that is widely viewed as scientific, is accepted as sound, but cannot meet the *Daubert* criteria. This appears to be a dilemma that the lower courts will have to resolve on their own. . . .

Conley & Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New* Reference Manual on Scientific Evidence, 74 N.C. L. REV. 1183, 1204 (1996).

Rather than addressing this problem on a case-by-case basis, the bench and bar would be better served if we dealt with it head-on. I therefore suggest that we refer this matter to the Supreme Court Advisory Committee and the appropriate state bar committees for recommendations concerning a possible rule change by our Court. In the meantime, I suggest that trial courts apply *Robinson* across the board in determining the admissibility of scientific evidence.

RAUL A. GONZALEZ
Justice

OPINION DELIVERED: November 15, 1996

[1] Science is the process of generating and testing hypotheses. The initial inquiry is whether the proffered testimony is scientifically valid, and validity depends on testability. *See Daubert*, 113 S. Ct. at 2796–97 (1993); *Robinson*, 923 S.W.2d at 555.

12/9/96
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cc (LHS)
orig nnd

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December 6, 1996

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John F. Sutton, Jr.
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Re: State Bar of Texas Rules of Evidence Committee
Subcommittee Studying Proposed Rules Changes
Regarding Expert Testimony

Dear Dean Sutton:

Enclosed is a recent letter I received from Buddy Low, and an attached letter from Richard Orsinger, both members of the Supreme Court Advisory Committee. These letters deal with recent concurring opinions by Justice Gonzalez and Justice Cornyn in the S.V. v. R.V. case regarding non-scientific expert testimony. I would like your subcommittee to review and consider any recommendations regarding the standard for admissibility of non-scientific expert testimony. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

Mark K. Sales

MKS:spl

Enclosure

cc: Gilbert I. Low
Luther H. Soules, III

3RD00561

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December 3, 1996

Mr. Gilbert I. Low
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Beaumont, Texas 77702

Re: Subcommittee on TRCE

Dear Mr. Low:

Enclosed please find a copy of a letter I received from Richard Orsinger forwarding a copy of Justice Gonzalez' concurring opinion in S.V. v. R.V., 40 Tex. Sup. Ct. J. 114 (Nov. 15, 1996). Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Sincerely,

LUTHER H. SOULES III

LHSIII/hhd
Enclosure
cc: Honorable Nathan L. Hecht
State Bar of Texas Court Rules Committee
Committee on Administration of Rules of Evidence Committee
Mr. Richard R. Orsinger

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November 21, 1996

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TRCE '702

BY TELEFAX AND U.S. MAIL

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Re: SCAC Agenda on *Robinson* as applied to social sciences

Dear Luke:

I am enclosing a copy of Justice Gonzalez's concurring opinion in *S.V. v. R.V.*, 40 TEX. SUP. CT. J. 114 (Nov. 15, 1996), in which Justice Gonzalez suggests that the SCAC consider alternative standards for the admissibility of social science evidence, as opposed to trying to fit such evidence into the *Robinson* standards.

I would like to request that this item be added to the SCAC Agenda for 1997.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je
Enclosure

way if it is. Confidentiality is intended to facilitate the work of an appellate court, not determine the outcomes of cases. The decision in a case ought never to turn on the fact that individual JUSTICES are not obliged to explain their positions.

There is much less need for confidentiality in the votes on applications than in other aspects of the Court's deliberations. Appellate judges must have an opportunity to explore ideas with each other before taking public positions. I can scarcely imagine conducting our deliberations in the same environment as the Legislature, for example. But the need for candor in deliberations does not justify a lack of accountability in our decisions. This idea is neither novel nor renegade. Justice William O. Douglas discussed his views on the subject in his autobiography:

> When I came on the Court [in 1939] Hugo Black talked to me about his idea of having every vote on every case made public. In cases taken and argued, the vote of each Justice was eventually known. But in cases where appeals were dismissed out of hand or certiorari denied, no votes were recorded publicly. I thought his idea an excellent one and backed it when he proposed to the conference that it be adopted. But the requisite votes were not available then or subsequently. As a result he and I started to note our dissents from denials of certiorari and dismissal of appeal in important cases. Gradually the practice spread to a few other JUSTICES; and finally I ended up in the sixties noting my vote in all cases where dismissals or denials were contrary to my convictions.

WILLIAM O. DOUGLAS, GO EAST YOUNG MAN 452 (1974), *quoted in* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 113 n.2 (1975). Professor Karl Llewellyn has written:

> It is as well to remember that neither secrecy of the court's deliberation or later secrecy about what went on during that deliberation rests in the nature of things or in any ordinance of God. The roots of each are either practical or accidental, and it is only either ignorance or tradition which makes us feel that we have here something untouchable, a semiholy arcanum. We tend to forget that in common law history the centuries of the Year Books rest on a practice of conference, consultation, and decision going on in open court before ears and eyes of counsel, the bar at large, and the apprentices. . . . I personally suspect that our own to be postponed beyond the close of argument, with an eye to avoiding misapprehension and disappointment, and then to avoiding financial speculation. And I suspect the carryover into later secrecy about past deliberations to represent partly a closing of ranks to protect the court from criticism or attack, and in later years a similar closing to allow free discussion with no possible repercussions in a re-election campaign. Thus the storied sanctity of the conference room represents to me as pragmatic and nonmystic a phase of appellate judicial work as the handling of the docket. Our modern fetish of secrecy reminds me of the shock German lawyers displayed at the notion of such dangerous things as published dissenting opinions.

KARL N. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 324 n.308 (1960) (citation omitted), *quoted in* Arthur S. Miller & D. S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFFALO L. REV. 799, 809–810 (1973).

I recognize the danger that publicly announcing votes on denied applications could lead an unscrupulous Justice to posturing for ulterior reasons. And I believe that CHIEF JUSTICE PHILLIPS' concern that the Court's time and resources not become too strained is valid. I believe that maintaining the confidentiality of votes on denied applications is generally the preferable approach. But when it allows decisions in cases which would not be made if public explanations were required, confidentiality becomes indefensible.

I would grant the application for writ of error in this case, set oral argument, and resolve the important issues presented after plenary consideration of the merits. To ensure accountability in our decisions, the Court should announce the votes to grant and those to deny in this and all other cases in which relief is denied.

NATHAN L. HECHT
Justice

OPINION DELIVERED: November 15, 1996

3RD00564
S. V.
vs.
R. V.

No. 94-0856

From Dallas County, Fifth District.

(Opinion of the Court of Appeals, 880

Motion for rehearing of cause is overruled. Concurring opinion by Justice Cornyn delivered March 14, 1996 (39 Tex. Sup. Ct. Jour. 386) is withdrawn and the concurring opinion delivered this date is substituted therefor. Concurring opinion on motion for rehearing of cause by Justice Gonzalez.

CONCURRING OPINION

JUSTICE CORNYN, concurring.

I withdraw my prior concurring opinion and substitute this one in its place.

I concur in the Court's judgment. I question, however, whether the Court's extended discussion of the tragic and no doubt embarrassing facts of this case is necessary to conclude that the discovery rule does not apply. While it is true, as the Court's opinion notes, that when reviewing a directed verdict the evidence should be viewed in a light most favorable to the person suffering the adverse judgment, the only question the Court purports to answer is whether R.'s allegations of sexual abuse are objectively verifiable. Thus, only the evidence relating to that issue needs to be reviewed. Additionally, although it disclaims any intention of doing so, the Court's obvious concern for the lack of scientific consensus about the reliability of repressed memories necessarily raises questions, not only about the objective verifiability of R.'s allegations for purposes of its discovery rule analysis, but also about the admissibility of expert testimony on this subject under the Court's recent decision in *Robinson v. DuPont*, 923 S.W.2d 549 (Tex. 1995).

My first point needs little elaboration. The Court assumes without deciding that R. can satisfy one of the two elements required for the application of the discovery rule, the inherent undiscoverability element. The Court therefore addresses only the second requirement, that the allegations be objectively verifiable. ____ S.W.2d at ____. The plaintiff in this case, the Court observes, offers no objectively verifiable evidence: no confession by the abuser, criminal conviction, contemporaneous records or written statements of the abuser such as diaries or letters, medical records of the person abused showing contemporaneous physical injury resulting from the abuse, photographs or recordings of the abuse, objective eyewitness's account, or 'the like.' ____ S.W.2d at ____. I agree with this assessment, but having reached this conclusion, I see no need for an extensive discussion of the intimate details of the parties' lives when these ordinarily private matters can have no bearing on the objective verifiability inquiry.

My second point is that the centerpiece of the Court's opinion is the validity of expert testimony about repressed memory syndrome, and in assessing such testimony, the Court obliquely implicates the admissibility of this evidence under *Robinson*. The Court writes: "Because the second requirement for applying the discovery rule is an objectively verifiable wrong, the central determination that must be made is whether recovered memories meet this requirement. The question whether recovered memories are valid has elicited the most passionate debate among scholars and practitioners, and the consensus of professional organizations reviewing the debate is that there is no consensus on the truth or falsity of these memories." ____ S.W.2d at ____. Then, after a review of some of the available scientific literature, the Court concludes:

> In sum, the literature on repression and recovered memory syndrome establishes that fundamental theoretical and practical issues remain to be resolved. These issues include the extent to which experimental psychological theories of amnesia apply to psychotherapy, the effect of repression on memory, the effect of screening devices in recall, the effect of suggestibility, the difference between forensic and therapeutic truth, and the extent to which memory restoration techniques lead to credible memories or confabulations. Opinions in this area simply cannot meet the "objective verifiability" element for extending the discovery rule.

____ S.W.2d at ____. If there were a "settled scientific view," the Court suggests, the objective verifiability element might be satisfied. ____ S.W.2d at ____. By contrast, the dissent argues that the testimony of a "qualified, reputable mental health expert[] should suffice" as verification. ____ S.W.2d at ____ (Owen, J., dissenting).

In *Robinson*, this Court followed the lead of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), by adopting six nonexclusive factors to determine admissibility of expert testimony under Rule 702. Four members of the Court dissented from that decision, *Robinson*, 923 S.W.2d at 560 (Cornyn, J., dissenting, joined by Hightower, Gammage, and Spector, JJ.), not because we

disagreed with the Court's desire to curb "junk science" in the courtroom, but because of the means the Court chose: usurpation of the jury's historic role as the exclusive judge of the credibility of a witness.

Aside from the role of amateur scientist that *Robinson* unfortunately thrust upon them, trial courts face additional problems in behavioral science cases like this one because these disciplines cannot be readily evaluated under the nonexclusive factors enunciated in *Robinson*. *See Robinson*, 923 S.W.2d at 557. Of the factors listed in *Robinson*, only the third (whether the theory has been subjected to peer review and/or publication) appears to have been satisfied in this case, and even this factor does not tip the scales either for or against admissibility because both champions and critics of repressed memory syndrome have published articles on this subject. JUSTICE GONZALEZ, the author of *Robinson*, goes so far as to argue in his concurring opinion that application of the *Robinson* standard will result in the exclusion of *all* expert testimony of uncorroborated repressed memories of child sexual abuse. Even though *Robinson* now plainly controls the admissibility of *some* expert testimony, it *cannot* reasonably be construed to control the admissibility of *all* expert testimony. There are some types of expert testimony to which the nonexclusive factors adopted in *Robinson* are clearly inapplicable. As one legal scholar has noted:

> Scientific evidence is only part of the larger domain of expert testimony. In addition to listing scientific testimony, Rule 702 expressly refers to "technical, or other specialized knowledge." There are numerous examples of technical but nonscientific experts whose credentials normally include substantial formal instruction in the techniques of a discipline. Attorneys, historians, and musicians fall into this category. There are also many nonscientific experts who have informally acquired specialized knowledge through practical experience. This category includes auctioneers, bankers, railroad brakesmen, businesspersons, carpenters, farmers, security guards, and trapshooters.

Edward J. Imwinkelried, *The Next Step After* Daubert: *Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2272, 2278 (1994) (footnotes omitted); *see also* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 84 (1994) (questioning applicability of *Daubert* to social sciences including psychology, economics, sociology and political science). Thus, JUSTICE GONZALEZ cannot be correct when he contends that under *Robinson* or *Daubert*, evidence from any discipline that is incapable of being "empirically tested" is categorically inadmissible. ____ S.W.2d at ____.

This case provides an example. Unlike some other scientific theories, theories or opinions about behavior, memory, and psychology depend largely on the subjective interpretation of the expert and usually do not have demonstrable rates of error. Scholars have observed that "the nature of certain social and behavioral science theories may be inherently inconsistent with *Daubert* criteria such as 'falsifiability' and 'error rates'" and that some new theories "have simply not been sufficiently developed as theories to allow for proper consideration of the guidelines offered by *Daubert*." Richardson et al., *The Problems of Applying* Daubert *to Psychological Syndrome Evidence* 79 JUDICATURE 10, 11, 12 (1995).

That *Robinson* should not apply to all types of expert testimony may also be inferred from the dissent's conclusion that uncorroborated expert testimony about repressed memory can alone satisfy the objective verifiability requirement of the discovery rule. ____ S.W.2d at ____ (referring to psychiatry as the "penultimate gray area"). The dissent not only argues that expert testimony can satisfy the objective verifiability requirement of the discovery rule, but also assumes that such expert testimony would be unquestionably admissible at trial:

> In this case the defendant had the benefit of cross-examining R. V. and her experts and would have had the benefit of presenting his own expert testimony attacking the validity of recovered memories, if the trial court had not granted the motion for directed verdict at the conclusion of R. V.'s case in chief. These are all matters that would have been considered by the trier of fact in determining both when the plaintiff discovered that he or she was abused *and whether the underlying abuse actually occurred*.

____ S.W.2d at ____ (emphasis added). Recognizing the difficulties for the jury in reconstructing events occurring during R.'s minority with the aid of expert testimony, the dissent argues that these difficulties may be overcome by "expert testimony cautioning the jury of the dangers which the

majority discusses and . . . present[ing] evidence that R. V.'s post-traumatic stress disorder stemmed from another traumatic event." ____ S.W.2d at ____. In my opinion, JUSTICE OWEN's argument would not be viable after *Robinson* if JUSTICE GONZALEZ is correct about *Robinson*'s scope.

As I have said before, I fear that the admissibility standard that the Court adopted in *Robinson* will prove unworkable in a wide variety of contexts in which Rule 702 of our Rules of Evidence is implicated, including cases like this one. *See Robinson*, ____ S.W.2d at ____ (Cornyn, J., dissenting). I believe the Court's opinion today demonstrates the inevitability of that conclusion.

JOHN CORNYN
Justice

OPINION DELIVERED: November 15, 1996

CONCURRING OPINION

JUSTICE GONZALEZ, concurring opinion on motion for rehearing.

The rule we adopted in *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), was guided by the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Supreme Court appears to have intended that *Daubert* provide the exclusive standard for evaluating the reliability of expert testimony about anything characterized as science. *See Daubert*, 113 S. Ct. at 2795 & n.8 (distinguishing science from "technical or other specialized knowledge" also subject to scrutiny under Federal Rule of Evidence 702). That was our intent in adopting the *Daubert* rule in Texas. *See Robinson*, 923 S.W.2d at 557 (adopting *Daubert* rule to guide trial courts in "determining the reliability of the scientific evidence" presented under Texas Rule of Civil Evidence 702). But many things commonly represented and accepted as science cannot meet the *Daubert-Robinson* standard because they do not qualify under the definition of "science" set forth in *Daubert*.[1] They are not testable under the scientific method. As I discussed in my concurring opinion in the present case, repressed memory syndrome, as that phenomenon is now understood, is one of these things.

As JUSTICE CORNYN correctly recognizes, this case foreshadows larger issues than the admissibility of repressed memory syndrome. Under *Robinson*, many social and behavioral disciplines will undoubtedly suffer the same fate. Thus, we need to develop a standard or filter apart from *Robinson* to judge the validity of expert testimony based on the social sciences. A recent commentator has aptly summarized the problem:

> Although the [view that *Daubert-Robinson* provides the exclusive standard for evaluating scientific expert testimony] is our preferred solution, it leaves no safe harbor for evidence that is widely viewed as scientific, is accepted as sound, but cannot meet the *Daubert* criteria. This appears to be a dilemma that the lower courts will have to resolve on their own. . . .

Conley & Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New* Reference Manual on Scientific Evidence, 74 N.C. L. REV. 1183, 1204 (1996).

Rather than addressing this problem on a case-by-case basis, the bench and bar would be better served if we dealt with it head-on. I therefore suggest that we refer this matter to the Supreme Court Advisory Committee and the appropriate state bar committees for recommendations concerning a possible rule change by our Court. In the meantime, I suggest that trial courts apply *Robinson* across the board in determining the admissibility of scientific evidence.

RAUL A. GONZALEZ
Justice

OPINION DELIVERED: November 15, 1996

[1] Science is the process of generating and testing hypotheses. The initial inquiry is whether the proffered testimony is scientifically valid, and validity depends on testability. *See Daubert*, 113 S. Ct. at 2796–97 (1993); *Robinson*, 923 S.W.2d at 556.

12/10/96
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December 10, 1996

This fax transmission consists of 10 pages. If transmission is not complete, please call.

BY TELEFAX AND U.S. MAIL

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Re: SCAC Agenda on *Robinson* as applied to behavioral sciences

Dear Luke:

I am enclosing an article by Ann McClure, Justice on the El Paso Court of Appeals, relating to the *Robinson* junk science admissibility standards as applied to behavioral science testing in family law cases.

This might be a resource for the SCAC's consideration of special rules relating to admissibility of behavioral science evidence. Please include this in the Agenda.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je
Enclosure

JUNK SCIENCE AND FAMILY LAW:
The Debate over the Admissibility of Psychological Testimony

Justice Ann Crawford McClure[1]
Eighth District Court of Appeals

Family law practitioners routinely deal with psychological testing in contested custody cases, visitation and relocation disputes, and termination proceedings. Objective personality tests (including the Minnesota Multiphasic Personality Inventory [MMPI and MMPI-2]; the Millon Clinical Multiaxial Inventory [MCMI and MCMI-II], the California Psychological Inventory and the Personality Inventory for Children); projective personality tests and projective drawings (including the Rorschach, the Thematic Apperception Test [TAT], and various sentence completion tests); the Custody Quotient, the Bricklin Perceptual Scales, and even the Phallic Plethysmograph are commonly used to convince the fact finder of parental strengths and weaknesses, and of parental sins of omission and commission. Some commentators have advised practitioners of ways to "get it in" or to "keep it out". *See*, D. McClure, *Psychological Testing*, State Bar of Texas Advanced Family Law Seminar (1995); M. McCurley and K. Karlson: *Mental Experts: Understanding 16PF, Projective Drawings, Sentence Completion and Bricklin (For Children)*, State Bar of Texas Advanced Family Law Seminar (1993); J. Ferrell and D. McClure, *Mental Health Experts: Understanding and Interpreting DSM-III-R, MMPI-2 and MCMI-II*, State Bar of Texas Advanced Family Law Seminar (1993); J. Ferrell and D. McClure, *Mental Health Experts: Understanding and Interpreting the Rorschach and TAT*, State Bar of Texas Advanced Family Law Seminar (1993); M.J. McCurley, *Dealing with Experts and Psychological Tests*, State Bar of Texas Marriage Dissolution Course (1991); M. McCurley and K. Fuller, *The MMPI -- An Explanation and Critical Analysis*, Advanced Matrimonial Law Institute, American Academy of Matrimonial Lawyers/Oklahoma Chapter (1988); M. McCurley and M.J. McCurley, *Psychological Testing*, State Bar of Texas Marriage Dissolution Course (1987); M. McCurley and K. Fuller, *The MMPI - What Is It?*, State Bar of Texas Advanced Family Law Seminar (1986). Recent opinions from the Supreme Court indicate that the battle over admissibility is only just beginning. In short, the issue has become "junk science", or euphemistically speaking, the reliability of scientific evidence provided by purported expert witnesses. Junk science is rampant and easily available. And while we are truly in need of serious developments in the quality and availability of testing specifically attuned to parent-child litigation, until new techniques can be validated and their reliability determined, they are fair game for an evidentiary challenge.

The following comments are not intended to express my opinion or the opinion of the Eighth Court of Appeals on the reliability or validity of the testing devices discussed; nor do I express an opinion concerning the admissibility of these tests as evidence. I acknowledge that the spread of junk science in the courtroom poses legitimate concerns: one study criticized by Justice Gonzalez involved the admission of an experiment in which several different antibiotic sprays were applied to a dead pig's foot to compare temperature changes that the different sprays caused to the foot at

[1] Justice McClure serves as Chair-Elect of the Family Law Section and Treasurer of the Appellate Practice & Advocacy Section of the State Bar of Texas.

the surface, and at two depths below the surface. *See, Burroughs Wellcome Co. v. Crye,* 912 S.W.2d 251 (Tex.App.--El Paso 1994), *rev'd* 907 S.W.2d 497 (Tex. 1995)(Gonzalez, J., concurring). I suggest only that psychological testimony predicated on psychological testing can be essential in assessing parent-child attachments, parenting skills, and the overall best interest of the child. This is particularly true in those circumstances in which the child will be traumatized by, or is too young to take center stage in, the courtroom dramas that unfold in the family courts daily.

To set the stage for the developing battleground, a brief review is necessary. Admission of expert testimony in Texas is governed by Rule 702 of the Rules of Civil Evidence. The Texas rule is identical to the federal rule recently construed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). In *Daubert,* the Supreme Court rejected the common law test formulated in *Frye v. United States,* 293 F.1013, 1014 (D.C. Cir. 1923), that the method and testimony of an expert witness have "general acceptance in the particular field in which it belongs." The Supreme Court of Texas has now addressed the issue in *E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549 (Tex. 1995) and established new Texas law in the area.

The Robinsons alleged that their pecan orchard suffered damage as a result of the continued use of a fungicide manufactured by du Pont. The trial court excluded the testimony of the Robinson's only expert witness on causation, finding that his testimony (1) was not grounded upon careful scientific methods and procedures; (2) did not demonstrate a careful scientific investigation upon which reliable conclusions could be based; (3) and (4) was not shown to be based on scientifically valid reasoning and methodology or to have a reliable basis in the knowledge and experience of his discipline (horticulture); (5) and (6) was not based on theories and techniques that had been properly subjected to peer review and publication; and there was no showing that they would have received any degree of acceptance within the relevant scientific community.

In reversing, the court of appeals noted that an expert's evaluation must meet three prerequisites: (1) a body of scientific, technical or other specialized knowledge must exist that is pertinent to the facts of the case; (2) the witness must have sufficient experience in his field of expertise, encompassing knowledge, skill, experience, training, and education; and (3) the facts evaluated must be within the witness' field of specialized knowledge. *Robinson v. E. I. du Pont de Nemours & Co.*, 888 S.W.2d 490 (Tex.App.--Fort Worth 1994), *rev'd* 923 S.W.2d 549 (Tex. 1995). Recognizing that whether an individual is an expert witness is a discretionary matter left to the trial court, the appellate court concluded that du Pont did not contest the qualifications of the witness, only the methodologies and the research upon which he would base his opinion. The court concluded:

> "He would not have testified as a chemist, but as a horticulturalist with a doctorate in horticulture and plant ecology and agronomy who had been conducting research with regard to Benlate. His testimony would have been pertinent to the cause of the damage to the Robinsons' orchard and the connection, if any, of Benlate to that damage. In light of his qualifications and experience as revealed in the bill of exception, Dr. Whitcomb's testimony was relevant to causation and it was error of the trial court to exclude it. . . The weight to be given his testimony or the credibility

of Dr. Whitcomb as an expert witness, however, is to be determined by the trier of fact." 888 S.W.2d at 492-93.

The Supreme Court disagreed, noting that the use of experts in litigation is widespread, and that "[p]rofessional expert witnesses are available to render an opinion on almost any theory, regardless of its merit." *Robinson*, 923 S.W.2d at 553 (*quoting Chaulk v. Volkswagen of Am., Inc.*, 808 F.2d 639, 644 (7th Cir. 1986). Recognizing that it had not defined standards for the admission of expert testimony since the adoption of the Rules of Civil Evidence, the Court announced that trial judges would have heightened responsibility to insure that expert testimony was reliable, especially when predicated on "novel scientific theories" (from the proponent's perspective) or "junk science" (from the opponent's point of view). *Id.* at 554. The Court laid out the Supreme Court's analysis in *Daubert*, and that of the Court of Criminal Appeals in *Kelly v. State*, 824 S.W.2d 568 (Tex. - Crim.App. 1992), and found them persuasive. It construed Rule 702 to include three requirements for the admission of expert testimony: (1) the expert must be qualified; (2) the testimony must be "scientific . . . knowledge"; and (3) the testimony "must assist the trier of fact to understand the evidence or to determine a fact in issue." TEX.R.CIV.EVID. 702; 923 S.W.2d at 556. The latter two requirements are met by showing that testimony is both relevant and reliable. Reliability is the key issue in *Robinson*.

The Court then listed several factors a trial court may consider in determining reliability, cautioning that the list was not exhaustive. The factors announced were:

(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 published;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

923 S.W.2d at 557. The Supreme Court suggested that one indication of reliability is whether an expert's testimony -- and underlying scientific experimentation -- were prepared for the instant litigation. This was also a factor announced in *Daubert* on remand. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)("the only review the plaintiff's experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters"). To date, there has been no commentary on whether the trial court's ability to order psychological evaluations incident to parent-child litigation impacts on this reliability factor.

The burden of showing admissibility is on the proponent at trial when objection is made. 923

S.W.2d at 557. The standard of review is whether the trial court abused its discretion in admitting or excluding the evidence. *Id.* at 558. Applying this analysis, the Court concluded that the trial court had properly excluded the expert testimony, reversed the judgment of the court of appeals, and affirmed the trial court.

On March 14, 1996, the Supreme Court delivered its opinion in *S.V. v. R.V.*, __ S.W.2d __ (Tex. 1996)(1996 WL 112206). R. intervened in her parents divorce action, alleging that her father, S., had sexually abused her. The direct issue before the Court involved the application of the discovery rule, inasmuch as R. filed her action four months after her 20th birthday. The applicable statute of limitations at the time required that suit be filed within two years of her majority. R. claimed that the discovery rule should be applied because she had repressed all memory of the sexual abuse until one month before she turned 20 years of age. The trial court directed a verdict against her on the grounds that the discovery rule did not apply and that she had not adduced evidence of abuse. The court of appeals reversed and remanded. *Vesecky v. Vesecky*, 880 S.W.2d 804 (Tex.App.--Dallas 1994). The Supreme Court reversed the judgment of the court of appeals and affirmed the judgment of the trial court on limitations grounds.

Delineating the two elements which must be present before the discovery rule may be applied, the Court held that "[T]hese two elements of inherent undiscoverability and objective verifiability balance the conflicting policies in statutes of limitations: the benefits of precluding stale or spurious claims versus the risks of precluding meritorious claims that happen to fall outside an arbitrarily set period." 1996 WL 112206, at *4. Thus, R.'s claim must have been inherently undiscoverable within the limitations period and objectively verifiable. Assuming without deciding that R. could satisfy the inherent undiscoverability element, the Court proceeded to address the question of "whether there can be enough objective verification of wrong and injury in childhood sexual abuse cases to warrant application of the discovery rule." In answering this question in the negative, the majority opinion (authored by Justice Hecht and joined by Chief Justice Phillips and Justices Enoch, Spector, Baker and Abbott) makes some sweeping statements concerning the reliability of psychological testing and diagnosis. The concurring opinions of Justices Gonzalez and Cornyn focus on the relationship between reliability and admissibility.

The factual recitation in the majority opinion is lengthy and thus condensed here. R. considered her relationship with her father to be distant but satisfactory, while R. and her mother were quite close. During her senior year in high school, R.'s parents separated and her mother filed for divorce. R. was angry over the divorce and sought psychiatric counseling. At the end of her freshman year in college, R. learned that her mother had been sexually abused as a child, a revelation that the mother did not recall until the preceding year. Shortly thereafter, R. began counseling with Alice Frazier, a licensed professional counselor whom R.'s mother had been consulting. R. sought help with the breakup of a long term relationship, and discussed her anger with her father over the divorce, her concern that the financial problems created by the divorce would impact her return to college, her fear of sexual intimacy, and her feelings of dissociation. R. returned to college in the fall of 1990 and, just before Thanksgiving of that year, she had her first recollection of an incestuous incident. She visited with Frazier over the Thanksgiving holiday and as their sessions continued, Frazier became convinced that R. was a victim of sexual abuse. R. continued to recall additional incidents of abuse. Ultimately, R. became outraged that her father was demanding visitation with

R.'s younger sister, and concerned that S. would abuse the younger daughter, R. intervened in the divorce action. Although the divorce proceedings ultimately settled, R. persisted with her negligence action against S. At trial, R.'s experts discussed dissociation and repression, along with repressed/recovered memory syndrome. In addition to Frazier, two other experts testified that R.'s symptomatology was consistent with that of other survivors of childhood sexual abuse: headaches, gastrointestinal problems, fatigue, nightmares, low self-esteem, depression, anxiety, body memories, gagging, distraction, fear of sexual intercourse, and lack of emotion in recounting memories. All three testified that R. suffered from post-traumatic stress disorder, which included symptoms of all-pervading fear, anxiety, depression, intrusive thoughts, memories, flashbacks, mood swings, feelings of helplessness and confusion. They also admitted that these symptoms could have been caused by something other than child abuse. However, each expert was convinced that R. could not have invented the events she claimed to recall and that she was indeed telling the truth.

The MMPI test administered to R. showed a classic "V" profile, shared by many survivors of sexual abuse. R. also showed traits of a borderline personality disorder and although she did not have the disorder, individuals who do are prone to distort the truth. S. was subjected to the MMPI and the MCMI tests, and these results showed traits similar to sexual offenders: narcissistic traits like self-centeredness, overvaluation of self, high need for recognition and control; reality distortion; and problems in the ability to express emotions, particularly negative ones. While these tests also showed contradictory results and did not show S. to be sexually abusive, several aspects of his Rorschach test were consistent with those one would expect to see in a child abuser. Still other unspecified personality tests showed no sexual deviancy, and his penile plethysmograph revealed a "flat affect" indicating no arousal.

The majority opinion observes that uncertainty surrounds scientific literature on memory in general, and on recovered memory in particular. While there is some agreement among psychiatrists concerning psychiatric treatment in this area, there is little consensus on the validity of recovered memories or on the techniques used to retrieve them. *Id.* at *16. The opinion purports to limit the evidentiary considerations to the application of the discovery rule: "Had R. brought suit against S. before she turned twenty, the conflict in the evidence would be for the jury to resolve." *Id.* at *20. This single statement becomes significant in light of the concurring opinions; Justice Owens further emphasizes it in her dissent. *Id.* at *34 ("The Court readily concedes that if suit had been filed within the two year window between R.V.'s eighteenth and twentieth birthdays, 'the conflict in the evidence' as to the validity of repressed memory 'would be for the jury to resolve'.")

Justice Gonzalez's concurring opinion comments that because expert testimony regarding repressed memory does not meet the *Robinson* guidelines for admissibility, it should be kept out of the courtroom. *Id.* at *28, *30. One reason is that the repressed memory theory cannot be empirically tested, a key question in determining whether a theory or technique can be classified as science. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Id.* at *29 (citing *Daubert).* Of greater concern to family practitioners is his statement that repressed memory diagnosis relies heavily upon the subjective interpretation of the expert. He then notes that this reliance is a sobering reality in sexual abuse cases and that "experts constitute a highly variable and therefore unreliable source of opinion formation in cases of alleged

sexual abuse." *Id.* at *29. I pause here to note that the sexual abuse allegations involved in *S.V. v. R.V.* ultimately arose in the tort context. Sadly, however, allegations of sexual abuse have achieved a level of frequency in family law litigation. As much as we may want to believe that such atrocities do not occur, indeed they do. Trial judges across the state must routinely determine whether an allegation is true or whether it is strategically made in order to inflame the passions of the fact finder. Where there is no documented medical or physical evidence to substantiate a valid claim, psychological testimony may be critical to the protection of a child.

Justice Cornyn's original concurring opinion states similar concerns, noting that although the majority disclaims any intention of doing so, its concern for the lack of scientific consensus about the reliability of repressed memories necessarily raises questions about the admissibility of expert testimony on this subject under *Robinson*. In fact, he concludes that Justice Gonzalez is correct when he contends that under *Robinson*, evidence from any scientific discipline that is incapable of being 'empirically tested' is categorically inadmissible. *Id.* at *30-31. To family law practitioners concerned with subjective psychological testing which has been routinely admitted without objection, the following statements will no doubt generate interest:

> "Unlike some other scientific theories, theories or opinions about behavior, memory, and psychology depend largely on the subjective interpretation of the expert and usually do not have demonstrable rates of error. Scholars have observed that 'the nature of certain social and behavioral science theories may be inherently inconsistent with *Daubert* criteria such as falsifiability and error rates' and that some theories 'have simply not been sufficiently developed as theories to allow for proper consideration of the guidelines offered by *Daubert*.'" *Id.* at *32 (citing Richardson et al., *The Problems of Applying* Daubert *to Psychological Syndrome Evidence*, 79 Judicature 10, 11, 12 (1995).

On November 15, 1996, Justice Cornyn withdrew his original concurring opinion and substituted a new one. The referenced passage also appears in the later text. *S.V. v. R.V.*, 40 Tex.Sup.Ct.Jour. 114, 116 (Cornyn, J., concurring). He concludes by stating his fear that the admissibility standard adopted in *Robinson* will prove unworkable in a wide variety of contexts in which Rule 702 of our Rules of Evidence is implicated. *Id.* at 117.

The majority opinion includes a response to the admissibility issues addressed in the concurring opinions:

> "The concurring opinions take up the debate over the admissibility of scientific evidence where *Robinson* (full citation deleted) left off. Justice Gonzalez favors the rule in *Daubert* (citation deleted) . . . which requires a determination of the reliability of expert opinion before it is admitted in an effort to exclude what has come to be called 'junk science'. Justice Cornyn opposes assessing experts' reliability, considering this to be a 'usurpation of the jury's historic role as the exclusive judge of the credibility of a witness.' . . . The issue is simply not in this case. None of the parties has ever raised it. We intimate no view on whether the evidence in this case was or was not admissible, and nothing we have written suggests the answer to that

> question, 'obliquely', to use Justice Cornyn's word, . . . or otherwise. Evidence can be reliable and still not provide objective verification of an injury. . . . This case does not speak to whether expert testimony about repressed memories is ever admissible or inadmissible, contrary to what Justice Gonzalez and Justice Cornyn appear to believe . . ." 1996 WL 112206 at *27.

What do "validity" and "reliability" mean in the context of psychological testing? Psychological testing is a standardized method of checking a portion of an individual's behavior and comparing it to that of a group with known characteristics. The tests are categorized depending on what factors the particular test is designed to measure. Reliability of a given test, in the traditional sense, requires consistency of results. For example, in order for a test to be "reliable" in scientific terms, the test results should be essentially the same whether the patient is tested six days, or six weeks, or six months later. There is not complete agreement among psychologists as to what reliability standard should be set in order to be confident of a certain test. *See* M. McCurley and M.J. McCurley, *Psychological Testing*, State Bar of Texas Marriage Dissolution Course (1987).

Validation for scientific purposes requires that the test measure what it actually purports to measure. For example, does a particular intelligence test truly measure intelligence? The American Psychological Association, along with two other associations, have produced a report entitled *Educational and Psychological Tests and Manuals* (1974), which is designed to help the clinical psychologist determine "validity" of a given test. However, validity is more difficult to establish than reliability and there are different approaches to validation. These approaches range from predictive validity (with certain information about A, one can state with probability that B will occur), to concurrent validity (rather than being predictive of behavior, the test scores are compared to present information: comparing what score one makes on an intelligence test with what grades the test taker is making in school) to "concurrent" or "face" validity (if the test involved problems in multiplication, it would then seem to follow that the test measures one's ability to multiply), to "construct" validity (the extent to which the test may be said to measure a theoretical concept, for example, intelligence or mechanical comprehension or anxiety). J. Ziskin, Vol. 1 *Coping with Psychiatric and Psychological Testimony,* (3rd Ed.) 78-81 (California: Law and Psychology Press, 1981).

While the concurrences in *S.V. v. R.V.* indicate concern over the admissibility of psychological testing in general, the specific comments in the majority opinion deal with testimony concerning repressed memory syndrome. It appears, however, that evidence of the MMPI, the MCMI, the Rorschach and the Phallic Plethysmograph were all introduced into evidence at trial, presumably without objection. Yet psychologists cannot agree on the reliability or validity of these testing devices, either. The MMPI, although it is an objective personality test, was designed as a diagnostic tool to examine psychological pathology. It is routinely utilized to determine psychological profiles as a means of weighing (and comparing) parental skills. According to the reviewers in O.K. Bros.' *Fifth Mental Measurements Yearbook*, the validity for distinguishing one kind of group from another, in terms of pathology, is modest at best. As the manual states, "a high score on a scale has been found to predict positively the corresponding final clinical diagnosis or estimate in more than sixty percent of new psychiatric admissions." *Id.* Does this mean that the MMPI fails to accurately predict personality disorders in almost forty percent of the cases?

Considering the *Robinson* guidelines, should such predictive error be allowed in the courtroom? As to validity of the MMPI, Ziskin made the following comments some fifteen years ago:

> "The test is dependent for its power on self-description. It was empirically developed from patient populations that were reasonably cooperative and reasonably motivated to reveal upset. In a differently motivated population, the test and its standard norms are not valid and can be grossly misleading." J. Ziskin, Vol. 1 *Coping with Psychiatric and Psychological Testimony* (3rd Ed.) 220-221 (California: Law and Psychology Press, 1981).

Other tests suffer similar defects. The Bricklin Perceptual Scales are a more recent testing device, yet aside from efforts by Dr. Bricklin himself, virtually no research exists to establish reliability and validity. Dr. Bricklin argues that these testing scales have been validated by 23 years of continuous research in which he compared primary caretakers selected through the use of his test with primary caretakers selected by using figure drawings, child questionnaires, parent interview forms, clinical and life history data, and judicial decisions in adversarial proceedings. The latest approach is the Custody Quotient, developed by Dr. Robert Gordon and Dr. Leon Peek of Dallas. It was designed because of a growing dissatisfaction with traditional psychological tests as they are applied to measuring good parenting, yet it is so new as to have had little time for validity and reliability testing.

The difficulties of psychological and behavioral "sciences" are at the core of Justice Gonzalez's concurring opinion on motion for rehearing. *S.V. v. R.V.*, 40 Tex.Sup.Ct.Jour. 114, 117 (November 15, 1996). He observes that many things commonly represented and accepted as science cannot meet the *Daubert-Robinson* standard because they do not qualify under the definition of "science" set forth in *Daubert*. ["Science is the process of generating and testing hypotheses. The initial inquiry is whether the proffered testimony is scientifically valid, and validity depends on testability. *See Daubert*, 133 S.Ct. At 2796-97 (1993); *Robinson*, 923 S.W.2d at 555."] 40 Tex.Sup.Ct.Jour. at 117, n.1.

Of interest to family law attorneys is his open invitation for practitioners to study the issue:

> "Under *Robinson*, many social and behavioral disciplines will undoubtedly suffer the same fate. Thus, we need to develop a standard or filter apart from *Robinson* to judge the validity of expert testimony based on the social sciences. . . Rather than addressing this problem on a case-by-case basis, the bench and bar would be better served if we dealt with it head-on. I therefore suggest that we refer this matter to the Supreme Court Advisory Committee and the appropriate state bar committees for recommendations concerning a possible rule change by our Court. In the meantime, I suggest that trial courts apply *Robinson* across the board in determining the admissibility of scientific evidence." *Id.*

In response to Justice Gonzalez's invitation, Richard R. Orsinger of San Antonio, a family law specialist and member of the Supreme Court Advisory Committee, has suggested that the Family Law Section assist with the development of criteria for the admissibility of social science evidence.

The Chair of the Family Law Section, J. Lindsey Short, Jr. of Houston, has appointed an ad hoc committee to study the issue. Needless to say, this battle will continue to be waged in the trial courts, either at pre-trial conferences or while jurors cool their heels in the hallway, until the Supreme Court adopts a new methodology. I can only hope that the children of Texas are not the ones who must pay the price caused by delay.

STATE BAR OF TEXAS

12/6/96
4913.001
cc LHS
Chg: HH
SW

FAMILY LAW SECTION

HFD
SCAC agenda
v Evidence Subc
SBOT Staff
J Hecht

December 4, 1996

Mr. Luther H. Soules, III
Soules & Wallace, P.C.
100 W. Houston St., Suite 1500
San Antonio, Texas 78205

RE: SCAC Agenda on Robinson As Applied to Social Sciences

Dear Luke:

I have had the benefit of reviewing the S.V. v. R.V. case and the letter from Richard Orsinger to you. Because of the significance of social science evidence in the family law area in general and custody and visitation cases in particular, I would concur with Richard and respectfully suggest that if possible, the SCAC Agenda for 1997 include possible alternative standards for the admissibility of social science evidence.

I have taken the liberty of establishing an *Ad Hoc* Committee to analyze this and to submit to the Family Law Council its ideas for consideration. At such time as we have concluded our work, I will respectfully and humbly forward our work to you for consideration.

Thank you for your assistance in this regard and I hope you have a wonderful holiday season.

Very truly yours,

Lindsey

J. Lindsey Short, Jr.

JLS/arz

cc: Executive Committee

3RD00578

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December 13, 1996

Mr. Luther H. Soules, III
SOULES & WALLACE, P.C.
100 W. Houston Street
Suite 1500
San Antonio, Texas 78205

Re: Developing *Robinson* Standards for Behavioral Science Evidence

Dear Luke:

This letter is to advise you that the Family Law Council has created an Ad Hoc Committee to develop standards for the admissibility of behavioral science evidence in Texas trials, per the suggestion of Justice Gonzalez in *S.V. v. R.V.*

It is anticipated that the Committee will complete its work by March, 1997, in time for the proposal to be considered by the Family Law Council at its May, 1997 meeting.

Sincerely yours,

RICHARD R. ORSINGER

RRO/je

cc: Justice Raul Gonzalez

Rule 1009

ARROYO SHRIMP FARM, INC., Chi-Ming Tao and U.S.A. Shrimp Farm Development, Inc. and Wang Hui-Chi A/K/A Michelle Huei Zei Wong, Appellants,

v.

HUNG SHRIMP FARM, INC. and Ping-Kung Hung, Appellees.

No. 13-94-344-CV.

Court of Appeals of Texas, Corpus Christi.

June 27, 1996.

Rehearing Overruled July 25, 1996.

Foreign purchaser brought action against vendor and his companies for fraud in sale of land intended to be used as commercial shrimp farms. The 103rd District Court, Cameron County, Robert Garza, J., entered judgment on verdict in favor of purchaser, and vendor appealed. The Court of Appeals, Dorsey, J., held that: (1) vendor failed to preserve his claim that evidence was both legally and factually insufficient to support jury's verdict of fraud; (2) purchaser did not ratify or waive his fraud claims; and (3) denial of vendor's proposed trial amendment raising defenses of res judicata, collateral estoppel, and judicial admission was not abuse of discretion.

Affirmed.

1. **Appeal and Error ⇐209.1**

Complaint that evidence is insufficient must be raised in trial court before one may complain of it on appeal. Rules App.Proc., Rule 52(a).

2. **Appeal and Error ⇐213, 237(5), 238(2), 294(1)**

To preserve legal sufficiency or "no evidence" complaint for appeal from jury trial, party must make motion for instructed verdict, object to submission of issue to jury, make motion to disregard jury's answer, make motion for judgment non obstante veredicto, or make motion for new trial specifically raising complaint.

3. **Appeal and Error ⇐295**

Party complaining of factual insufficiency of evidence to support jury finding or of excessiveness of damage award must raise complaint first in motion for new trial in order to complain of it on appeal. Vernon's Ann.Texas Rules Civ.Proc., Rule 324(b)(2, 4).

4. **Appeal and Error ⇐294(1)**

Motion for new trial can preserve both factual and legal insufficiency points for appeal.

5. **Appeal and Error ⇐302(6)**

In order to preserve insufficient evidence point for review, motion for new trial must specifically point out deficiencies in manner that adequately apprises trial judge of those deficiencies. Vernon's Ann.Texas Rules Civ.Proc., Rule 321.

6. **Appeal and Error ⇐232(.5)**

To preserve issue for appeal, grounds supporting objection made during trial must conform with argument supporting corresponding point of error on appeal.

7. **Appeal and Error ⇐232(.5)**

Objection made during trial which is not same as argument urged on appeal presents nothing for appellate review.

8. **Appeal and Error ⇐302(6)**

Defendant's motion for new trial failed to preserve his argument that evidence was both legally and factually insufficient to support jury's verdict of fraud, where defendant's motion argued that, due to collusion of trial lawyers, he should be given new trial, but did not state or imply that evidence was legally or factually insufficient to support jury's findings of fraud or their award of damages.

3RD00580

9. **Trial ⇐420**

Should movant offer additional evidence after his motion for instructed verdict is denied, he thereby waives motion.

10. **Appeal and Error ⇐241**

Defendant's filing of "Motion to Withdraw Case from Jury and Render Judgment" at close of all evidence did not preserve his

argument that evidence was both legally and factually insufficient to support jury's verdict of fraud, where motion sought directed verdict on grounds of res judicata, collateral estoppel, judicial admissions, waiver, estoppel, and ratification.

11. Fraud ⇐36

In order to prove ratification defense to fraud, opposing party had to prove that party alleging fraud had full knowledge of fraudulent acts or breach at time of ratification and nevertheless intentionally chose to ratify contract in spite of alleged fraud.

12. Fraud ⇐64(1)

If evidence of ratification of fraud is controverted, question is for trier of fact.

13. Fraud ⇐23

If party who claims to have been defrauded had means to have discovered fraud, if any existed, and undertakes to investigate for himself, and does make such investigation as he deems necessary, and is not hindered or prevented from doing so by any act of other party, it must be held as matter of law that he has knowledge of everything that proper investigation would disclose, and hence would not be justified in acting on fraudulent representations, if any were made to him, merely because they were made to him.

14. Fraud ⇐22(1)

Person must exercise reasonable ordinary care for protection of his own interests and discover existence of fraud if he has knowledge of facts that would put reasonably prudent person on inquiry.

15. Fraud ⇐35

Fact that foreign purchaser signed contract for sale of land and shrimp farming license some three months after entering letter of intent which allowed purchaser to obtain information that he thought necessary and satisfactory regarding license did not amount to waiver of purchaser's fraud claims, where there was no evidence that purchaser was aware of anything which would have put him on notice that he should have made inquiry into license, rather than simply relying on vendor's representations that license was transferable and difficult for foreign nationals to obtain.

16. Fraud ⇐10

Representations concerning law of foreign states or countries are considered to be representations of fact, and therefore can support fraud action.

17. Fraud ⇐35, 36

Fact that foreign purchaser assigned contract for purchase of land and shrimp farming license to related company and that he purchased additional land and continued to make payments on contracts did not show that he had affirmative intent to ratify contracts or to waive his claims for fraud, in view of purchaser's testimony that he did not even know he had action for fraud available to him until he conferred with American attorney, and that he purchased new land and constructed pump station on that land in futile effort to save his original investment.

18. Fraud ⇐35

Acts done in affirmance of original contract do not necessarily amount to waiver of right to sue for fraud.

19. Appeal and Error ⇐294(1)

In order to attack jury finding on appeal for being against overwhelming weight of evidence, party must first raise point of error in motion for new trial. Vernon's Ann.Texas Rules Civ.Proc., Rule 324(b)(3).

20. Pleading ⇐245(3), 258(3)

Trial court must allow trial amendment unless opposing party presents evidence of surprise or prejudice, or amendment asserts new cause of action or defense, and thus is facially prejudicial.

3RD00581

21. Pleading ⇐236(3, 7)

Trial court has no discretion to deny trial amendment unless opposing party presents evidence of surprise or prejudice, or amendment asserts new cause of action or defense and is thus prejudicial on its face and opposing party objects. Vernon's Ann.Texas Rules Civ.Proc., Rule 66.

22. Appeal and Error ⇐959(3)

If trial amendment is not mandatory, court's decision to allow or deny amendment may be reversed only if it is clear abuse of discretion.

23. Pleading ⇐229

Party opposing trial amendment does not have to prove prejudice or surprise if amendment is substantive one which changes nature of trial.

24. Pleading ⇐261

Newly plead affirmative defense in trial amendment substantially changes nature of trial so that party opposing amendment does not have to prove prejudice or surprise.

25. Pleading ⇐236(7)

Denial of vendor's proposed trial amendment, at close of evidence in fraud action, raising defenses of res judicata, collateral estoppel, and judicial admission was not abuse of discretion, where vendor was aware of facts that led him to seek trial amendment well before trial began, and where purchaser stated that he was surprised by attempted trial amendment and that it would be unfair to purchaser if amendment were granted, at end of lengthy trial, without notice to him.

26. Appeal and Error ⇐946

In reviewing trial court's ruling for abuse of discretion, court looks to whether trial court made its ruling without reference to any guiding rule or principle.

27. Pretrial Procedure ⇐45

In determining whether good cause exists for admitting witness' testimony regarding evidence not disclosed by offering party during discovery, court may look at inadvertence of counsel, lack of surprise, unfairness or ambush, uniqueness of excluded evidence, and whether or not witness was deposed. Vernon's Ann.Texas Rules Civ.Proc., Rule 215, subd. 5.

28. Pretrial Procedure ⇐312

Denial of vendor's motion to strike purchaser's expert's testimony regarding value of land, which was based on different set of "comparable sales" than those given during discovery in fraud action, was not abuse of discretion, in view of expert's testimony that he mistakenly listed ranch land sales rather than farmland sales when he provided answers to vendor's interrogatories and that this was his mistake, not that of attorneys, and where expert's ultimate valuations did not change significantly from his interrogatory responses to his trial testimony.

Clinard J. Hanby, Woodlands, Juan A. Guerra, Raymondville, for appellant.

Charles A. Carlson, III, Harlingen, William M. Mills, McAllen, for appellee.

Before SEERDEN, C.J., and DORSEY and HINOJOSA, JJ.

OPINION

DORSEY, Justice.

Ping-Kung Hung, a citizen and resident of Taiwan, Republic of China, and his company, Hung Shrimp Farm, Inc. ("Hung"), sued Chi-Ming Tao, an American citizen, and his companies, Arroyo Shrimp Farm, Inc., and U.S.A. Shrimp Farm Development, Inc. ("Tao"), for fraud in the sale of land in Willacy County, Texas. The intended purpose of the purchase was to install and operate commercial shrimp farms. The case was tried to a jury, which found that Tao had defrauded Hung and awarded Hung approximately $11.5 million in actual damages and an additional $10.5 million in exemplary damages. Tao appeals with nine points of error.

Sufficiency of the Evidence

Tao complains in his first two points of error that the evidence is legally and factually insufficient to support the jury's verdict of fraud. He raises the same complaint about the actual and punitive damage awards in his fifth, sixth, seventh, and eighth points of error. We hold these points of error were not preserved in the trial court and are waived on appeal, and thus we overrule them.

[1–3] A complaint that evidence is insufficient must be raised in the trial court before one may complain of it on appeal. *See* TEX. R.APP. P. 52(a). To preserve a legal sufficiency or "no evidence" complaint for appeal

from a jury trial, a party must use one of the following methods: (1) a motion for instructed verdict, (2) an objection to the submission of the issue to the jury, (3) a motion to disregard the jury's answer, (4) a motion for judgment *non obstante veredicto*, or (5) a motion for new trial specifically raising the complaint. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex.1992); *Regan v. Lee*, 879 S.W.2d 133, 135 (Tex.App.-Houston [14th Dist.] 1994, no writ); *Villalpando v. De La Garza*, 793 S.W.2d 274, 277 (Tex.App.—Corpus Christi 1990, no writ). A party complaining of factual insufficiency of the evidence to support a jury finding or of the excessiveness of the damage award must raise the complaint first in a motion for new trial in order to complain of it on appeal. TEX.R. CIV. P. 324(b)(2), (4); *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex.1991).

[4] A motion for new trial can preserve both factual and legal insufficiency points for appeal, and Tao argues that his motion for new trial does so with respect to the findings of fraud and damages. Tao's motion for new trial in its entirety follows:

I.

Defendants bring this motion pursuant to Rule 320 and 324 of the Texas Rules of Civil Procedure. It is the opinion and belief of Defendants that the final judgment signed on or about the 20th of January, 1994, should be set aside for good cause. Defendants would show the Court that this rule authorizes the Court in all fairness due to the damages that were awarded are manifest[ly] too large. In the history of all the South Texas counties, never had such an amount ever been awarded.

II.

Defendants complain, by way of this their Motion For New Trial, of the conduct of the attorneys involved first as their attorneys and then the attorneys exchanging clients and ultimately their opposing counsel. If the Court would take notice of the official organ of the State Bar of Texas, *The Texas Bar Journal*, volume 57, no. 2, February 1994 issue, on p. 200, undoubtedly there is concern as to any attorney trying to serve two (2) masters.

The pertinent areas [in] such an article are the following:

Conclusion

In order to adequately safeguard those confidences, the firm must withdraw from representing any of the parties.

Therefore, such conduct may not have been abrogated by mere disclosures. The only way to attempt to cure such gross misconduct of the attorneys involved, is for this Court to grant a new trial.

III.

Defendants would show that in this case at bar, all attorneys for the parties were also players in the events that lead to the alleged causes of action, the subject matter of this lawsuit. Defendants hereby invoke the mandates of Texas Disciplinary Rules of Professional Conduct, Rule 3.08 which in its pertinent parts states the following:

LAWYER AS WITNESS

(a) A lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered [sic] in opposition to the testimony;

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish[ ] testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which an-

other lawyer [in the] lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not [also serve] as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

IV.

Defendants would show the Court that fraud was never committed. Defendant's defense never included an independent expert witness on the value of the land sold. The obvious rationale for not having obtained one is the collusion between all attorneys in this case.

Defend[ants] would show the Court, through expert testimony that the land sold was not at all excessive and was only the net reasonable value of the land. Therefore, as a matter of law, if indeed, by a stretch of imagination, there was a stat[e]ment which would qualify as fraudulent, there were no damages. Damages is an element of this tort, therefore, if none, there could not have been fraud.

V.

This case represents the sad states of affairs among the legal field. There is a series of lawyers who contracted each other to represent both sides. This coupled with the ineffectiveness of counsel to bring in evidence to show the lack of facts proffered in proving the causes of action alleged.

The lack of expert testimony, the lack of having placed opposing counsel as witnesses, the lack of the amounts of monies paid for each acre from Defendant to Plaintiff's attorneys, is just a small accounting of the abuses exerted on Defendants.

Therefore, the only solution is to have a new trial ordered by this Honorable Court.

VI.

Defendants would show the Court that a corollary issue was brought about in order to divert the attention from the true and correct facts. This issue was the one that Defendants had not given clear title. One, the full price had not been paid. And second, if Defendants had deficient title it is because Plaintiff's attorneys had extended a deficient title.

Therefore, it is a miscarriage of justice to allow this verdict to stand.

WHEREFORE PREMISES CONSIDERED, Defendants pray that a hearing be held and they be allowed to present evidence that their previous attorney did not want to present. Defendants pray that this motion be granted and that a new trial be ordered.

Tao's motion [1] says "fraud was never committed" and "there were no damages," and he argues here that that is the equivalent of saying "there is no evidence of fraud or damages." However, in the context of the motion presented to the trial judge, Tao complains of collusion among the trial lawyers, argues that that collusion is the reason he presented no expert evidence on the value of the land, and insists that he will do so at the next trial. His complaints in the motion for new trial are an appeal to the equitable powers of the court to do justice, but nowhere does Tao indicate why the evidence introduced at trial is inadequate to support the verdict, or constitutes no evidence.

[5–8] In order to preserve an insufficient evidence point for review, the motion for new trial must specifically point out the deficiencies in a manner that adequately apprises the trial judge of those deficiencies. As the Texas Rules of Civil Procedure require, a point in a motion for new trial "shall briefly refer to that part of the ruling of the court ... in such a way that the objection can be clearly

1. Subsequent to filing this motion for new trial, appellants sought to file an out-of-time amended motion for new trial, but the trial court denied leave to file the amended motion. Supplemental motions for new trial, filed more than thirty days after the judgment was signed, are a nullity. TEX.R. CIV. P. 329b(b); *Davis v. Mathis*, 846 S.W.2d 84, 90 (Tex.App.—Dallas 1992, no writ); *Equinox Enterprises v. Associated Media*, 730 S.W.2d 872, 875 (Tex.App.—Dallas 1987, no writ).

identified and understood by the court." TEX.R. CIV. P. 321. Additionally, the grounds supporting an objection made during trial must conform with the argument supporting the corresponding point of error on appeal. *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 525 (Tex.App.—Corpus Christi 1993, writ dism'd by agr.); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 655 (Tex.App.—Corpus Christi 1991, writ denied). An objection made during trial which is not the same as an argument urged on appeal presents nothing for appellate review. *Borden*, 860 S.W.2d at 525. Tao's motion for new trial argued that, due to the collusion of the trial lawyers, he should be given a new trial. It does not state or imply, however, that the evidence is legally or factually insufficient to support the jury's findings of fraud or their award of damages. We hold that Tao's motion for new trial failed to preserve either his legal sufficiency or his factual sufficiency arguments for our review.

Since legal sufficiency or "no evidence" points can be preserved through other motions in the trial court, we examine the other motions filed by Tao to determine if they preserved the "no evidence" argument.

[9] Tao made an oral motion for instructed verdict at the close of Hung's case, but proceeded to present evidence in his defense after the motion was denied. Should a movant offer additional evidence after his motion is denied, he thereby waives the motion. *Humes v. Hallmark*, 895 S.W.2d 475, 477 (Tex.App.—Austin 1995, no writ); *Hydro-Line Mfg. Co. v. Pulido*, 674 S.W.2d 382, 386 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). Since Tao did not re-urge the motion at the close of evidence, the motion was waived.

[10] Tao filed a "Motion to Withdraw Case from Jury and Render Judgment" at the close of all evidence. That motion sought a directed verdict on the grounds of *res judicata*, collateral estoppel, judicial admissions, waiver, estoppel, and ratification. None of these grounds argued that the evidence was legally insufficient to support a finding of fraud or of damages, and so did not preserve Tao's legal sufficiency arguments.

Tao objected to various portions of the jury charge, but these objections did not raise legal sufficiency arguments, and therefore did not preserve such arguments for our review. Finally, Tao did not file a motion for judgment *non obstante veredicto* or a motion to disregard the jury's answer to a vital fact issue. Tao failed to preserve his legal and factual sufficiency arguments for our review. Accordingly, we overrule points of error one, two, five, six, seven, and eight.

Waiver and Ratification

By his third point of error, Tao argues that the trial court erred in denying his motion for directed verdict because waiver and ratification were established as a matter of law. In his "Motion to Withdraw Case from Jury and Render Judgment," Tao argued that Hung assigned the contract for sale of the land to his company, Hung Shrimp Farm, Inc., and that such assignment amounted to a bar or waiver of his fraud claim as a matter of law. The motion also argued that "[t]he evidence before the Court at this point in the trial conclusively proves all facts necessary to establish the defense of ratification."[2] Tao argued that, since Hung assigned the contract for sale of the land to Hung Shrimp Farm *after* any alleged misrepresentations by Tao were made, and since Hung had full knowledge of the alleged misrepresentations at the time he assigned the contract, he effectively accepted the conditions of the contract and waived any fraud claims he might have had as a result of the misrepresentations. Tao cited *Russell v. French & Associates, Inc.*, 709 S.W.2d 312, 317 (Tex.App.—Texarkana 1986, writ ref'd n.r.e.), in his motion as authority for this argument.

On appeal, Tao notes that, in order to prove ratification or waiver, he must show that Hung, after obtaining full knowledge of the fraud, either (1) continued to accept ben-

2. Tao's oral motion for directed verdict similarly asserted that "the evidence presented by plaintiffs has conclusively established ratification by the plaintiffs of the 'E' and 'F' transaction ..." and "that the evidence conclusively establishes a waiver of the—any right to complain about the 'E' and 'F' transaction."

efits under the transaction or (2) conducted himself so as to recognize the transaction as binding. *LSR Joint Venture No. 2 v. Calleward*, 837 S.W.2d 693, 699 (Tex.App.—Dallas 1992, writ denied); *see Spangler v. Jones*, 797 S.W.2d 125, 131 (Tex.App.—Dallas 1990, writ denied). Tao also notes that ratification or waiver of fraud has been found where a plaintiff undertook to investigate a matter himself and was able to investigate without hinderance from the defendant. *Laughlin v. FDIC*, 657 S.W.2d 477, 483 (Tex.App.—Tyler 1983, no writ); *Mann v. Rugel*, 228 S.W.2d 585, 587 (Tex.Civ.App.—Dallas 1950, no writ).

When they first entered negotiations for the purchase of land, Hung and Tao signed a "Letter of Intention," which recited the terms of the sale, including a purchase price of $1500 per acre and an additional $1000 per acre for a "Shellfish Culture License."[3] Hung claimed that Tao told him the license was costly and difficult for foreign nationals to obtain. Hung later learned that the license, for which he had paid a total of $2.6 million, was non-transferable and therefore worthless to him. He also learned that foreign nationals could obtain the license for themselves, and that the license cost only $50.

Tao argues that the Letter of Intent provided for investigation into the appropriate shrimp farming licenses by Hung, and that he had three months in which to conduct this investigation before the contract for sale was signed. The fact that Hung signed the contract after this investigation period, Tao claims, amounted to a waiver on his part of any claims of fraud regarding the license.

Hung also based his fraud allegations on Tao's alleged representation that a water pumping station located on Tao's property fronting the Arroyo Colorado[4] could supply sufficient water to the land Hung purchased (which had no direct access to the Arroyo Colorado) to allow him to operate a shrimp farm. After purchasing the land, Hung learned that the pumping station could not supply adequate water. He therefore purchased land from Tao that fronted the Arroyo Colorado, for $4600 per acre, and constructed a new pumping station in an attempt to save his investment. He also traded a portion of his original purchase for a third tract of land that connected the waterfront property with the originally purchased property, to facilitate transporting the water back to the shrimp farm ponds he intended to construct.

Tao argues that Hung was already aware of the claimed misrepresentations concerning the capacity of the original water pumping station when he purchased the waterfront acreage and the land connecting the waterfront tract with the original tract. He notes that Hung continued to make payments on the initial contract and exchanged a portion of the land covered under the original contract for new land even after becoming aware of the pump station misrepresentations. Finally, Tao argues that even after Hung claimed he learned of the misrepresentation regarding the shrimp license, he continued to make payments under the contract, assigned all the contracts to his company, filed an answer to a suit in Federal Court admitting continuing indebtedness to Tao, and attempted to get title to the land from Tao. Tao argues that these actions by Hung show that he continued to accept benefits under the transaction and conducted himself so as to recognize the transaction as binding.

Hung responds that he was not even aware that he had a claim for fraud against Tao until December, 1992, shortly before the suit was filed, and that he never had any intention of waiving his rights to such action.

3. The original "Letter of Intention" and "Contract for Sale" were drafted in Chinese and later translated into English. The actual terms of the Chinese letter and the contract are disputed, with Tao claiming the $1000 per acre was designated for commissions and finders fees for middlemen, rather than solely for the Shellfish Culture License. At trial, the plaintiff's translator testified that an addendum to the Chinese-language Contract for Sale stated that the $1000 per acre was for "rights and interest fee." Tao testified that the literal translation of the Chinese is "the man who holds the hog," a Chinese figure of speech meaning "middleman."

4. The Arroyo Colorado is a body of water that opens and flows into the Laguna Madre, which is separated from the Gulf of Mexico by Padre Island.

Hung argues that the defense of waiver requires a showing that the waiving party both knew that he had a right to the action and that he intended to relinquish that right. Hung cites for support *Sun Exploration & Prod. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987), *Trinity Nat. Life & Accident Ins. Co. v. Bomar*, 572 S.W.2d 790 (Tex.Civ.App.—Tyler 1978), *rev'd on other grounds*, 579 S.W.2d 464 (Tex.1979), and *Braugh v. Phillips*, 557 S.W.2d 155 (Tex.Civ.App.—Corpus Christi 1977, writ ref'd n.r.e.). Hung also notes that making payments in an effort to obtain title to land does not establish that he intended to waive his right to sue Tao for fraud, citing *Smallwood v. Singer*, 823 S.W.2d 319 (Tex.App.—Texarkana 1991, no writ).

[11, 12] In order to prove the ratification defense, Tao had to prove that Hung (1) had full knowledge of the fraudulent acts or breach at the time of ratification and (2) nevertheless intentionally chose to ratify the contract in spite of the alleged fraud. *Texacadian Fuels, Inc. v. Lone Star Energy Storage, Inc.*, 896 S.W.2d 233, 237 (Tex.App.—Houston [1st Dist.] 1995, writ denied); *LSR Joint Venture*, 837 S.W.2d at 699; *see also Spangler*, 797 S.W.2d at 131; *Wise v. Pena*, 552 S.W.2d 196, 200 (Tex.Civ.App.—Corpus Christi 1977, writ dism'd). The burden is on Tao to prove that Hung had full knowledge of the fraud and to prove that he made a voluntary, intentional choice to ratify the transaction in light of that knowledge. *Spangler*, 797 S.W.2d at 131. If the evidence of ratification is controverted, the question is for the trier of fact. *Id.*

> The "Letter of Intention" provided that
> Upon obtaining all information deemed necessary and satisfactory to the undersigned regarding Shellfish Culture License (No. 204–00053–0), the undersigned agrees to pay U.S. $2,643,900 (1,000 per acre) for the purchase of the License. You, the owner of the License, is [sic] obliged to disclose all information upon the request by the undersigned.

Hung testified that, while the letter of intent gave him the right to research the license, he did not have the ability to do so since he does not speak English well, he lives in Taiwan, and he does not understand "the legalities of this license." He stated that he trusted Tao regarding the license, and, although there are lawyers in Texas who could have researched the licensing requirements for him, he did not know any at the time. He acknowledged that he never asked to see a copy of the license or checked with any of the regulatory authorities that oversee such licenses.

[13] Tao's reliance on *Laughlin v. FDIC* and *Mann v. Rugel* is misplaced. Both of these cases stand for the proposition that, once a party has done some independent investigation of the facts, he can not thereafter complain that he relied on the misrepresentations of others regarding those same facts. As stated in *Mann*,

> Where a party who claims to have been defrauded had the means to have discovered the fraud, if any existed, *and undertakes to investigate for himself, and does make such investigation as he deems necessary*, and is not hindered or prevented from doing so by any act of the other party, it must be held as a matter of law that he has knowledge of everything that a proper investigation would disclose, and hence would not be justified in acting on fraudulent representations, if any were made to him, merely because they were made to him.

Mann v. Rugel, 228 S.W.2d 585, 587 (Tex. Civ.App.—Dallas 1950, no writ) (emphasis added). In *Laughlin*, the court determined that the plaintiff had relied upon his own information regarding the value of certain stock, rather than on the representations of others. As the court stated, "Texas courts have consistently held that *when a person makes his own investigation of the facts*, he cannot, as a matter of law, be said to have relied upon the misrepresentations of others." *Laughlin*, 657 S.W.2d at 483 (emphasis added) (citations omitted).

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[14–16] In the present case, Hung made no independent inquiries into the shrimp license he purchased. A person must exercise reasonable ordinary care for the protection of his own interests and discover the existence of fraud if he has knowledge of facts that

would put a reasonably prudent person on inquiry. *Id.* at 482 (citing *Thigpen v. Locke*, 363 S.W.2d 247 (Tex.1962)). The court in *Laughlin* determined that the unusual nature of the transaction at issue put Laughlin on notice and should have required him to make further investigation. *Laughlin*, 657 S.W.2d at 482. In the present case, however, there is no evidence that Hung was aware of anything which would have put him on notice that he should make inquiry into the shrimp farming license, rather than simply relying on Tao's representations that the license was transferable and difficult for foreign nationals to obtain.[5] The fact that the letter of intent allowed Hung to obtain information he "deemed necessary and satisfactory" did not place any affirmative burden of investigation on him regarding the license. The fact that he signed the contract for sale some three months later, therefore, did not amount to a waiver of his fraud claims.

[17, 18] Furthermore, the fact that Hung assigned the contract to Hung Shrimp Farm and that he purchased additional land and continued to make payments on the contracts does not show that he had an affirmative intent to ratify the contracts or to waive his claims for fraud. Hung testified that he did not even know he had an action for fraud available to him until he conferred with an American attorney in late 1992. Shortly after learning that he had a claim for fraud, Hung sued Tao. He testified that he purchased the new land and constructed a pump station on that land in a futile effort to save his original investment. This action does not show an intent on his part to waive the fraud claim. Finally, continuing with the payments due under the contract does not show that Hung intended to waive his claims or ratify the contract. Acts done in affirmance of the original contract do not necessarily amount to a waiver of the right to sue for fraud. *Andrews v. Powell*, 242 S.W.2d 656, 661 (Tex. Civ.App.—Texarkana 1951, no writ). Tao did not show conclusively that Hung intended to waive his claims and ratify the contract in spite of his knowledge of the alleged misrepresentations. As the evidence regarding waiver and ratification was in dispute, it was appropriately a question for the fact finder. *Spangler*, 797 S.W.2d at 131. The trial court did not abuse its discretion in denying the motion for directed verdict on these grounds.

[19] Tao argues in the alternative that the failure of the jury to find waiver and ratification was against the great weight of the evidence. In order to attack a jury finding on appeal for being against the overwhelming weight of the evidence, a party must first raise the point of error in a motion for new trial. TEX.R. CIV. P. 324(b)(3). Tao's motion for new trial did not argue that the jury's failure to find waiver and ratification was against the great weight of the evidence. Point of error three is overruled.

Trial Amendment

By his fourth point of error, Tao claims that the trial court erred in denying leave to file a trial amendment raising the defenses of *res judicata*, collateral estoppel, and judicial admission and in denying his motion for directed verdict on these grounds.

Tao and Hung were parties to a garnishment suit in Federal Court prior to the suit at bar. In the federal case, certain third parties with claims against Tao sued Hung seeking garnishment of money he owed Tao pursuant to the sale of land. In that case, Hung admitted indebtedness to Tao under the Contract for Sale in the amount of $2,365,850. The federal court issued orders denying the garnishment.

Tao sought a trial amendment at the close of evidence in the trial, but before the jury charge was read, in order to raise the issues of *res judicata*, collateral estoppel, and judicial admission based on the federal proceedings. Hung's counsel argued against the tri-

5. Tao argues that any representations he might have made about the shrimp farming license were non-actionable opinions of law. Although we held that this argument was waived, we would note that representations concerning the law of foreign states or countries, which Tao's representations about Texas law certainly would be to Hung, are considered to be representations of fact, and therefore can support a fraud action. *Askew v. Smith*, 246 S.W.2d 920, 922–23 (Tex. Civ.App.—Dallas 1952, no writ); 41 TEX. JUR.3D. *Fraud and Deceit* § 19 (1985); 37 AM.JUR.2D. *Fraud and Deceit* § 80 (1968); 37 C.J.S., *Fraud* § 55 (1943).

al amendment, complaining that it would work an injustice to allow the trial amendment "at the very end of this lengthy trial ... and for the first time, with absolutely no notice to us." The trial court denied the motion.

[20] A trial court must allow a trial amendment unless the opposing party presents evidence of surprise or prejudice, or the amendment asserts a new cause of action or defense, and thus is facially prejudicial. *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656 (Tex.1994). While Tao's desired trial amendment did raise a new defense, Tao argues that such trial amendments should be allowed anyway when the new defense is purely legal in nature and does not require any factual development during discovery. Tao cites *Vermillion v. Haynes*, 147 Tex. 599, 215 S.W.2d 605, 609 (1948), where the Court determined that it was an abuse of discretion for the trial court to refuse a trial amendment raising the defense of limitations. Tao argues that the defenses he raised would have required no further fact development, and that Hung did not present any evidence of prejudice that would have been caused had the amendment been allowed.

Hung responds to this point of error by noting that the defenses in Tao's desired trial amendment were entirely new and offered only after the close of evidence on both sides. Hung argues that he had no prior notice of these defenses and indicated as much to the trial court. Hung claimed that allowing the trial amendment would subject him to unfair surprise. Hung also notes that in Tao's last filed pleading, filed just seven days before trial began, Tao did not raise these defenses, although he was aware of the facts upon which he sought the trial amendment well before that time. Hung alleges that the desired trial amendment amounted to an ambush, and that the trial court does not err in disallowing a trial amendment when the record reflects a lack of diligence on the part of the requesting party. *Sanchez v. Matthews*, 636 S.W.2d 455 (Tex.App.—San Antonio 1982, writ ref'd n.r.e.).

[21–24] Rule 94 requires that affirmative defenses such as estoppel, *res judicata* and "any other matter constituting an avoidance or affirmative defense" be pleaded. TEX.R. CIV. P. 94. A trial court has no discretion to deny a trial amendment unless: (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense and is thus prejudicial on its face and the opposing party objects. *See* TEX.R. CIV. P. 66; *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex.1992); *White v. Sullins*, 917 S.W.2d 158, 161 (Tex.App.—Beaumont 1996, writ requested). If the amendment is not mandatory, the court's decision to allow or deny the trial amendment may be reversed only if it is a clear abuse of discretion. *Hardin v. Hardin*, 597 S.W.2d 347, 349–50 (Tex.1980). A party opposing a trial amendment does not have to prove prejudice or surprise if the amendment is a substantive one which changes the nature of the trial. *Chapin & Chapin*, 844 S.W.2d at 665. A newly plead affirmative defense substantially changes the nature of a trial. *White*, 917 S.W.2d at 161.

[25] Tao was aware of the facts that led him to seek the trial amendment well before the trial began, yet he chose to wait until the close of evidence to attempt to raise the affirmative defenses. Regardless of whether or not Hung presented sufficient evidence in the trial court that the amendment would work a surprise on him, the amendment raised a new affirmative defense, and was therefore prejudicial on its face. *Id.* The trial court therefore had discretion in allowing or disallowing the amendment. In this case, Hung noted for the trial court that he was surprised by the attempted trial amendment, and that it would be "a great injustice for them at the very end of this lengthy trial, to ask for a trial amendment, and for the first time, with absolutely no notice to us." Under the circumstances of this case, we cannot say that the trial court abused its discretion in disallowing the trial amendment at that late point in the trial. Tao's fourth point of error is overruled.

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Expert's Testimony

In his ninth and final point of error, Tao complains of the trial court's denial of his

motion to strike the testimony of Mr. Robin Moore, a real estate appraiser called by Hung to testify regarding the value of the land. Tao argues that Hung provided him with one set of "comparable sales" figures during discovery, but that Mr. Moore testified concerning a completely different set of comparable sales at trial. Tao claims that this change was material and, since Mr. Moore's testimony was the only testimony that might have supported the amount of damages awarded by the jury, the testimony was harmful and should have been excluded.

Hung responds that the trial court did not abuse its discretion in denying Tao's motion to strike Mr. Moore's testimony. Mr. Moore's ultimate testimony regarding the value of the land did not change substantially from the amounts noted in Hung's answers to Tao's interrogatories,[6] so Hung argues that there was no surprise to Tao. Hung argues that the change from one set of comparable sales data to another (farm land to ranch land) was an inadvertent mistake on Mr. Moore's part, did not come to Hung's counsel's attention until Mr. Moore took the witness stand, and that Tao's counsel was given ample time to examine the new data and conducted a very thorough cross-examination of Mr. Moore. Hung also notes that the evidence of comparable sales was denied admission.

[26] We review the trial court's denial of the motion to strike Mr. Moore's testimony for an abuse of discretion. In such a review, we look to whether the trial court made its ruling without reference to any guiding rule or principle. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex.1995).

[27] Rule of Civil Procedure 215(5) provides that:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, *unless the trial court finds that good cause sufficient to require admission exists.* The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

TEX.R. CIV. P. 215(5) (emphasis added). In determining whether good cause exists, the court may look at: 1) inadvertence of counsel, 2) lack of surprise, unfairness or ambush, 3) uniqueness of excluded evidence, and 4) whether or not the witness was deposed. *Patton v. Saint Joseph's Hosp.*, 887 S.W.2d 233, 239 (Tex.App.—Fort Worth 1994, writ denied) (citing *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex.1992)).

[28] In the present case, these factors all favor the trial court's decision to allow Mr. Moore to testify. Mr. Moore testified that he mistakenly listed ranch land sales rather than farm land sales when he provided the answers to Tao's interrogatories. He stated that this was his mistake, not that of the attorneys. Additionally, Mr. Moore's ultimate valuations did not change significantly from his interrogatory responses to his trial testimony: his valuation changed from $475—$500 per acre to $450—$500 per acre. His valuation testimony was unique, in that he was the only expert to testify regarding the value of the land. Finally, although Mr. Moore was designated in Hung's discovery responses, Tao did not depose him. Under these circumstances, we cannot say that the trial court abused its discretion in overruling Tao's motion to strike Mr. Moore's testimony. Point of error nine is overruled.

The judgment of the trial court is AFFIRMED.

6. Mr. Moore valued the land at $475 to $500 per acre in the appellees' answers to interrogatories. At trial, Mr. Moore testified that the land had a value of $450 to $500 per acre.

paper packages of dominoes, a substance chemically different from cocaine. Therefore, the State should have charged appellants with the offense of delivery of a simulated controlled substance.

The State argues that *Stewart v. State*, 718 S.W.2d 286 (Tex.Crim.App.1986) is controlwart, the court of criminal ap- he evidence sufficient to sustain

an offer to sell, no transfer need take place, and the offense is complete when a person offers to sell what he represents is a controlled substance. *Id.* at 288. Thus, we agree with the State that *Stewart* is controlling to the extent that it holds the evidence is sufficient to sustain a conviction under either statute.

However, as noted by this court in *Rodriguez*, the legislature had not yet enacted Section 482.002 at the time *Stewart* was decided. *Rodriguez*, 879 S.W.2d at 286. Further, *Stewart* specifically left open the question before this court today, and the question addressed by this court in *Rodriguez*, namely, whether appellant could be prosecuted for delivery by offer to sell under the Controlled Substances Act after the enaction of the Simulated Controlled Substances Act. As stated above, and consistent with our holding in *Rodriguez*, we find that he cannot. Accordingly, appellant's first point of error is sustained in part and overruled in part. Because the disposition of this point of error requires that we reverse and remand, we decline to address appellant's remaining points of error.

We reverse the judgment of the court below and remand with instructions to dismiss the indictment.

Carlos SALAZAR, Appellant,

v.

COASTAL CORPORATION, Coastal States Trading, Inc., Coastal Petroleum Marketing, N.V., and Coastal Petroleum, N.V., Appellees.

No. 14-95-00310-CV.

Court of Appeals of Texas, Houston (14th Dist.).

June 20, 1996.

Terminated agent sued principal and related corporations, asserting breach of contract and other claims. The 190th District Court, Harris County, John P. Devine, J., granted summary judgment for defendants, and agent appealed. The Court of Appeals, Amidei, J., held that: (1) Texas choice of law clause in contract would be respected under rule of party autonomy though contract was performed in Ecuador; (2) there were issues of fact precluding summary judgment on claims of breach of contract, quantum meruit, fraud, negligent misrepresentation, promissory estoppel, negligence and alter ego; and (3) evidence relevant to alter ego issue was discoverable absent showing of privilege.

Reversed and remanded.

1. Appeal and Error ⇐893(1)

The question of which law to apply is a question of law for the court and is subject to de novo review.

2. Contracts ⇐206

Parties were continuing to operate under their contractual Texas choice of law provision in agency agreement though agency agreement expired under its own terms and no written renewal was executed, where both parties continued to act as if the agreement were still in effect.

3. Master and Servant ⇐2.1

Continuance of the employment relationship in accordance with the terms of a written employment contract after the contract

has expired by lapse of time is a continuance of the old contract as a matter of law.

4. Contracts ⇐129(1)

Under the concept of "party autonomy," court respects the parties' choice of law unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the state whose laws otherwise ought to apply. V.T.C.A., Bus. & C. § 1.105(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Contracts ⇐129(1)

Provision in agency agreement that Texas law would apply would be respected in agent's suit arising from termination, under party autonomy rule, though virtually all of agent's services were rendered in Ecuador, as issue of termination was one that could have been, and was, resolved by contract provision, principal and its parent corporation had their principal places of business in Texas, and it did not appear that Ecuador would have policy reason for objecting to termination of agency contract, when principal terminated activities in Ecuador. V.T.C.A., Bus. & C. § 1.105(a); Restatement (Second) Conflict of Laws §§ 187(1), 196.

6. Appeal and Error ⇐169

Contention was waived when raised for first time on appeal.

7. Judgment ⇐181(11)

Summary judgment disposing of the entire case is proper only if, as a matter of law, the plaintiff could not succeed upon any theories pleaded.

8. Judgment ⇐185(2)

Once the defendant, moving for summary judgment, has produced competent evidence to negate a necessary element of the plaintiff's cause of action, the burden shifts to the plaintiff to introduce evidence raising a fact question, but all doubts about the existence of a genuine issue of material fact are resolved against the movant, every reasonable inference from the evidence must be indulged in favor of the nonmovant and any doubts resolved in his favor, and evidence which favors the movant will not be considered unless it is uncontroverted.

9. Judgment ⇐181(15.1)

There were fact issues precluding summary judgment on agent's claim that principal breached agency agreement by failing to pay commissions for contracts agent had been responsible for obtaining, though they were executed after his termination, and on claim for quantum meruit, though written contract did not preclude termination on 30 days notice, in light of claimed misrepresentations of continued employment and that principal and related entities were ceasing to do business in agent's territory, causing him to fail to assert claims for additional commissions.

10. Contracts ⇐27

An implied contract arises when circumstances disclose that, according to the parties' course of conduct and common understanding, there was a mutual intent to contract.

11. Implied and Constructive Contracts ⇐60.1

There are instances where recovery under quantum meruit is permitted despite the existence of an express contract covering the subject matter of the claim.

12. Implied and Constructive Contracts ⇐30

"Quantum meruit" is an equitable theory of recovery which is based on an implied agreement to pay for benefits received.

See publication Words and Phrases for other judicial constructions and definitions.

13. Implied and Constructive Contracts ⇐30

To recover under quantum meruit, a plaintiff must establish that: valuable services and/or materials were furnished; to the party sought to be charged; which were accepted by the party sought to be charged; under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient.

14. Judgment ⇐181(33)

There were fact questions precluding summary judgment on terminated agent's tort claims, including fraud, negligent misrepresentation, promissory estoppel, and negligence, based on agent's contention that he was told he would continue to be agent "for life," despite contention that agent showed no conversations by persons who could have made such representations.

15. Judgment ⇐181(11)

If plaintiff's allegations were unclear, special exceptions were required before summary judgment could be granted.

16. Corporations ⇐1.5(1)

The doctrine of "alter ego" is applicable where a corporation is organized and operated as a mere tool or business conduit of another corporation.

See publication Words and Phrases for other judicial constructions and definitions.

17. Corporations ⇐1.5(1, 2)

Alter ego is often established by evidence showing a blending of identities, or a blurring of lines of distinction between corporations, and important factors in making a determination of alter ego include the identity of shareholders, directors, officers, and employees, or failure to distinguish in ordinary business between different entities.

18. Judgment ⇐181(19)

In action by terminated agent asserting breach of contract and other claims, there were issues of fact, precluding summary judgment, as to whether principal and other corporate defendants were alter egos of one another.

19. Pretrial Procedure ⇐35

Designation of individual as testifying expert subjected his work product to discovery. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 2, par. e(1).

20. Appeal and Error ⇐961

Standard of review of a trial court's pretrial discovery order is abuse of discretion, and trial court abuses its discretion when it reaches a decision so arbitrary or unreasonable as to amount to a clear and prejudicial error of law.

21. Pretrial Procedure ⇐371

Documents showing that expert, as parent corporation's attorney, was involved in contract dispute where the contract was executed by the same subsidiary which contracted with plaintiff were relevant to plaintiff's alter ego claim and were discoverable absent showing of privilege, though expert had been designated as testifying expert on Ecuadorian law, which was no longer at issue in case. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 2, par. a.

22. Pretrial Procedure ⇐31

Rule providing that parties may obtain discovery of any matter which is "relevant to the subject matter" and is "reasonably calculated to lead to the discovery of admissible evidence" is liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subd. 2, par. a.

23. Pretrial Procedure ⇐403, 410

Any party seeking to exclude documents from discovery must specifically plead the particular privilege claimed and provide evidence supporting that claim.

24. Pretrial Procedure ⇐411

If the court determines an in camera inspection is necessary on claim of privilege, the objecting party has the burden to segregate the items which they allege are exempt from discovery and tender the documents to the court.

25. Pretrial Procedure ⇐410

Where defendants did not meet their burden to establish their claimed attorney-client privilege, plaintiff was not required to prove his claimed fraud exception, and it was an abuse of discretion to deny discovery.

26. Pretrial Procedure ⇐411

If the documents themselves are the only evidence substantiating the claim of privilege, the trial court has no choice but to review the allegedly privileged documents in camera when requested, and the trial court's

failure to conduct an in camera inspection under these circumstances constitutes an abuse of discretion.

James H. Miller, John O. Tyler, Micky N. Das, Houston, for appellants.

Mark J. Tempest, Marcheta Leighton-Beasley, Houston, for appellees.

Before MURPHY, C.J., and AMIDEI and ANDERSON, JJ.

OPINION

AMIDEI, Justice.

This appeal from a summary judgment in a suit arising from the termination of an agency relationship presents the questions of whether Texas law should be applied to govern the parties' agreement, whether material fact questions exist, and whether discovery was properly denied. Appellant, Carlos Salazar ("Salazar"), sued appellees, the Coastal Corporation ("TCC"), and its subsidiaries, Coastal States Trading, Inc. ("CSTI"), and Coastal Petroleum Marketing N.V. n/k/a Coastal Petroleum N.V. ("CPNV"), after CSTI terminated Salazar's agency relationship with it in Ecuador. The trial court granted summary judgment for appellees, and Salazar appeals in three points of error. We reverse and remand.

Salazar began acting as CSTI's legal representative in Ecuador in 1986. He entered into an agreement with Mobile Bay Refining Company ("Mobile Bay"), which acted as CSTI's general agent in Latin America. Mobile Bay's contract with CSTI expired in mid-1990. On July 9, 1990, CSTI and Salazar entered an agency agreement, executed in Miami, Florida, continuing Salazar's services for CSTI ("the agency agreement"). Salazar was to receive a monthly retainer of $1,500, to be recovered from commissions paid to him based on $.03 per barrel of crude or refined petrochemical products that were sold to or purchased from Ecuador's government-controlled oil company, PetroEcuador. CSTI notified PetroEcuador that Salazar would continue as its local representative in Ecuador.

The agency agreement provided for an initial term of six months, and it could be renewed from year to year or cancelled by either party on thirty days written notice. It is undisputed that no renewals were entered. It is also undisputed that after the initial six-month period, the parties continued to operate under the terms of the agency agreement with respect to Salazar's compensation. Both parties continued the agency relationship until February 18, 1992, when CSTI notified Salazar that it decided to "wind up its operations in Ecuador," and the agency relationship would terminate in thirty days. The day before, on February 17, TCC requested and received authorization from PetroEcuador for CPNV to be permitted to respond to PetroEcuador's tender offers on TCC's behalf. After Salazar's agency was terminated, TCC began doing business in Ecuador through CPNV.[1]

Salazar filed suit alleging breach of contract, quantum meruit, tortious interference, breach of fiduciary duty, fraud, constructive fraud, negligence, negligent misrepresentation, conspiracy and promissory estoppel. He also claimed that all of the Coastal entities were alter egos of one another. Salazar alleged that the terms of his agreement were orally modified to include a promise that he would remain the agent for any and all of the Coastal companies so long as any Coastal company did business in Ecuador. He claimed that his termination was a "charade" to "dump" him and avoid compensating him for the value of his services. He contended that Coastal falsely told him none of its companies would be doing further business in Ecuador. Salazar asserted that approximately two months after his agency terminated, as a result of his efforts, CPNV obtained a contract with PetroEcuador for

1. CPNV is a wholly-owned subsidiary of Coastal Aruba Refining Company N.V., which in turn is wholly owned by Coastal Aruba Holding Company N.V. Coastal Aruba Holding Company N.V. is owned by Coastal Securities Company Limited and Coastal Stock Company Limited, which are each wholly-owned subsidiaries of Coscol Petroleum Corporation. Coscol Petroleum Corporation is a wholly-owned subsidiary of TCC. CPNV was incorporated in 1991 as Coastal Petroleum Marketing N.V., and its name was changed to CPNV on February 17, 1992.

12,000 barrels per day and appellees refused to pay the commissions owed to him.

Appellees moved for summary judgment, and Salazar requested the trial court to take notice of and apply Ecuadorian law. Responses to both motions were filed, and both motions were denied by Judge Eileen O'Neill on December 27, 1994. On January 12, 1995, shortly before the trial setting, the new presiding judge of the 190th District Court, Judge John Devine, held a hearing on appellees' motion to quash depositions and also considered other pending motions. During this hearing he granted appellees' request to reconsider their summary judgment motion, denied Salazar's motion to reconsider application of Ecuadorian law, denied Salazar's motion to compel discovery, and granted appellees' motion to quash depositions. The court then entered its take nothing judgment against Salazar, and this appeal resulted.

CHOICE OF LAW

[1] Because determination of the proper choice of law is necessary before we may address the propriety of the summary judgment granted by the trial court, we first consider Salazar's second point of error contending that the trial court erred in overruling his motion to apply Ecuadorian law. The question of which law to apply is a question of law for the court and is subject to *de novo* review. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984); *Hull & Co. v. Chandler*, 889 S.W.2d 513, 517 (Tex.App.—Houston [14th Dist.] 1994, writ denied); *see also* TEX.R. CIV. EVID. 203.

[2, 3] In the agency agreement, the parties provided that Texas law would control. While it is true that the agency agreement expired under its own terms and no written renewal was executed, both parties continued to act as if the agreement were still in effect. It is well settled in Texas that a continuance of the employment relationship in accordance with the terms of a written employment contract after the contract has expired by lapse of time is a continuance of the old contract as a matter of law. *Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 833 (Tex.App.—El Paso 1993, writ denied); *Fenno v. Jacobs*, 657 S.W.2d 844, 846 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). There is nothing in the record indicating the parties intended to change the choice of law provision in the agency agreement after its expiration. Therefore, we conclude the parties were continuing to operate under their contractual Texas choice of law provision.

[4] Under the concept of "party autonomy," we respect the parties' choice of law unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the state whose laws otherwise ought to apply. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex.1990), *cert. denied*, 498 U.S. 1048, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991); *see also First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806, 808–09 (Tex.Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (recognizing that the parties' express agreement controls if the contract bears a reasonable relation to the chosen state and there is no countervailing public policy demanding otherwise). This rule has been codified in Texas as:

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

TEX. BUS. & COM.CODE ANN. § 1.105(a) (Vernon 1994).

[5] Texas has adopted Section 187 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ["RESTATEMENT"] concerning contractual choice of law provisions. *DeSantis*, 793 S.W.2d at 677. Section 187 provides:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

RESTATEMENT § 187(1). Here, the parties not only could have resolved the issue of termination of the contract by an explicit provision, they did so. The parties expressly agreed the contract could be terminated by either party on thirty days notice. Thus, according to the party autonomy rule as ex-

pressed in the RESTATEMENT, Texas law should govern this dispute.

In addition, there is a reasonable relationship to Texas. The state where a company has its principal place of business has a reasonable relationship to the parties and transaction. *Chase Manhattan Bank, N.A. v. Greenbriar N. Section II*, 835 S.W.2d 720, 725 (Tex.App.—Houston [1st Dist.] 1992, no writ); *First Commerce Realty*, 617 S.W.2d at 809. Both TCC and CSTI have their principal places of business in Texas.

Salazar argues that, under the general rule, the place of performance is determinative of which law is applicable. Virtually all of Salazar's services were rendered in Ecuador. Section 196 of the RESTATEMENT provides that contracts for the rendition of services, *in the absence of an effective choice of law by the parties*, are enforced under the laws of the state where the contract requires that the services be rendered, unless some other state has a more significant relationship. *Cf. Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53 (Tex.1991) (holding that the place of performance is given paramount importance where there is no choice of law provision in the contract). Section 196 is inapplicable because Texas law is specified as the choice of law in the parties' agreement in this case. Since there is a reasonable relationship to Texas, we need only ascertain whether there is any countervailing public policy that requires the application of Ecuadorian law.

According to the English translations of relevant Ecuadorian law supplied to the trial court, Ecuador requires foreign companies to appoint a legal representative in Ecuador. In addition, Ecuadorian law contains provisions governing the relationship between foreign countries and their agents in Ecuador. In Ecuador, it appears that an agency contract can only be terminated for cause, and then after a judicial proceeding. One of the causes listed, however, is the "termination of activities."[2] Here, CSTI terminated activities in Ecuador. Thus, Ecuador would not appear to have a policy reason for objecting to termination of Salazar's agency contract. Had CSTI gone through the judicial proceeding required under Ecuadorian law, Salazar would apparently have no claim under that country's laws for wrongful termination of his contract. In Texas, agency relationships can be terminated freely in accordance with the contract terms. *Juliette Fowler Homes, Inc. v. Welch Assoc., Inc.*, 793 S.W.2d 660, 665 (Tex.1990). Under the facts presented here, either Texas or Ecuador permit termination of the agency agreement. We determine that Salazar failed to establish that application of Texas law would conflict with a fundamental policy of Ecuador.

[6] Salazar also contends that the situs of the alleged torts requires Ecuadorian law to be applied. He raises this argument for the first time on appeal, and therefore has waived this contention. *See Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 568–69 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

We hold that the trial court correctly determined that Texas law governs this dispute and overrule point of error two.

SUMMARY JUDGMENT

In Salazar's first point of error, he generally attacks the trial court's granting of summary judgment, raising specific complaints in six sub-points. He argues there are genuine issues of material fact as to: (1) the terms and conditions of his contract and whether

2. The record contains a translation of relevant portions of the LAW OF CORPORATIONS, of the Republic of Ecuador, Official Register No. 389 (July 28, 1977). There is also a "free" translation of the PROTECTIVE LAW FOR REPRESENTATIVES, AGENTS, OR DISTRIBUTORS OF FOREIGN COMPANIES, of the laws of the Republic of Ecuador, Official Register No. 245 (December 31, 1976). According to article three, the following are considered just cause for unilateral termination by the principal of an agency contract: (a) the agent's failure to fulfill his contractual obligations; (b) if the agent's acts or omissions adversely affect the interest of the enterprise; (c) the principal's bankruptcy or insolvency; and (d) the liquidation or termination of activities.

Salazar contends that while CSTI terminated its activities in Ecuador, TCC did not. He argues that TCC continued to operate in Ecuador through CPNV. He has not argued, however, that Ecuadorian law recognizes alter ego theories. Therefore, this contention does not support application of Ecuadorian law under these facts.

appellees breached that contract; (2) alter ego; (3) quantum meruit; (4) breach of fiduciary duty; (5) other tort theories; and (6) conspiracy and tortious interference.

[7, 8] A summary judgment disposing of the entire case is proper only if, as a matter of law, the plaintiff could not succeed upon any theories pleaded. *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex.1983). To prevail, a defendant must "establish as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action." *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). Once the defendant has produced competent evidence to negate a necessary element of the plaintiff's cause of action, the burden shifts to the plaintiff to introduce evidence raising a fact question. *Goldberg v. United States Shoe Corp.*, 775 S.W.2d 751, 752 (Tex.App.—Houston [1st Dist.] 1989, writ denied). All doubts about the existence of a genuine issue of material fact are resolved against the movant. *Clark v. Pruett*, 820 S.W.2d 903, 905 (Tex.App.—Houston [1st Dist.] 1991, no writ). Every reasonable inference from the evidence must be indulged in favor of the nonmovant and any doubts resolved in his favor. *Continental Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex.1988). Evidence which favors the movant will not be considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex.1965).

[9] Salazar first argues that there are material fact questions concerning his agency agreement. He contends CSTI breached the agency agreement by failing to pay him commissions for contracts that he had been responsible for obtaining, even though they were executed after his termination. CSTI provided the trial court with summary judgment proof from Salazar's deposition testimony where Salazar admitted he had received payments for all amounts for which he had submitted invoices. CSTI contends this testimony established it did not breach the agreement because it was obligated to pay commissions only if invoices were submitted. The agreement provided:

> The commission net of retainer fee, payable to AGENT will be US$0.03 per barrel of crude or petroleum products bought from or sold to PETROECUADOR in connection with [his] efforts on behalf of [CSTI] *upon receipt of invoice with support documentation.* (emphasis added).

Salazar provided in his response a copy of an offer made by CPNV on February 19, 1992, the day after he was notified of his termination, which he claimed resulted in a contract dated April 22, 1992. Appellees furnished a responsive affidavit from the custodian of records for CPNV that the February 19, 1992, offer to which Salazar referred did not result in a PetroEcuador contract being awarded to CPNV. The affidavit does not assert, however, that there were no contracts awarded after Salazar's termination which resulted from his efforts.

[10] Salazar argues that there is a material fact question as to the terms of the implied contract under which the parties operated after expiration of the initial six-month term of the written agency agreement. An implied contract arises when circumstances disclose that, according to the parties' course of conduct and common understanding, there was a mutual intent to contract. *City of Houston v. First City*, 827 S.W.2d 462, 473 (Tex.App.—Houston [1st Dist.] 1992, writ denied). Whether mutual assent to contract exists is a question of fact. *Id.*

Salazar admitted at his deposition that nothing in the written contract prohibited his termination on thirty days notice. However, he claimed that he believed he would be TCC's agent in Ecuador as long as any Coastal entity did business there. He testified that he was led to believe that he would be the Coastal agent in Ecuador so long as he performed his duties, based on his continuous relationship with Coastal for six years and the fact he had never been informed there were problems with his performance. He contends that appellees misrepresented to him that all Coastal entities were ceasing business in Ecuador. He relied on this misrepresentation in failing to assert his claims for additional commissions. Therefore, there are disputed fact questions as to the terms of

Salazar's implied agency agreement and whether Salazar is entitled to commissions for contracts executed after his termination.

[11] Fact questions also exist as to Salazar's alternative claim for quantum meruit. Appellees primarily argued that Salazar could have no quantum meruit cause of action because an express contract existed. Appellees rely on the general rule as expressed in *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex.1988). The court in *Truly* acknowledged, however, that there are instances where recovery under quantum meruit is permitted despite the existence of an express contract covering the subject matter of the claim. *Id.* Appellees did not negate these exceptions to the general rule, and therefore, did not negate Salazar's quantum meruit claim as a matter of law.

[12, 13] Quantum meruit is an equitable theory of recovery which is based on an implied agreement to pay for benefits received. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex.1992). To recover under quantum meruit, a plaintiff must establish that: (1) valuable services and/or materials were furnished, (2) to the party sought to be charged, (3) which were accepted by the party sought to be charged, and (4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient. *Id.* Appellees' only summary judgment proof as to Salazar's quantum meruit claim is Salazar's deposition testimony that he was CSTI's agent and he was registered with PetroEcuador as such, which was offered to show Salazar did not perform services for CPNV or TCC. Salazar's deposition testimony shows, however, that he believed he was working on behalf of all Coastal entities in Ecuador and expected compensation for the work he did on their behalf. Thus, appellees' summary judgment proof failed to negate Salazar's claim as a matter of law.

[14] In addition, there are fact questions remaining on Salazar's tort claims, including fraud, negligent misrepresentation, promissory estoppel, and negligence. Appellees contend all these claims are based on Salazar's contention that he was told he would continue to be the agent for all Coastal entities operating in Ecuador "for life." Salazar testified by deposition that he spoke to no one at Coastal, CSTI or Mobile Bay prior to beginning his work as CSTI's agent in 1986. He also acknowledged he had no conversations with anyone concerning the agency agreement after signing it on July 9, 1990. Thus, appellees assert there could have been no misrepresentations made.

Appellees' summary judgment proof fails to negate Salazar's misrepresentation claims as a matter of law. Salazar testified the agency agreement was presented to him for signature by Todd Peterson, a CSTI employee. Salazar denied discussing the agreement with CSTI's vice-president, Richard Green. Green, however, testified by deposition that he fully discussed the agreement with Salazar. Salazar also maintains that he was told when he was terminated that all Coastal entities were ceasing business in Ecuador, which is not controverted by appellees. His deposition testimony shows he was "led to believe" he would continue to be the "Coastal man" in Ecuador. After indulging all inferences in favor of Salazar as the nonmovant, we conclude appellees have not negated that the statements upon which Salazar's claims rested may have been made.

[15] There is no summary judgment proof at all regarding Salazar's negligence claim. It is not clear exactly what Salazar's specific contentions are regarding appellees' negligent conduct, but they are apparently more that merely a negligent misrepresentation claim because he made separate allegations in his pleadings. If Salazar's allegations were unclear, special exceptions were required before summary judgment may be granted. *See Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983). We find no record of special exceptions in this case.

[16–18] Salazar also pleaded that the various Coastal entities are alter egos of one another. The doctrine of "alter ego" is applicable "where a corporation is organized and operated as a mere tool or business conduit of another corporation." *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex.1986). Alter ego is often established by evidence

showing a blending of identities, or a blurring of lines of distinction between corporations. *Hideca Petroleum Corp. v. Tampimex Oil Internat'l, Ltd.*, 740 S.W.2d 838, 844 (Tex.App.—Houston [1st Dist.] 1987, no writ). Important factors in making a determination of alter ego include the identity of shareholders, directors, officers, and employees, or failure to distinguish in ordinary business between different entities. *Id.* When there is such unity between the corporations that the separateness between them has ceased, holding just one of the corporations liable results in injustice. *Castleberry*, 721 S.W.2d at 272.

Appellees did not attempt to negate alter ego in their motion for summary judgment. Instead, they contend alter ego is not a separate cause of action and there is no need to reach this contention if all of Salazar's causes of action are negated. We have found fact questions as to those of Salazar's claims addressed in this opinion. Therefore, the existence of material fact questions as to alter ego, as demonstrated by the summary judgment proof Salazar provided, also precludes summary judgment. Salazar cites to evidence that when PetroEcuador required financial information for CSTI, he was furnished information on TCC, which he then supplied to PetroEcuador. In addition, Salazar's responsive proof included letters concerning different Coastal entities' dealings with PetroEcuador, from the same employees, yet written on behalf of TCC, CSTI and CPNV. Richard Green testified he served as an officer of several Coastal entities at the same time, but was only paid by one. Thus, there is some evidence TCC, CSTI and CPNV had the same employees and failed to maintain a distinction between the entities.

Because appellees failed to establish as a matter of law that Salazar could not succeed on any theory pleaded, we hold that the trial court erred in granting summary judgment. We sustain Salazar's first point of error.

DISCOVERY

In his third point of error, Salazar complains that the trial court erred in granting appellees' motion to quash the depositions of appellees' corporate representatives and in denying his motion to compel production of documents he claims are relevant to his alter ego and breach of contract allegations. He asserts that the documents serve to refute appellees' allegations that the Coastal entities are separate companies acting independently of one another and that CPNV's subsequent business in Ecuador was not a continuation of earlier business conducted by CSTI. Salazar also contends the documents are needed to impeach appellees' witnesses.

[19] Salazar obtained from PetroEcuador copies of briefs prepared by appellees' expert, Dr. Ider Valverde Farfan ("Dr. Valverde"), an Ecuadorian attorney, regarding disputes between appellees and PetroEcuador. Appellees designated Dr. Valverde as a testifying expert, which subjects his work product to discovery. *See* TEX.R. CIV. P. 166b(2)(e)(1); *see also Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex.1990) (prohibiting redesignation of testifying expert as consulting expert to protect from discovery). In his Fourth Request for Production, Salazar sought production of documents related to the brief, including correspondence between PetroEcuador and various Coastal entities either prepared or reviewed by Dr. Valverde. Appellees filed objections to production, including attorney-client and attorney work product privileges. Salazar then filed a Motion to Compel, and requested the court to require appellees to prove their privilege claims in accordance with Rule of Civil Procedure 166b(4).[3] Salazar asserted that

3. Rule 166b(4) provides in relevant part as follows:

> [A] party seeking to exclude any matter from discovery on the basis of an exemption of immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and at or prior to any hearing shall produce any evidence necessary to support such claim either in the form of affidavits served at least seven days before the hearing or by testimony. If the trial court determines that an in camera inspection and review by the court of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained.

TEX.R. CIV. P. 166b(4).

documents reviewed or prepared by Dr. Valverde were not exempt from discovery under the fraud exception to the attorney-client privilege. *See* TEX.R. CIV. EVID. 503(d)(1). After the trial court notified appellees it denied Salazar's motion to apply Ecuadorian law, appellees filed supplemental objections arguing that because Dr. Valverde would no longer be called to testify as an expert on Ecuadorian law, any documents he reviewed in connection with his proposed testimony were not relevant.

Shortly before the trial setting, Salazar noticed appellees for depositions of their corporate representatives. Included with the deposition notice was a subpoena duces tecum requesting the same documents demanded in Salazar's Fourth Request for Production.[4] Appellees filed a Motion to Quash these depositions, claiming the documents requested in the subpoena were not relevant because they were generated more than a year after suit was filed. They also reasserted the attorney-client privilege. The trial court conducted a hearing on Salazar's motion to compel and appellees' motion to quash at the same time it heard appellees' motion to reconsider the denial of their motion for summary judgment. At the conclusion of the hearing, the court denied Salazar's motion to compel and quashed the depositions.

[20] The standard of review of a trial court's pretrial discovery order is abuse of discretion. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). A trial court abuses its discretion when it reaches a decision so arbitrary or unreasonable as to amount to a clear and prejudicial error of law. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 709 (Tex.App.—Houston [14th Dist.] 1991, writ denied).

[21] Dr. Valverde represented himself as the attorney-in-fact for TCC in disputes involving contracts executed by CSTI and CPNV. He prepared two briefs on behalf of "TCC." The brief dated March 10, 1994 concerns a dispute between TCC and PetroEcuador on a contract where CSTI sold PetroEcuador contaminated aviation gasoline (AVgas).[5] This contract was executed in May 1990, by Salazar on behalf of CSTI. Thus, even though the briefs were not prepared until much later, they concern a transaction that took place while Salazar was CSTI's agent. The briefs, and the requested documentation related to their preparation, are relevant to Salazar's claim he was actually employed by TCC. The briefs support Salazar's attempt to show that TCC was acting through CSTI and CPNV, and they controvert testimony of appellees' witnesses that the companies are separate.

[22] Rule 166b provides that parties may obtain discovery of any matter which is "relevant to the subject matter" and is "reasonably calculated to lead to the discovery of admissible evidence." TEX.R. CIV. P. 166b(2)(a). This test is liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial. *Gutierrez v. Dallas ISD*, 729 S.W.2d 691, 693 (Tex.1987). Because Dr. Valverde's brief shows that he, as TCC's attorney, was involved in a contract dispute where the contract was executed by CSTI, this evidence is relevant to Salazar's alter ego claim. The requested documents are also reasonably calculated to lead to the discovery of other admissible evidence.

4. The parties restrict their arguments to production of the documents requested in the Salazar's Fourth Request for Production, which both sides agree are the same documents listed in the subpoena duces tecum attached to the deposition notice. Therefore, the record is sufficient for our review of Salazar's complaint as to denial of his requested production even though the deposition notice is not included in our record.

5. We discuss only the March 1994 brief, for which a translation is provided. According to the translation, Dr. Valverde referred to himself as "attorney-in-fact" for TCC, and urged settlement of the AVgas dispute based on the "magnificent relationship" TCC had maintained with PetroEcuador for "more than twenty years." There is no translation for the other brief, apparently prepared in December 1993. Salazar contends it concerned a diesel oil contract between CPNV and PetroEcuador, and also referred to a twenty-year relationship between TCC and PetroEcuador.

We conclude that the requested discovery is relevant to Salazar's claim that TCC's operations in Ecuador were conducted through its alleged alter egos, CSTI and CPNV. Therefore, these matters are properly discoverable, unless appellees are entitled to prevail on their privilege claims.

[23, 24] Any party seeking to exclude documents from discovery must specifically plead the particular privilege claimed and provide evidence supporting that claim. *Loftin v. Martin*, 776 S.W.2d 145, 147–47 (Tex. 1989). The objecting party should provide evidence to the trial court in the form of affidavits or testimony establishing the claimed privilege. *State v. Lowry*, 802 S.W.2d 669 671 (Tex.1991). In some circumstances, the documents themselves may constitute sufficient proof. *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex.1986) (per curiam). If the court determines an *in camera* inspection is necessary, the objecting party has the burden to segregate the items which they allege are exempt from discovery and tender the documents to the court. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 n. 6 (Tex.1990); TEX.R. CIV. P. 166b(4).

[25, 26] Appellees provided no evidence to support their privilege and work product claims. They failed to establish that any of the documents contained confidential communications. *See* TEX.R. CIV. EVID. 503. Because appellees did not meet their burden to establish their claimed privilege, Salazar was not required to prove his claimed fraud exception. It is an abuse of discretion to deny discovery when no proof of the privilege is provided. *Weisel Enters.*, 718 S.W.2d at 58. In addition, Salazar's counsel requested appellees to produce the allegedly privileged documents for *in camera* inspection, and they did not do so. If the documents themselves are the only evidence substantiating the claim of privilege, the trial court has no choice but to review the allegedly privileged documents *in camera* when requested. The trial court's failure to conduct an *in camera* inspection under these circumstances constitutes an abuse of discretion. *Lowry*, 802 S.W.2d at 673–74.

We hold that the trial court abused its discretion in denying the requested relevant discovery without requiring the claimed privileges to be proved. Therefore, we sustain point of error three.

In conclusion, the trial court correctly determined that Texas law applies. The court below improperly denied appellant's requested discovery, however. In addition, appellees failed to establish their entitlement to judgment on all of appellant's claims as a matter of law. Because additional discovery will be completed as a result of our opinion, the entire judgment should be reversed out of fairness to appellant and in the interest of justice. *See* TEX.R.APP. P. 81(b). We reverse the summary judgment and remand this cause for proceedings consistent with this opinion.

GALIL MOVING & STORAGE, INC., Appellant,

v.

Arnold McGREGOR, Appellee.

No. 04–96–00245–CV.

Court of Appeals of Texas, San Antonio.

June 26, 1996.

Plaintiff sued moving and storage company. The Justice Court, Bexar County, Keith Baker, J., entered judgment for plaintiff and company appealed. The Court of Appeals held that judgment of small claims court could not be appealed by writ of error directly to Court of Appeals.

Appeal dismissed.

1. Certiorari ⇐14 3RD00601
Courts ⇐176.5

Final judgment from small claims court may be appealed, directly or by writ of cer-