REPORT OF TRCE SUBCOMMITTEE FOR JANUARY 17-18, 1996 SCAC MEETING

CHART SHOWING ACTION TAKEN
BY SUPREME COURT ADVISORY COMMITTEE
AT MEETING OF NOVEMBER 15-16, 1996

RULE NO.	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
NEW RULE 1009 - CIV & CRIM	Rule approved as attached
509 - CIV	No change
606 - CIV & CRIM	Insert "indictment"
509 - CIV	No change
UNIFIED RULES	Approved as recommended (a) New page 16 inadvertently left out one paragraph which we will add (b) Possible amendment of changing "may" to "shall" was discussed and referred to Justice Clinton with regard to Rule 508 (c)(2) Exceptions to the identity of informer rule. It was decided that the rule should stay as it presently exists.

FINAL REDRAFT

RULE 1009. TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS

(a) **Translations.** A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.

(b) **Objections.** Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.

(c) **Effect of Failure to Object or Offer Conflicting Translation.** If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without further need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.

(d) **Effect of Objections or Conflicting Translations.** In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court then shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.

(e) **Expert Testimony of Translator.** Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.

(f) **Varying of Time Limits.** The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.

(g) **Court Appointment.** The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

(APPROVED BY SUPREME COURT ADVISORY COMMITTEE SEPTEMBER 20, 1996)

RULE 606 OF THE RULES OF PROCEDURE
(BOTH CRIMINAL AND CIVIL)

ULE 606. COMPETENCY OF JUROR AS A WITNESS

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

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

DISPOSITION CHART
TEXAS RULES OF EVIDENCE
(AGENDA JANUARY 17-18, 1997)
*REFER TO CHART SHOWING ACTION TAKEN BY
SUPREME COURT ADVISORY COMMITTE AT
MEETING OF NOVEMBER 15-16, 1996

RULE NO	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASON
609(d) - CIV & CRIM	Letter from Judge Martin J. Chiuminatto, Jr. recommending consistency with Section 51.13(b) Family Code	Approve changes recommended by adding the words pointed out in the redline version attached	So juvenile's prior adjudications and dispositions can be used to impeach juvenile only in subsequent proceedings in which juvenile is a party
702 - CIV & CRIM	The Supreme Court Advisory Committee on September 20, 1996, voted to make no amendment or addition to 702. Richard Orsinger suggested drawing rule setting standard for admissibility of non-scientific expert, attaching concurring opinion of Justice Gonzalez in S.V. v. R.V., November 15, 1996.	Take no action at this time	Family Law Council has created Ad Hoc Committee to study problem. State Bar Evidence Committee has referred to Dean Sutton's subcommittee to study problem.

RULE 609(d) OF THE RULES OF PROCEDURE
(BOTH CIVIL AND CRIMINAL)

(d) Juvenile Adjudications. Evidence of Juvenile adjudications is not admissible under this rule, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, unless required to be admitted by the Constitution of the United States or Texas.

RULE 609(d) OF THE RULES OF PROCEDURE
(BOTH CIVIL AND CRIMINAL)
REDLINE VERSION

(d) **Juvenile Adjudications.** Evidence of Juvenile adjudications is not admissible under this rule, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, unless required to be admitted by the Constitution of the United States or Texas.

section, provisions of this section and Vernon's Ann.Civ.St. art. 5115 for solid masonry walls between juvenile facilities and other inmate facilities were substantially complied with, and vents and openings through which verbal contact could be made were not violation of statute. Vest v. Lubbock County Com'rs Court (D.C. 1977) 444 F.Supp. 824.

Where fourth-floor homicide division at police station was completely empty, so that minor never came in contact with adult offenders and was not subjected to any coercion in making of statement, there was substantial compliance with this section, even if applicable, requiring that juvenile be detained only in facilities designated as juvenile detention centers, purpose of this section being to avoid contact with adult offenders. Matthews v. State (App. 2 Dist.1984) 677 S.W.2d 809, review refused.

As long as juvenile offenders and adult offenders are not detained in the same compartment and juvenile offenders are not permitted any contact with adult offenders, a county may locate its juvenile detention facility in the same building as its county jail. Op.Atty.Gen.1974, No. H-363.

A ward of the Texas Youth Commission between the ages of 18 and 21 who has been arrested for, charged with, or convicted of any crime may under no circumstances be housed in the same compartment of a facility as, or permitted regular contact with, any "child" as defined in section 51.02 of the Family Code. Op.Atty.Gen.1991, No. DM-38.

4. Instructions

Where accused at the commission of the offense was over 16 years old, his imprisonment would be in the penitentiary; and there was no error in not submitting the issue of his age, that the jury might assess his punishment in the reformatory, in their discretion. Munger v. State (1909) 57 Cr.R. 384, 122 S.W. 874.

Jury should determine place of confinement for delinquent child, and charge limiting confinement to state training school was error. Curry v. State (1927) 107 Cr.R. 265, 296 S.W. 307.

5. Habeas corpus

Subsection (d) of this section, providing that child detained in facility that has not been certified as suitable for detention of children shall be entitled to immediate release from custody in that facility is mandatory and consequently minor, who filed application for writ of habeas corpus for release from uncertified facility, was entitled to immediate release. Matter of G. T. H. (Civ.App.1976) 541 S.W.2d 527.

§ 51.13. Effect of Adjudication or Disposition

(a) Except as provided by Subsection (d), an order of adjudication or disposition in a proceeding under this title is not a conviction of crime, and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment.

(b) The adjudication or disposition of a child or evidence adduced in a hearing under this title may be used only in subsequent proceedings under this title in which the child is a party or in subsequent sentencing proceedings in criminal court against the child to the extent permitted by the Texas Code of Criminal Procedure, 1965.

(c) A child may not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of crime, except:

(1) for temporary detention in a jail or lockup pending juvenile court hearing or disposition under conditions meeting the requirements of Section 51.12 of this code;

(2) after transfer for prosecution in criminal court under Section 54.02 of this code; or

(3) after transfer from the Texas Youth Commission under Section 61.084, Human Resources Code.

(d) An adjudication under Section 54.03 that a child engaged in conduct that constitutes a felony offense resulting in commitment to the Texas Youth Commission under Section 54.04(d)(2), (d)(3), or (m) or 54.05(f) is a final felony conviction only for the purposes of Sections 12.42(a)–(c) and (e), Penal Code.

Acts 1973, 63rd Leg., p. 1460, ch. 544, § 1, eff. Sept. 1, 1973. Amended by Acts 1987, 70th Leg., ch. 385, § 3, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 799, § 1, eff. June 18, 1993; Acts 1995, 74th Leg., ch. 262, § 13, eff. Jan. 1, 1996.

Historical and Statutory Notes

The 1987 amendment in subsec. (c) added the exception relating to transfer from the Youth Commission.

Section 20 of the 1987 amendatory act provides:

"(a) This Act applies only to offenses and conduct occurring on or after its effective date. For the purposes of this section, an offense or delinquent conduct based on an offense occurs on or after the effective date if all the elements of the offense occur on or after the effective date.

"(b) An offense or conduct that occurs before the effective date of this Act shall be prosecuted under the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose only."

The 1993 amendment in subd. (c)(3) deleted "on or after the 18th birthday of the child," preceding "after transfer".

The 1995 amendment, in subsec. (a), substituted "Except as provided by subsec. (d), an" for "An"; and added subsec. (d).

Comparative Laws:

Uniform Juvenile Court Act (U.L.A.) § 33.

Prior Laws:

Acts 1943, 48th Leg., p. 313, ch. 204, § 13.
Acts 1965, 59th Leg., p. 1256, ch. 577, § 5.
Acts 1967, 60th Leg., p. 1082, ch. 475, § 6.
Vernon's Ann.Civ.St. art. 2338–1, § 13(d), (e).

Cross References

Age affecting criminal responsibility, see V.T.C.A., Penal Code § 8.07.
Commitment to Texas Youth Commission, use as evidence only in subsequent proceedings or criminal sentencing proceedings, see V.T.C.A., Human Resources Code § 61.066.

Law Review Commentaries

Constitutionality of pre-trial juvenile proceedings in Texas. Matthew Hoffman, 14 South Texas L.J. 434 (1973).

Library References

Infants ⇐223.1.
WESTLAW Topic No. 211.
C.J.S. Infants §§ 57, 69 to 85.

Tex.Prac., Juvenile Law and Practice, Chs. 13, 20.

Notes of Decisions

1. Validity

Subsection (b) of this section, providing that evidence adduced at hearing on petition for minor's transfer to district court could be used against minor in sentencing proceedings in criminal court to extent permitted by code of

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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

way 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.
R. V.

No. 94-0856

From Dallas County, Fifth District.

(Opinion of the Court of Appeals, 880 S.W.2d 804.)

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NATHAN L. HECHT
Justice

ELIVERED: November 15,

S. V.
vs.
R. V.

No. 94-0856

County, Fifth District.

the Court of Appeals, 880

Motion for rehearing of cause is ove. ruled. 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 the intimate details of the parties' liv when these ordinarily private matters c have no bearing on the objective verifiabili inquiry.

My second point is that the centerpiece the Court's opinion is the validity of expe testimony about repressed memory sy drome, and in assessing such testimony, t Court obliquely implicates the admissibilit of this evidence under *Robinson*. The Cou writes: "Because the second requirement fc applying the discovery rule is an objectivel verifiable wrong, the central determinatio that must be made is whether recovere memories meet this requirement. The que tion whether recovered memories are vali has elicited the most passionate debat among scholars and practitioners, and th consensus of professional organizations re viewing the debate is that there is no con sensus on the truth or falsity of thes memories." _____ S.W.2d at _____. Then after a review of some of the available sci entific literature, the Court concludes:

> In sum, the literature on repression anc recovered memory syndrome establishes that fundamental theoretical and practica 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

Daubert to social sciences, chology, economics, sociology, science). Thus, JUSTICE GON- be correct when he contends *binson* or *Daubert*, evidence pline that is incapable of be- lly tested" is categorically in- ___ S.W.2d at ___.

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at ___ (emphasis added). he difficulties for the jury in events occurring during R.'s the aid of expert testimony, gues that these difficulties me by "expert testimony cau- ury of the dangers which the

majority discusses and . . . present[ing] ev dence that R. V.'s post-traumatic stress disorder stemmed from another traumatic event." ___ S.W.2d at ___. In my opin- ion, 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] Th are not testable under the scientific metho As I discussed in my concurring opinion the present case, repressed memory sy drome, as that phenomenon is now unde stood, is one of these things.

As JUSTICE CORNYN correctly recognize this case foreshadows larger issues tha the admissibility of repressed memory syn drome. Under *Robinson*, many social an behavioral disciplines will undoubtedly su fer the same fate. Thus, we need to develo a standard or filter apart from *Robinson* t judge the validity of expert testimony base on the social sciences. A recent commenta tor has aptly summarized the problem:

> Although the [view that *Daubert-Robinso* provides the exclusive standard for evaluat ing scientific expert testimony] is our pre ferred solution, it leaves no safe harbor fo evidence that is widely viewed as scientific is accepted as sound, but cannot meet th *Daubert* criteria. This appears to be a di lemma that the lower courts will have to re solve on their own. . . .

Conley & Peterson, *The Science of Gatekeep ing: The Federal Judicial Center's New* Ref erence 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.

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GILBERT I. LOW
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WILL E ORGAIN (1882-1965)
MAJOR T BELL (1897-1969)

February 27, 1997

FEDERAL EXPRESS

Mr. Luther H. Soules III
Soules & Wallace
Frost Bank Tower, 15th Floor
100 W. Houston, Suite 1500
San Antonio, TX 78205-1457

Dear Luke:

I am enclosing herein agenda for the upcoming meeting. Since there was no discussion by the Evidence Committee at the last meeting, I will also take up that agenda. I previously mailed it to you and I am sure you probably had it copied for the meeting. At any rate, I will see you on Friday, March 7, 1997.

Sincerely,

Gilbert I. Low

GIL:cc

Enclosure

cc: Mr. Mark K. Sales - FEDERAL EXPRESS

DISPOSITION CHART
TEXAS RULES OF EVIDENCE
(AGENDA MARCH 7-8, 1997)

*REFER TO CHART SHOWING ACTION TAKEN BY
SUPREME COURT ADVISORY COMMITTE AT
MEETING OF NOVEMBER 15-16, 1996
(THIS WAS NOT DISCUSSED AT THE JANUARY 17-18, 1997 MEETING)

*REFER TO DISPOSITION CHART SHOWING AGENDA
FOR JANUARY 17-18, 1997
(NO DISCUSSION WAS HAD ON THESE MATTERS AT THAT MEETING)

RULE NO	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASON
503	Letter from Paul Gold concerning legislation to implement Upjohn standard regarding attorney-client privilege	Take no further action at this time	See history of proposed amendment to Rule 503 as attached hereto
902	Letter from Lloyd M. Lunsford complaining of medical records being obtained without authentication requiring other party to duplicate and authenticate	Take no action	Rule presently allows party to obtain copies and authenticate with affidavit and file
902 (new)	Letter from Alan L. Schechter and Lloyd M. Lunsford concerning proving necessity and reasonableness of medical bills	Take no action	Section 18.001 and Section 18.002 of Civil Practice & Remedies Code provides practical manner of proof

RULE 503 - PROPOSED LEGISLATION

History of Proposed Amendment to Rule 503:

On March 30, 1994, Mark Sales wrote to Justice Hecht, proposing a change in view of the Supreme Court's decision in National Tank Co. v. Brotherton. Mark enclosed a report of the State Bar Committee on Rules of Evidence (SBCRE). The Meredith version and the Upjohn version were discussed. Dean Sutton had a modified version that he recommended. After that the Evidence Subcommittee of the Texas Supreme Court Advisory Committee (TSCAC) reviewed the proposal on July 5, 1994. The full TSCAC was engaged at that time in revising the discovery rules. The Evidence Rules were not brought before the committee for some period of time because of the full schedule involving the Discovery Rules. The Evidence Subcommittee by a vote of 2 to 1 recommended to TSCAC that there was no need to expand the privilege and that no action be taken. Rule 503 was discussed by the full TSCAC, which voted to table the matter until the next meeting. At the next meeting it was discussed and the full TSCAC voted to make no change to Rule 503. At the time the full committee voted, a proposed rule was submitted in the event the committee decided to amend 503. Since there was no vote to amend 503, there was no discussion of the proposed amendment to 503.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

SUBCHAPTER A. DOCUMENTARY EVIDENCE

§ 18.001. Affidavit Concerning Cost and Necessity of Services

[See main volume for (a) to (c)]

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

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

(1) not later than:

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

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

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

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

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

Historical and Statutory Notes

1987 Legislation

The 1987 amendment, in order to conform with Acts 1985, 69th Leg., ch. 617, directed that in subsec. (d) the time for serving the affidavit be extended from 14 to 30 days; in subsec. (e) extended the time for serving a counteraffidavit from 10 to 30 days and added the limit of 14 days before the day on which evidence is first presented at the trial; and, in subsec. (f), established qualifications for persons making counteraffidavits.

Law Review and Journal Commentaries

Affidavits concerning cost and necessity of services: Irreconcilable differences? Linda L. Addison, 49 Tex.B.J 1030 (1986).

Article I of Texas rules of evidence and articles I and XI of Texas rules of criminal evidence: Applicability of rules. Olin Guy Wellborn III, 18 St. Mary's L.J. 1165 (1987).

Notes of Decisions

Reasonable and necessary expenses 3

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1. In general

Statute governing affidavits establishing cost and necessity of services is evidentiary statute which allows for admissibility, by affidavit, of evidence of reasonableness and necessity of charges which would otherwise be inadmissible hearsay, permits use of otherwise inadmissible hearsay to support findings of fact by trier of fact, and provides for exclusion of evidence to contrary, upon proper objection, in absence of properly filed counteraffidavit. Beauchamp v. Hambrick (App. 11 Dist. 1995) 901 S.W.2d 747.

Statute governing affidavits establishing cost and necessity of services provides that evidence of reasonableness and necessity of costs incurred will support finding of fact; statute does not provide that evidence is conclusive, and does not address issue of causation. Beauchamp v. Hambrick (App. 11 Dist. 1995) 901 S.W.2d 747.

...T OF NONRESIDENTS—
...PROVISIONS

...ent Tax Cases

... the state or a legal subdivision of the state
...lent, the secretary of state is an agent for
...tant owned, had, or claimed a taxable interest
...ax year for which taxes have not been paid.
...state in accordance with this section for a
...ise of action accrued but has subsequently

...r (c) and (d)]

...under this section must be accompanied by
...1, Texas Business Corporation Act, for the
...f the service of process.

... 1, 1989; Acts 1991, 72nd Leg., 2nd C.S., ch. 6, ..., eff. Jan. 1, 1996.

...atutory Notes

1995 Legislation

The 1995 amendment, in subsecs. (a), (b), and (c), substituted "secretary of state" for "comptroller"; and, in subsec. (e), substituted "the fee provided by Section A(20), Article 10.01, Texas Business Corporation Act," for "a $25 fee", and deleted the last sentence, which read "The fee for the comptroller's certification of the service of process the defendant or of any other matter related to the service of process is $10.".

Section 15 of the 1995 amendatory act provides:

"The change in law made by Section 1 of this ...t applies only to service of process in a suit filed on or after the effective date of this Act. Service of process in a suit filed before the effective date of ...s Act is covered by the law in effect when the ...t was filed, and the former law is continued in effect for that purpose."

...al Commentaries

EVIDENCE

...ction
SUBCHAPTER B. PRESUMPTIONS

18.032. Traffic Control Device Presumed to be Lawful.

Statute governing affidavit concerning cost and necessity of services does not address admissibility of affidavit concerning cost and necessity of services, but only sufficiency of affidavit to support finding of fact that charge was reasonable or service was necessary. City of El Paso v. Public Utility Com'n of Texas (App. 3 Dist. 1995) 916 S.W.2d 515, judgment withdrawn.

3. Reasonable and necessary expenses

Affidavits that charges for medical expenses rendered to plaintiff by hospitals were reasonable and necessary were sufficient to support trial judge's findings that medical expenses incurred by plaintiff were reasonable and necessary, and thus supported award of $79,538 for past medical expenses, in personal injury action. Six Flags Over Texas, Inc. v. Parker (App. 2 Dist. 1988) 759 S.W.2d 758.

Amount and reasonableness of medical expenses incurred by workers' compensation claimant were sufficiently established by hospital bills, claimant's uncontroverted affidavit, and carrier's deemed admission that claimant was totally and permanently disabled by work-related injury. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Wyar (App. 1 Dist. 1991) 821 S.W.2d 291.

Finding that motorist injured in automobile accident was entitled to recover only medical expenses incurred during brief period of treatment which immediately followed collision and not for treatment received later after treatment had ceased for period was supported where driver against whom action was brought contested issues of causation, even though injured motorist had submitted affidavits detailing expenses incurred during both periods. Beauchamp v. Hambrick (App. 11 Dist. 1995) 901 S.W.2d 747.

§ 18.002. Form of Affidavit

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

No._____

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

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____(NAME OF AFFIANT)_____, who, being by me duly sworn, deposed as follows:

My name is _____(NAME OF AFFIANT)_____. I am of sound mind and capable of making this affidavit.

On _____(DATE)_____, I provided a service to _____(NAME OF PERSON WHO RECEIVED SERVICE)_____. An itemized statement of the service and the charge for the service is attached to this affidavit and is a part of this affidavit.

The service I provided was necessary and the amount that I charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19___.
My commission expires:

_____

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

_____

(b) An affidavit concerning cost and necessity of services by the person who is in charge of records showing the service provided and the charge made is sufficient if it follows the following form:

No._____

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

nount and reasonableness of medical expenses
ɔred by workers' compensation claimant were
ufficiently established by hospital bills, claimant's
ıcontroverted affidavit, and carrier's deemed ad-
ion that claimant was totally and permanently
ɔled by work-related injury. National Union
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S.W.2d 747.

of services by the person who provided the

IN THE _____
COURT IN AND FOR
_____ COUNTY,
TEXAS

IT
ıally appeared _____(NAME OF AFFI-
deposed as follows:
IT)_____. I am of sound mind and

ɑ a service to _____(NAME OF PER-
_ An itemized statement of the service and
affidavit and is a part of this affidavit.
ı amount that I charged for the service was
e was provided.

fiant
he _____ day of _____, 19___

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

ɔf services by the person who is in charge of
ıe charge made is sufficient if it follows the

IN THE _____
COURT IN AND FOR
_____ COUNTY,
TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____(NAME OF AFFIANT)_____, who, being by me duly sworn, deposed as follows:

My name is _____(NAME OF AFFIANT)_____. I am of sound mind and capable of making this affidavit.

I am the person in charge of records of _____(PERSON WHO PROVIDED THE SERVICE)_____. Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that _____(PERSON WHO PROVIDED THE SERVICE)_____ provided to _____ (PERSON WHO RECEIVED THE SERVICE)_____ on _____(DATE)_____. The attached records are a part of this affidavit.

The attached records are kept by me in the regular course of business. The information contained in the records was transmitted to me in the regular course of business by _____(PERSON WHO PROVIDED THE SERVICE)_____ or an employee or representative of _____(PERSON WHO PROVIDED THE SERVICE)_____ who had personal knowledge of the information. The records were made at or near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original.

The service provided was necessary and the amount charged for the service was reasonable at the time and place that the service was provided.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19___.
My commission expires:

_____

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

(c) The form of an affidavit provided by this section is not exclusive and an affidavit that substantially complies with Section 18.001 is sufficient.

Added by Acts 1993, 73rd Leg., ch. 248, § 1, eff. Aug. 30, 1993.

Notes of Decisions

In general 1

1. In general

Except as authorized by statute, affidavit is insufficient unless allegations are direct and unequivocal, and perjury can be assigned upon it. Rodriquez v. Texas Farmers Ins. Co. (App. 7 Dist. 1995) 903 S.W.2d 499, rehearing overruled, error denied, rehearing of writ of error overruled.

SUBCHAPTER B. PRESUMPTIONS

§ 18.031. Foreign Interest Rate

Law Review and Journal Commentaries

Article I of Texas rules of evidence and articles I and XI of Texas rules of criminal evidence: Applicability of rules. Olin Guy Wellborn III, 18 St. Mary's L.J. 1165 (1987).

§ 18.032. Traffic Control Device Presumed to be Lawful

(a) In a civil case, proof of the existence of a traffic control device on or alongside a public thoroughfare by a party is prima facie proof of all facts necessary to prove the proper and lawful installation of the device at that place, including proof of competent authority and an ordinance by a municipality or order by the commissioners court of a county.

3/6/97 Draft with Motion to Sever/Strike

RULE 86: Improper or Inconvenient Venue[1]

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

2. **Motion to Transfer.**

   a. Time to File. A motion to transfer must be made prior to or concurrently with the movant's first plea, pleading or motion other than a challenge to the court's personal jurisdiction, ~~except a motion challenging a plaintiff's intervention on the ground that the intervenor cannot establish independently of any other plaintiff proper venue in the county of suit must be filed within 30 days of the intervention. The filing or determination of a motion to strike an intervention under Rule 60 on grounds other than venue does not waive a subsequent but timely venue challenge to the intervention under this rule.~~[2]

   b. Grounds for Motion. The motion shall specifically deny pleaded venue facts, state that the case should be transferred to another specified county of proper venue, state the legal basis for the transfer, and plead venue facts establishing that the county to which transfer is sought is a proper venue. ~~In a case with multiple plaintiffs, a motion to transfer may challenge a plaintiff's joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit, and the motion need not specifically deny pleaded venue facts nor seek transfer to another specified county of proper venue.~~

3. **Time for Hearing, Response and Reply.** The movant must request a hearing on the motion at a reasonable time prior to commencement of the trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing. Any response, including proof filed in opposition to the motion, shall be filed at least 30 days prior to the hearing on the motion. Any reply to the response, including additional proof in support of the motion must be filed not later than 7 days prior to the hearing.

4. **Burden of Proof of Proper Venue.** A party seeking to maintain venue in the county of suit has the burden of proof that the county of suit is a proper venue.[3] A party seeking transfer has the burden of proof that the county specified in the motion to which transfer is sought is a proper venue. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact satisfies its burden of proof by making prima facie proof of the venue fact. The existence of a claim[4] when pleaded properly shall be taken as

---

1 I think this rule is too long to be included in Bill Dorsaneo's Rule 25 so I have kept it as a separate rule.

2 I think the new procedure in this rule makes this sentence unnecessary. Am I right?

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

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

established for venue purposes, and no party shall be required to establish a claim by prima facie proof.

5. **Burden of Proof of Inconvenient Venue.** In addition to the burden of proof of proper venue in accordance with section 4 of this rule, a party seeking transfer to another county of proper venue for the convenience of the parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code must present proof that transfer is justified on such grounds, regardless of whether the adverse party specifically denies the movant's allegations. The nonmovant may present opposing proof that the court shall also consider when determining whether transfer is justified. The judge may transfer the case for convenience and in the interest of justice after reviewing all of the evidence filed in support of and opposing the transfer and making the findings set forth in § 15.002(b) of the Civil Practice and Remedies Code when established by the preponderance of the evidence.

~~6. **Burden of Proof for Challenges to Joinder or Intervention**. A plaintiff, original or intervening, responding to a motion challenging the plaintiff's joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 4 of this rule or establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. A plaintiff seeking to establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence and determine whether the requirements have been established by the preponderance of the evidence.~~

6~~7~~. **Proof.** Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for venue. 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. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products may constitute proof when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.

7~~8~~. **Hearing.** The court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by the parties, and the proof filed by the parties. No oral testimony shall be received at the hearing. If the party seeking to maintain venue in the county of suit has established that the county of suit is proper venue, the case shall not be transferred unless the party seeking transfer has established a mandatory venue in another county or the court finds that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that

county~~, unless a plaintiff or intervenor has established the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code.~~[5] If no county of proper venue is established, the court may direct the parties to make further proof.

~~**9. Transfer if Motion Granted.** If a motion to transfer is granted, the cause shall not be dismissed, but the court shall transfer the case to the proper county as provided in Rule __ [clerk rule, currently Rule 89]. If a motion challenging a plaintiff's joinder or intervention is granted, the court shall sever the plaintiff's claims and transfer the severed cause to any county of proper venue; however, if a motion challenging a plaintiff's intervention is granted, the court shall either sever and transfer the intervenor's claims or strike the intervention.~~ [6]

8~~10~~. Motions Filed after Ruling and Rehearing. If a court has ruled on a motion to transfer venue in the case, no further motions under this rule shall be considered except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code. Timely motions filed under this subdivision that the court does not consider will preserve the movant's objection to venue for purposes of appeal. A court may reconsider a previously overruled motion to transfer if the original ruling was legally incorrect, the defendant against whom proper venue was established is dismissed from the cause before trial, or when the prima facie proof of proper venue is conclusively negated.[7]

9~~11~~. Discovery. Discovery shall not be abated or otherwise affected by pendency of a motion to transfer. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue. Depositions taken in a case where a motion to transfer is pending 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.

10~~12~~. Consent. At any time the parties may file written consent to transfer the case to any other county and the judge shall order transfer accordingly.[8]

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[5] I'm not sure whether this should be out or in if we go this way. Check it later.

[6] Actually, the first sentence of this may need to stay in or perhaps put somewhere else. Check later.

[7] This is an attempt to solve the problem of reconsidering motions to transfer. Do we want to allow courts to reconsider any motion, in which case defendants may be bothering trial courts with many motions to reconsider, or limit it to the circumstances where there really may be reversible error because of the prior venue decision? I opted for the latter, although admittedly the circumstances where a defendant is dismissed is not so certain to be reversible error. Maybe it should be limited to where the D gets a SJ or the trial court actually makes a determination of fraudulent joinder. See ACF Industries v. Carter, 903 SW2d 423 (Texarkana 1995)(reversed on venue error where trial court directed verdict against D upon whom venue based) . A separate question not dealt with here is whether to allow the transferee court to send a case back that was improperly transferred. If we allow this, however, we might end up with a case begin bounced back and forth, with no court allowing it to land. I did not address this issue in this draft.

[8] This section could be included in Dorsaneo's Rule 25. For example: "Motions to transfer or change venue shall be made pursuant to Rule __ or Rule ___. At any time the parties may file written consent to transfer the case...."

11. Motion to Sever or Strike. If a plaintiff seeks to join a pending suit by an amended pleading or by a plea in intervention, the defendant may file a motion to sever and transfer the plaintiff's claims or a motion to strike the intervention to challenge the joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit . The motion must be filed within 30 days of service of the joinder or intervention. The motion need not specifically deny pleaded venue facts nor seek transfer to another specified county of proper venue. In response, the plaintiff must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 4 of this rule or establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. A plaintiff seeking to establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence and determine whether the requirements have been established by the preponderance of the evidence. If the motion is granted, the court shall sever the plaintiff's claims and transfer the severed cause to any county of proper venue, taking into consideration the convenience of the parties and the witnesses and the interests of justice; however, if a motion to strike a plaintiff's intervention is granted, the court shall either sever and transfer the intervenor's claims or strike the intervention.

RULE 86: Improper or Inconvenient Venue[1]

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

2. **Motion to Transfer.**

   a. Time to File. A motion to transfer must be made prior to or concurrently with the movant's first plea, pleading or motion other than a challenge to the court's personal jurisdiction, except a motion challenging a plaintiff's intervention on the ground that the intervenor cannot establish independently of any other plaintiff proper venue in the county of suit must be filed within 30~~[20]~~ days of the intervention. The filing or determination of a motion to strike an intervention under Rule 60 on grounds other than venue does not waive a subsequent but timely venue challenge to the intervention under this rule.

   b. Grounds for Motion. The motion shall specifically deny pleaded venue facts, state that the case should be transferred to another specified county of proper venue, state the legal basis for the transfer, and plead venue facts establishing that the county to which transfer is sought is a proper venue. In a case with multiple plaintiffs, a motion to transfer may challenge a plaintiff's joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit, and the motion need not specifically deny pleaded venue facts nor seek transfer to another specified county of proper venue.

3. **Time for Hearing, Response and Reply.** The movant must request a hearing on the motion at a reasonable time prior to commencement of the trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing. Any response, including proof filed in opposition to the motion, shall be filed at least 30 days prior to the hearing on the motion. Any reply to the response, including additional proof in support of the motion must be filed not later than 7 days prior to the hearing.

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---

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

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

5. **Burden of Proof of Inconvenient Venue.** In addition to the burden of proof of proper venue in accordance with section 4~~5~~ of this rule, a party seeking transfer to another county of proper venue for the convenience of the parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code must present proof that transfer is justified on such grounds, regardless of whether the adverse party specifically denies the movant's allegations. The nonmovant may present opposing proof that the court shall also consider when determining whether transfer is justified. The judge may transfer the case for convenience and in the interest of justice after reviewing all of the evidence filed in support of and opposing the transfer and making the findings set forth in § 15.002(b) of the Civil Practice and Remedies Code when established by the preponderance of the evidence.

6. **Burden of Proof for Challenges to Joinder or Intervention**. A plaintiff,original or intervening, responding to a motion challenging thea plaintiff's joinder or intervention on the ground that the plaintiff cannot establish independently of any other plaintiff proper venue in the county of suit must independently of any other plaintiff satisfy the burden of proof of proper venue in accordance with section 4~~5~~ of this rule or establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. A~~The~~ plaintiff seeking to establish the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code shall present proof relevant to the requirements, the movant may present opposing proof, and the judge shall review all of the evidence and determine whether the requirements have been established by the preponderance of the evidence ~~whether to grant or deny the motion~~.

7. **Proof.** Proof is made by filing and serving an affidavit and any duly proved attachments thereto that fully and specifically set forth facts that support the grounds for venue. 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. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products may constitute proof when they are attached to, or incorporated by reference in, an affidavit of a person who has knowledge of such discovery.

8. **Hearing.** The court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by the parties, and the proof filed by the parties. No oral testimony shall be received at the hearing. If the party seeking to maintain venue in the county of suit has established that the county of suit is proper venue, the case shall not be transferred unless the party seeking transfer has established a mandatory venue in another county or the court finds that transfer to another proper venue for the convenience of the parties and witnesses and in the interest of justice is warranted pursuant to § 15.002(b) of the Civil Practice and Remedies Code. If the party seeking to maintain venue in the county of suit fails to establish proper venue in the county of suit, the case shall be transferred to the county to which transfer is sought if the movant has established proper venue in that county, unless a plaintiff or intervenor has established the requirements of subdivisions (1) through (4) of § 15.003(a) of the Civil Practice and Remedies Code. If no county of proper venue is established, the court may direct the parties to make further proof.

9. **Transfer if Motion Granted.** If a motion to transfer is granted, the cause shall not be dismissed, but the court shall transfer the case to the proper county~~court~~ as provided in Rule __ [clerk rule, currently Rule 89]. ~~However, i~~If a~~the~~ motion challenging a~~n~~ plaintiff's joinder or intervention is granted, the court shall sever the plaintiff's claims and transfer the severed cause to any county of proper venue; however, if a motion challenging a plaintiff's intervention is granted, the court shall~~may~~ either sever and transfer the intervenor's claims or strike the intervention~~ or transfer the intervenor's claim to the proper court~~. ~~If the motion to transfer is granted as to one party, but not as to other parties, the claims by or against that party shall be severed and only the severed cause shall be transferred, unless § 15.004 of the Civil Practice and Remedies Code applies.~~

10. **Motions Filed after Ruling and Rehearing.** If a court has ruled on a motion to transfer venue in the case, no further motions under this rule shall be considered except that if the prior motion was overruled, the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code. Timely ~~filed~~ motions filed under this subdivision that the court does not consider~~ed by the court~~ will preserve the movant's objection to venue for purposes of appeal. A court may reconsider a previously overruled motion to transfer if the original ruling was legally incorrect, the defendant against whom proper venue was established is dismissed from the cause before trial, or when the prima facie proof of proper venue is conclusively negated.[4]

11. **Discovery.** Discovery shall not be abated or otherwise affected by pendency of a motion to transfer. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue. Depositions taken in a case where a motion to transfer is pending 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.

12. **Consent.** At any time the parties may file written consent to transfer the case to any other county and the judge shall order transfer accordingly.[5]

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[4] This is an attempt to solve the problem of reconsidering motions to transfer. Do we want to allow courts to reconsider any motion, in which case defendants may be bothering trial courts with many motions to reconsider, or limit it to the circumstances where there really may be reversible error because of the prior venue decision? I opted for the latter, although admittedly the circumstances where a defendant is dismissed is not so certain to be reversible error. Maybe it should be limited to where the D gets a SJ or the trial court actually makes a determination of fraudulent joinder. See ACF Industries v. Carter, 903 SW2d 423 (Texarkana 1995)(reversed on venue error where trial court directed verdict against D upon whom venue based). A separate question not dealt with here is whether to allow the transferee court to send a case back that was improperly transferred. If we allow this, however, we might end up with a case begin bounced back and forth, with no court allowing it to land. I did not address this issue in this draft.

[5] This section could be included in Dorsaneo's Rule 25. For example: "Motions to transfer or change venue shall be made pursuant to Rule __ or Rule ___. At any time the parties may file written consent to transfer the case...."

An optional paragraph 10:

This requires the court to consider the motions that must be considered under the earlier draft, but also allows the trial court to hear all late filed motions and reconsider any motion, under the theory that under 15.0641 a late added defendant can assert that the other defendant waived his venue rights because incompetence caused the trial judge to overrule the motion. If we are going to allow all late filed motions to be heard, why not just rehear earlier motions as well. It may go too far, but I put it up for discussion purposes as per my conversation with Sarah Duncan.

10. **Rehearing and Motions Filed after Ruling.** If a court has overruled ~~on~~ a motion to transfer venue in the case, ~~no further motions under this rule shall be considered except that if the prior motion was overruled,~~ the court shall consider a motion to transfer venue filed by a defendant whose appearance date was subsequent to the venue ruling based upon grounds not asserted in the earlier motion or seeking transfer for the convenience of parties and witnesses and in the interest of justice pursuant to § 15.002(b) of the Civil Practice and Remedies Code. Timely motions filed under this subdivision that the court does not consider will preserve the movant's objection to venue for purposes of appeal. A court may consider any timely motion filed after ruling on the prior motion, and may reconsider any previously overruled motion. ~~to transfer if the original ruling was legally incorrect, the defendant against whom proper venue was established is dismissed from the cause, or when the prima facie proof of proper venue is conclusively negated.~~ If a motion to transfer has been granted and the cause transferred, no further motions to transfer shall be considered.

Reconsideration and Further Motions. If the trial court rules on a motion to transfer, no further motions may be filed or considered unless the motion:

(a) is filed by a defendant who timely appears after the trial court's ruling, and

(b) the motion is based upon

(i) a ground or grounds not asserted in the earlier motion, or

(ii) the convenience of parties or witnesses and in the interest of justice under section 15.002(b) of the Texas Civil Practice and Remedies Code.

Any further motion that is timely filed under this subdivision preserves the movant's venue objection on appeal. Nothing in this subdivision precludes the trial court from reconsidering the denial of a motion to transfer if:

(a) it appears before trial that the ruling was incorrect at the time it was made;

(b) the evidence introduced at trial conclusively negates the prima facie proof of proper venue introduced at the venue hearing and thus establishes that the earlier venue determination was erroneous; or

(c) the defendant against whom proper venue was established is dismissed before trial.

Sarah Duncan's suggested revision of Rule 86(10)

SCOTT A. BRISTER
JUDGE, 234TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713)755-6262

January 24, 1997

Mr. Luther H. Soules III
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100 West Houston, Suite 1500
San Antonio, Texas 78205

Dear Luke:

Enclosed please a redlined and clean copy of TRCP 18 regarding the disqualification and recusal of judges. I believe this incorporates the changes approved at our last meeting. In addition to the drafts, I have enclosed a side-by-side comparison between the committee approved version and the current rule. Please review the enclosed to make sure I have made all the necessary corrections, and forward the rule to the members of the committee and the Court for their consideration.

Very truly yours,

Hon. Scott Brister
Judge, 234th District Court

Rule __. Recusal or Disqualification of Judges

(a) **Grounds For Disqualification.** A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;

(2) the judge has an ~~economic~~ interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) **Grounds For Recusal.** A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned ~~by a reasonable member of the public~~;

(2) the judge~~'s actions or statements other than rulings on the case demonstrate~~ has a personal bias or prejudice concerning the subject matter or a party;

(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;

(4) the judge has personal knowledge of ~~disputed~~ material evidentiary facts ~~gained prior to filing~~ relating to the dispute between the parties;

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a~~n economic~~ financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

(c) **Waiver ~~and Cure~~.** Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record. ~~Recusal pursuant to subparagraph (b)(7) is not required if the economic interest is divested, but any rulings made prior thereto are voidable.~~

(d) **Procedure.**

(1) *Motion.* A motion to disqualify or recuse a judge may be filed at any time. The motion must state in detail the grounds asserted, and must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A judge's rulings may not be used as the grounds for the motion, but may be used as evidence supporting the motion. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Referral.* The judge must ~~rule~~ sign an order ruling on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) *Interim Proceedings.* A judge who refuses to recuse may proceed with the case if a motion to recuse alleges only grounds listed in subparagraphs (b)(1), (b)(2), or (b)(3). If the motion alleges other grounds for recusal or disqualification, the judge must take no further action on the case until the motion is disposed.

(4) *Hearing.* The presiding judge of the region shall immediately hear or assign another judge to hear the motion, and shall set a hearing to commence before such judge within ~~twenty (20)~~ ten (10) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing. The assigned judge must rule within twenty (20) days of referral or the motion is deemed granted.

(5) *Disposition.* If a District Court judge is disqualified, either by the original judge or the assigned judge, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(6) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be ~~appealed~~ reviewed.

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

(e) **~~Economic~~ Financial interest.** As used in this rule, "~~economic~~ financial interest" means ~~the interests~~ "economic interest" as defined in Canon 8 of the Code of Judicial Conduct. ~~Economic~~ Financial interest does not include an interest as a taxpayer, utility ratepayer, or any similar interest unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

Rule 18. Recusal or Disqualification of Judges

(a) **Grounds For Disqualification.** A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;

(2) the judge has an interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) **Grounds For Recusal.** A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned;

(2) the judge has a personal bias or prejudice concerning the subject matter or a party;

(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

(c) **Waiver.** Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record.

(d) **Procedure.**

(1) *Motion.* A motion to disqualify or recuse a judge may be filed at any time. The motion must state in detail the grounds asserted, and must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A judge's rulings may not be used as the grounds for the motion, but may be used as evidence supporting the motion. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Referral.* The judge must sign an order ruling on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) *Interim Proceedings.* A judge who refuses to recuse may proceed with the case if a motion to recuse alleges only grounds listed in subparagraphs (b)(1), (b)(2), or (b)(3). If the motion alleges other grounds for recusal or disqualification, the judge must take no further action on the case until the motion is disposed.

(4) *Hearing.* The presiding judge of the region shall immediately hear or assign another judge to hear the motion, and shall set a hearing to commence before such judge within ten (10) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing. The assigned judge must rule within twenty (20) days of referral or the motion is deemed granted.

(5) *Disposition.* If a District Court judge is disqualified, either by the original judge or the assigned judge, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(6) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be reviewed.

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

(e) **Financial interest.** As used in this rule, "financial interest" means "economic interest" as defined in Canon 8 of the Code of Judicial Conduct. Financial interest does not include an interest as a taxpayer, utility ratepayer, or any similar interest unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

Rule 18b. Grounds For Disqualification and Recusal of Judges

(1) **Disqualification.** Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) **Recusal.** A judge shall recuse himself in any proceeding in which:

(a) his impartially might reasonably be questioned;

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

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

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

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a)"proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

Rule 18. Recusal or Disqualification of Judges

(a) Grounds For Disqualification. A judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law with someone while they acted as counsel in the matter;

(2) the judge has an interest in the matter, either individually or as a fiduciary; or

(3) the judge is related to any party by consanguinity or affinity within the third degree.

(b) Grounds For Recusal. A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned;

(2) the judge has a personal bias or prejudice concerning the subject matter or a party;

(3) the judge is a material witness, formerly practiced law with a material witness, or is related to a material witness or such witness's spouse by consanguinity or affinity within the third degree;

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;

(6) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a party or an officer, director, or trustee of a party;

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone with a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to a lawyer in the proceeding or a member of such lawyer's firm.

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[Deleted. Repeats Canon 4(D)(3), Code of Judicial Conduct]

((e) **Financial interest.** As used in this rule, "financial interest" means "economic interest" as defined in Canon 8 of the Code of Judicial Conduct. Financial interest does not include an interest as a taxpayer, utility ratepayer, or any similar interest unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

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 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 judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

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

(h) 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).

(c) **Waiver.** Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record.

(d) **Procedure.**

(1) *Motion.* A motion to disqualify or recuse a judge may be filed at any time. The motion must state in detail the grounds asserted, and must be made on personal knowledge or upon information and belief if the grounds of such belief are stated specifically. A judge's rulings may not be used as the grounds for the motion, but may be used as evidence supporting the motion. A motion to recuse must be verified; an unverified motion may be ignored.

(2) *Referral.* The judge must sign an order ruling on the motion promptly, and prior to taking any other action on the case. If the judge refuses to recuse or disqualify, the judge must refer the motion to the presiding judge of the administrative region for assignment of a judge to hear the motion.

(3) *Interim Proceedings.* A judge who refuses to recuse may proceed with the case if a motion to recuse alleges only grounds listed in subparagraphs (b)(1), (b)(2), or (b)(3). If the motion alleges other grounds for recusal or disqualification, the judge must take no further action on the case until the motion is disposed.

(4) *Hearing.* The presiding judge of the region shall immediately hear or assign another judge to hear the motion, and shall set a hearing to commence before such judge within ten (10) days of the referral. The presiding judge must send notice of the hearing to all parties, and may make such other orders including interim or ancillary relief as justice may require. The hearing on the motion may be conducted by telephone, and facsimile copies of documents filed in the case may be used in the hearing. The assigned judge must rule within twenty (20) days of referral or the motion is deemed granted.

(5) *Disposition.* If a District Court judge is disqualified, either by the original judge or the assigned judge, the parties may by consent appoint a proper person to try the case. Failing such consent, and in all other instances of disqualification or recusal, the presiding judge of the region must assign another judge to preside over the case.

(6) *Appeal.* If the motion is denied, the order may be reviewed on appeal from the final judgment. If the motion is granted, the order may not be reviewed.

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

Motions in Limine

1. The purpose of a motion in limine is to afford an opportunity for counsel to prevent jurors or potential jurors from hearing or seeing things which may not be admissible in evidence and the exposure to which creates substantial prejudice which is not susceptible of being cured by instructions from the judge.

2. A motion in limine asks the court to instruct counsel, litigants, and witnesses whom they call to refrain from mentioning the offending matter without first having received permission from the judge outside the hearing of the jury or jury panel.

3. A motion in limine should be restricted to those matters which are specific to the particular case, and counsel should not file, and judges should not grant motions or parts of motions which amount to requests for opposing counsel to observe standard rules of evidence or courtroom decorum. Examples of such motions are ones which request an order that opposing counsel "refrain from asking any question the answer to which is based on hearsay," or that opposing counsel "refrain from addressing questions to the movant," etc.

4. The filing of such boilerplate type motions should not be encouraged, and trial judges are directed to overrule or refuse to consider motions or parts of motions which are contra to the spirit of this rule.

5. The granting or denying of a motion in limine or part thereof does not constitute a ruling on the final admissibility of any particular matter, and counsel are cautioned to secure a proper ruling as to any evidentiary matter as to which they wish to preserve error.

SCOTT A. BRISTER
JUDGE, 234TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002
(713)755-6262

February 2, 1997

Mr. Luther H. Soules III
Soules & Wallace
100 West Houston, Suite 1500
San Antonio, Texas 78205

Dear Luke:

As requested, I reviewed the materials appearing at pages 000579 thru 000632 in the original agenda regarding bifurcation. Attached are the proposals submitted therein. As they seem to adequately set forth the options, I did not see any reason to try my own draft. As you can see, the Texas and Federal rules are quite similar, with the various proposals suggesting the following changes:

1. Adopting efficiency and economy as bases for bifurcation, conforming the Texas rule to the Federal rule.

2. Adding a phrase allowing bifurcation of liability and damages, to change the holding of *Iley v. Hughes*, 311 S.W.2d 648 (Tex. 1958). As pointed out in the materials, the Court's concerns in that case may well have been eliminated by the adoption of comparative fault.

3. Adding a phrase allowing bifurcation of preliminary issues, such as limitations defenses or predicate elements in bill of review cases, conforming the rule to current law. *Phipps v. Miller*, 597 S.W.2d 458 (Tex.Civ.App.--Dallas 1980, writ ref'd n.r.e.); *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979).

4. Adding a phrase concerning whether the separated issues should be tried before the same jury (traditional "bifurcation") or different juries (technically, "separate trials"). Some proposals make this purely discretionary, others suggest a presumption of a single jury.

I do not understand Professor Ratliff's letter stating that TRCP 41 and TRCP 174 are at odds (page 000585). Both rules seem to me to give broad powers to the trial court to separate claims. I have included TRCP 41 and TRCP 40(b) for committee members to review for themselves.

Very truly yours,

Hon. Scott Brister
Judge, 234th District Court

Current TRCP 174(b). Separate Trials

(b) **Separate Trials**. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Current FRCP 42(b). Separate Trials

(b) **Separate Trials**. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Court Rules Committee Draft Rule 174(b). Separate Trials

(b) **Separate Trials**. The court, in furtherance of convenience, to avoid prejudice or to promote efficiency and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue including liability and damages issues, or any issues that may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. When two or more separate issues are to be tried to a jury, the Court where practicable shall allow the same jury to try both issues.

TADC, TMA, AIA, TCJL, TCC, etc. Draft Rule 174(b).

(b) **Separate Trials**. In all cases, including actions in which personal injury is alleged, the court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or such issue as may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court may allow the same jury to try both issues.

State Bar Committee on the Administration of Justice Draft Rule 174(b).

(b) **Separate Trials**. In all cases, including actions in which personal injury is alleged, the court in furtherance of convenience or to avoid prejudice or when separate trials will promote efficiency and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue, including liability and damages issues, or any issues that may be a prerequisite to the determination of another issue or issues, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. Where two or more separate issues are to be tried to a jury, the court shall allow the same jury to try both issues, unless the parties, by written agreement, specify otherwise.

Current TRCP 41. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Current TRCP 40(b)

Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Rule 188 Depositions in Foreign Jurisdictions.

(a) In General. Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice as provided in Rule _____(current Rule 200) before a person authorized to administer oaths and to take a deposition under the law of the place in which the deposition is taken or under the law of the State of Texas, as if the deposition was taken and conducted in the State of Texas or (2) pursuant to a letter rogatory or a letter of request, or (3) pursuant to the means and terms of any applicable treaty or convention. A letter rogatory, or a letter of request must be issued by the clerk of the court on application to the court in which the action is pending and on terms that are just and appropriate, regardless of whether taking the deposition in any other manner is impracticable or inconvenient; and a proper notice, letter rogatory or a letter of request may be issued in proper cases.

(b) Procedure. Upon issuance of a proper notice to take a deposition of a person in another jurisdiction the deposition must be taken in that jurisdiction under the Texas rules for discovery regarding time limits, conduct, signature of the witness, certificate of officer and return and custody of original deposition.

(c) Letter Rogatory. Upon application for a letter rogatory, the clerk of the court in which the action is pending must issue a

request may ~~all~~ be issued in proper cases.

(b) ~~Procedure2~~. Upon ~~the granting of a commission~~ issuance of a proper notice to take a ~~the oral~~ deposition of a person in another jurisdiction ~~under paragraph 1 above, the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas." The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take deposition as set forth in Section 20.001, Civil Practice and Remedies Code. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or officers at the time and place named in the commission for the purpose of giving that person's deposition.~~

~~Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and require the officer or officers to whom the same is addressed to summon the person to be deposed before the~~

~~officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission, the interrogatories and the answers of the person thereto to the clerk of the proper court, giving his official title and post office address.~~ the deposition must be taken in that jurisdiction under the Texas rules for discovery regarding time limits, conduct, signature of the witness, certificate of officer and return and custody of original deposition.

(c) Letter Rogatory~~3~~. Upon application for ~~the granting of~~ a letter rogatory ~~under paragraph 1 above,~~ the clerk of the court in which the action is pending must ~~shall~~ issue a letter requesting the assistance of an appropriate authority in the jurisdiction in which the deposition is to be taken in taking and reporting ~~rogatory to take~~ the deposition ~~by letter rogatory~~ of the person named in the application at the time and place set out in the application for the letter rogatory. ~~The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission.~~ The letter rogatory shall be addressed: "To the Appropriate Authority [here name the state, territory or country]." The letter must ~~rogatory shall~~ authorize and request the appropriate authority to summon the person to be deposed before the authority ~~forthwith~~ and to take the person's answers under oath to the oral or written questions which are addressed to that person; the letter must ~~rogatory shall~~ also authorize and request that the appropriate authority cause the ~~deposition~~ testimony by

letter rogatory of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the ~~written deposition~~ testimony by letter rogatory, with all exhibits, to be returned to the ~~clerk of the proper court under cover duly sealed and addressed~~ party requesting the letter rogatory.

(d) Letter of Request~~4~~. Upon application for ~~the granting of~~ a letter of request, or any other device pursuant to the ~~means and~~ terms of an ~~any other~~ applicable treaty or international convention, to take the deposition by letter of request, written or oral, of any person outside the United States ~~under paragraph 1 above,~~ the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition by letter of request of the person named in the application at the time and place set out in the application for the letter request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition by letter of request is to be taken, such form to be presented to the clerk by the party seeking the deposition by letter of request. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time affixed in the order granting the letter of request or other device.

(e)~~5~~. Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements of depositions taken by letter rogatory or letter of request within

the State of Texas under these rules.

COMMENT: Civil Practice and Remedies Code Section 20.001 (Persons Who May Take a Deposition) provides a nonexclusive list of persons who are qualified to take a written deposition in Texas and who may take depositions (oral or written) in another state or outside the United States. Government Code 52.021 concerns "shorthand reporting in this state" and "depositions conducted in this state." Subdivision (a) of this rule authorizes persons who qualify as certified shorthand reporters in Texas under Government Code 52.021 to take depositions in other states and outside the United States.

Rule 188 Depositions in Foreign Jurisdictions.

(a) In General. Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice as provided in Rule _____(current Rule 200) before a person authorized to administer oaths and to take a deposition under the law of the place in which the deposition is taken or under the law of the State of Texas, as if the deposition was taken and conducted in the State of Texas or (2) pursuant to a letter rogatory or a letter of request, or (3) pursuant to the means and terms of any applicable treaty or convention. A letter rogatory, or a letter of request must be issued by the clerk of the court on application to the court in which the action is pending and on terms that are just and appropriate, regardless of whether taking the deposition in any other manner is impracticable or inconvenient; and a proper notice, letter rogatory or a letter of request may be issued in proper cases.

(b) Procedure. Upon issuance of a proper notice to take a deposition of a person in another jurisdiction the deposition must be taken in that jurisdiction under the Texas rules for discovery regarding time limits, conduct, signature of the witness, certificate of officer and return and custody of original deposition.

(c) Letter Rogatory. Upon application for a letter rogatory, the clerk of the court in which the action is pending must issue a

letter requesting the assistance of an appropriate authority in the jurisdiction in which the deposition is to be taken in taking and reporting the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory shall be addressed: "To the Appropriate Authority [here name the state, territory or country]." The letter must authorize and request the appropriate authority to summon the person to be deposed before the authority and to take the person's answers under oath to the oral or written questions which are addressed to that person; the letter must also authorize and request that the appropriate authority cause the testimony by letter rogatory of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the testimony by letter rogatory, with all exhibits, to be returned to the party requesting the letter rogatory.

(d) Letter of Request. Upon application for a letter of request, or any other device pursuant to the terms of an applicable treaty or international convention, to take the deposition by letter of request, written or oral, of any person outside the United States the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition by letter of request of the person named in the application at the time and place set out in the application for the letter request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition by letter of request is to be taken, such form to be presented to the clerk by the party seeking

the deposition by letter of request. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time affixed in the order granting the letter of request or other device.

(e). Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements of depositions taken by letter rogatory or letter of request within the State of Texas under these rules.

COMMENT: Civil Practice and Remedies Code Section 20.001 (Persons Who May Take a Deposition) provides a nonexclusive list of persons who are qualified to take a written deposition in Texas and who may take depositions (oral or written) in another state or outside the United States. Government Code 52.021 concerns "shorthand reporting in this state" and "depositions conducted in this state." Subdivision (a) of this rule authorizes persons who qualify as certified shorthand reporters in Texas under Government Code 52.021 to take depositions in other states and outside the United States.

Draft 3/6/97

Rule 257. Motion to Change Venue For Unfair Forum.

1. Applicablility. A motion to change venue because a party cannot obtain a fair and impartial trial in the county where the action is pending must be filed according to the provisions of this rule.

2. Motion to Change Venue. Any party may file a motion to change venue under this rule at any time, but within a reasonable time after determining that grounds exist for the motion. The motion must be verified, and set out the reasons that the party believes it cannot obtain a fair and impartial trial in the county of suit. The movant must request a hearing on the motion at a reasonable time prior to trial. Except upon leave of court, each party is entitled to 45 days notice of the hearing.

3. Hearing. The court shall determine the motion to change venue on the basis of the pleadings, any stipulations made by and between the parties, affidavits, and the results of discovery processes, and any oral testimony. The movant's affidavits, if any, shall be filed and served at least 30 days before the hearing, and any responsive affidavits shall be filed not later than 7 days before the hearing. 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.[1] The court shall grant the motion upon finding that an impartial trial cannot be had in the county where the action is pending, or for other sufficient cause.[2]

4. Discovery. Reasonable discovery in support of or in opposition to the motion shall be permitted.

5. Transfer. If the motion to change venue is granted, the cause shall be transferred to any county of proper venue where an impartial trial can be had, or if there is no county of proper venue where an impartial trial can be had, then to any county where an impartial trial can be had; or to any county to which the parties agree. In determining where the cause shall be transferred, the court shall consider the convenience of the parties and witnesses and the interests of justice.

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[1] This is from special appearance rule.

[2] The current rule has 4 grounds for the motion, 3 of which are that an impartial trial cannot be had. The 4th is "for other sufficient cause to be determined by the court." It gives the trial judge substantial discretion, and I left it in. It certainly is consistent with the new statutory "convenience and justice" transfers.

DISPOSITION TABLE
TEXAS RULES OF CIVIL PROCEDURE 15 - 165a
(Cumulative Up To But Not Including March 7-8, 1997 SCAC Meeting)

RULE NO.	PAGE NO. & ACTION TAKEN	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
18a Revisit	Pg 113-113B **On 1/17/97, SCAC adopted new Rule 18a and 18b. Judge Brister is to submit the revised draft. Changed.**	Permit late-filing of m. to disqualify/recuse based on grounds not known or upon due diligence knowable until past deadline. By Justice Charles Bleil. See his article on "Focus on Judicial Recusal: A Clearing Picture," 25 TEX. TECH L. REV. 773, 782-83 (1994).	Subcommittee unanimously recommends that disqualification can be raised at any time. Subcommittee voted 4-3 that you can file recusal up to 10 days prior to a hearing or trial, and after that can only raise matters not previously known, or upon due diligence knowable, and they will be handled in a parallel proceeding while trial judge proceeds with case.	Disqualification grounds are constitutional and already can be raised at any time. Recusal should be raised at first opportunity. Permitting recusal within 10 days of trial risks use as disguised continuance. Avoid that by permitting judge to proceed to trial, while recusal is handled in a parallel proceeding under the existing procedure of assignment to another judge.
20	Pg 114 **SCAC approved eliminating TRCP 20 on 1/20/96. Changed.**	Eliminate requirement that special judge sign minutes of proceedings before him. By David Beck.	Eliminate reading and signing of minutes at end of court term, altogether, by eliminating Rule 20.	The procedure is no longer generally observed, and is unnecessary.
21	Pg 117-119 **SCAC rejected change by vote of 11-to-4 on 1/20/96. No change.**	Require that cert. of service reflect to whom service was made, and the address, and date and manner of service. By Larry W. Wise.	Adopt suggested change. Further provide that receiving party can rebut the recital of the manner of service.	Eliminates uncertainty as to how service was effected.

21a	Pg 121-129 **On 1/20/96, SCAC voted that service should be on attorney-of-record, if there is one. Changed.**	Rule 21a permits service upon a party or his atty of record. Service should be on atty and not party. By Wendell S. Loomis and Broadus Spivey.	Once party receives notice that opposing party is represented by counsel, service is upon that counsel.	Service upon the client and not the attorney creates delays, lost papers, invades privacy, etc.
	Pg 130 **SCAC rejected suggested change on 1/20/96. No change.**	Eliminate provision that service by telefax after 5 p.m. is effective next day. By Luke Soules.	Reject suggestion. Furthermore, hand-delivery after 5 pm should be effective next day.	Some offices close and lawyers leave at 5 pm. Delivery after 5 pm is tantamount to delivery next day, anyway.
	Pg 131-134 **SCAC rejected proposed change on 1/20/96. No change.**	Eliminate service by telefax. By Jose Lopez II.	Reject suggestion. Further, service should be permitted by electronic mail on parties who indicate in their initial pleading or by subsequent filing that service by E-mail is acceptable.	Telefax service is quick and effective. Also, E-mail is an efficient and quick way to transmit data. Permit service by E-mail on all parties willing to accept E-mail service.
	Pg 137-138 **SCAC rejected proposed change on 1/20/96. No change.**	Require lawyers to include on pleading a telefax no. for service, and if no telefax no. given, then no service by telefax except upon Rule 11 agreement. By Ken Fuller.	Reject suggestion.	Having the option of service by telefax is beneficial. Telefax number should be required.

21b	Pg 159-163 **SCAC voted by 16-to-1 to change rule to provide that service must be on attorney-in-charge, and to "recipient's last known address." Changed.**	This letter does not implicate Rule 21b, which relates to "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions." Wendell Loomis and Norman Kinzy.	Fold Rule 21b regarding sanctions into new service rule.	Consolidate related rules.
23	Pg 164-165 **On 1/20/96, SCAC voted unanimously to reject proposed change. However, TRCP 23 will be re-written to require random assignment and deter efforts to circumvent rule. Changed.**	Continue random case assignment by having clerks "designate the suits by regular consecutive numbers....," to help combat forum shopping. By John Appleman, Jefferson Co. Dist. Clerk.	No change.	Rule 23 provides for sequential cause numbers and not sequential assignment to courts.
26	Pg 166-167 **On 1/20/96, SCAC agreed to reject proposed change. No change.**	Does record keeping under Rule 26 include J.P. courts or just district and county courts, since J.P. courts are covered under Rule 524? By Bill Willis	Yes, Rule 26 does apply. No change.	J.P. courts have worked successfully with existing rules.
41 Revisit	Pg 168-169 **SCAC rejected abandonment of nexus requirement. Subcommittee is to make related rules more similar. Changed.**	Rules 174 and 41 are at odds. Joinder matters are within discretion of TC and subject to abuse of discretion review. TC should be able to join parties if not too expensive and not prejudicial to parties. By Professor Jack Ratliff.	Reject proposal that we eliminate the nexus requirement for joinder. Revise intervention and joinder language so that it is paralleled.	

46(b)	Pg 170-172 **On 1/20/96, referred to Judge Till. Referred.**	Misnomer: letter actually requests change to Rule 146.	Subcommittee recommends that this matter be referred to Judge Till's Committee.	This is within the scope of Judge Till's Committee.
47	Pg 173-177 **On 1/20/96, SCAC rejected proposed change. No change.**	The Rule 47(b) ban against pleading the amount of unliquidated damages in an original pleading can affect the question of county court at law jurisdiction. By Broadus Spivey.	Subcommittee recommends Rule stays as it is.	This is not perceived as a problem in actual practice.
	On 1/20/96, SCAC rejected proposed change. No change.	Party can forum shop by filing a pleading seeking an indefinite amount of damages and then amend to assert a recovery in excess of the county court at law's jurisdictional limits. By Pat McMurray.	Subcommittee recommends Rule stays as it is.	This is not perceived as a problem in actual practice.
48	Pg 178-180 **On 1/20/96, referred to Judge Till's Subcommittee. Referred.**	Misnomer: letter actually requests change to Rule 148.	Subcommittee recommends that this request be referred to Judge Till's Committee.	

63 Revisit	Pg 181-184 **On 1/20/96, proposed change was postponed. Postponed.**	Change from 7 days prior to trial to 30 days prior to trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson.	Change Rule to set deadline at 45 days before discovery cut off date.	
  Revisit	Pg 183-184 **On 9/20/96, [p. 6173], SCAC approved in concept giving the ability to recover from inadvertant dropping of a party from the pleadings. Pending revision.**	Proposed addition to Rule 63 permitting the amendment of pleadings to include a party that has been overlooked or misidentified in the original pleadings, if certain criteria are met. By Gilbert Low.	Propose rule saying that merely dropping a party from a pleading does not effect a non-suit as to that party.	
64 Revisit	Pg 185-186 **On 9/20/96, [p. 6175], proposal rejected by SCAC. No change.**	Allow amendment by designating page or paragraph amended. Not necessary to replead everything. By Richard H. Sommer.	Recommend that the Rule not be changed.	This has already been debated by SCAC. Judges might have to go through several volumes.
67 Revisit	Pg 187 **On 9/20/96, [p. 6177], SCAC approved counting with reference to closure of discovery period. Exact deadline tabled. Alteration of burden of proof rejected. Pending.**	No amendment to pleadings within 30 days of trial. Court can grant leave to file amended pleadings but movant must show "good cause," and no surprise on opposing party. By Glen Wilkerson.	Recommend no change to Rules 66 & 67, due to changes recommended to Rule 63.	We have advanced the deadline for amending pleadings, but not altered burden of proof as to good cause.

TRAP 74	Pg 199-200 **Referred to TRAP Subcommittee.**	Relates to TRAP 74, not TRCP 74. By Bruce Pauley.	Refer to TRAP Subcommittee.	Not within purview of this Subcommittee.
74 Revisit	Pg 188-200 **On 11/23/96 [p. 6712], SCAC adopted uniform fax filing rules. Changed.**	Permit clerks to file faxed documents, and to choose preferred method of securing payment for that service. By Hannah Kurkle and Keith Baker.	Recommend SCAC consider uniform electronic filing rule.	Electronic filing will become more prevalent in the future. Uniform rules statewide will eliminate confusion, telephone calls to district clerk, etc.
75a & 75b	Pg 5-7 **On 9/20/96, [p. 6178], SCAC approved Subcommittee recommendations. It's been handled in the TRAPS. Changed.**	Exhibits are filed with the court clerk but court reporter transmits them to the appellate court. By Michael Northrup.	Will make all rules gender neutral. Reference to TRCP 379 will be changed to refer to new TRAP. Concern over exhibits has been addressed by TRAP changes.	

76a Revisit	Pg 201-203 **On 9/20/96, [p. 6182], SCAC voted "no change."** Pg 204-208 **On 9/20/96, [p. 6194-95], SCAC decided not to address appealability of ex parte sealing order. Proposal, that Rule 76a.2(c) be dropped, was tabled until Supreme Court rules on *General Tire v. Kepple*. Postponed.**	Rule 76a(8) suggests that you can appeal from a temporary sealing order, even though based upon affidavit or verified petition. Make Rule clear that temporary sealing order is analogous to TRO and can't be appealed. By Bernard Fischman. 1st Ct. App. ruled that Rule 76a does not apply to protective orders. No particular change suggested. By Jack J. Garland, Jr.	Recommend no change. Change Rule 76a to provide that a confidentiality order relating to unfiled discovery is not a Rule 76a order unless the order is contested on the basis of Rule 76a.	Temporary order should be subject to appellate review. Clarification is needed. Recommend new Rule 76a(2)(a)(4) that would exclude from "court records": "unfiled discovery for which a protective order is sought and, there is no claim that the provisions of 76a2(c) apply."
86 Revisit	Pg 211 **On 9/20/96, [p. 6202], SCAC tabled this suggestion, pending submission of a venue rule by Subcommittee. Postponed.**	Rule does not specify time to file motion to transfer venue based on inability to obtain fair trial. Case law says motion can be filed on day of trial. By J. Hadley Edgar.	Subcommittee recommends that this and all venue rules be consolidated and caused to conform to existing venue statutes, while remaining general enough to minimize future rule changes based upon further legislative activity.	Legislature has put itself in the middle of venue rights. Rules need to provide a procedure to implement legislative mandates, but not so closely that every legislative change requires a rule change.

87 Revisit	Pg 212-216 **On 9/20/96, [p. 6202], SCAC tabled this suggestion, pending submission of a venue rule by Subcommittee. Postponed.**	If venue is challenged, a determination based on a preponderance of the evidence should be made to be certain that the resident defendant is the real defendant. By William J. Wade.	Subcommittee will evaluate new venue rules.	Addressed in new statute.
90 Revisit	Pg 217-221 **On 9/20/96, [p. 6204], SCAC tabled this suggestion, pending submission of proposed rule by Subcommittee. Postponed.**	Special exception needs to be presented to the trial court prior to trial to avoid waiver. By J. Hadley Edgar.	Prof. Dorsaneo is rewriting Rules 90-91. See Dallas Local Rule 1.10.a. Recommend general pretrial rule requiring disposition of motions/exceptions before trial.	Court Rules Committee suggests that 30 days before trial be the deadline for resolving special exceptions. Subcommittee would tie the deadline to the end of the discovery period, as recommended with deadline for amending pleadings.

91 Revisit	Pg 222-225 **No action needed.** Pg 226-229 **On 9/20/96, [p. 6203], SCAC tabled, pending submission of new rule by Subcommittee. Postponed.**	Letter does not relate to R 91. By Wendell Loomis. Special exceptions should be filed 10 days prior to trial. By Broadus Spivey.	Prof. Dorsaneo is rewriting Rules 90-91. Subcommittee recommends counting back from end of discovery period.	 Amended pleadings can impact scope of discovery.
  Revisit	Pg 228-229 **On 9/20/96, [p. 6204], SCAC tabled suggestion pending submission of new rule by Subcommittee. Postponed.** Pg 230-231 **No action needed.**	Special exceptions must be filed 30 days prior to trial if pertinent pleading has been on file for 30 days. Court may allow for good cause exceptions at any time. By unknown party; submitted by Broadus Spivey, who disagreed with the amendment. This letter relates to TRAP 91, not TRCP 91. By Bruce Pauley.	Subcommittee recommends counting back from end of discovery period.	Amending pleadings can impact scope of discovery.
93	Pg 232-235 **On 9/20/96, [p. 6204], SCAC approved suggestion. Changed.**	Notes and Comments should be changed to reflect the correct numbered paragraphs instead of letter paragraphs. By Bill Willis.	Fix the comments to reflect proper letters.	Achieves consistency.

98a Revisit	Pg 236-239 **On 9/20/96, [p. 6207], SCAC decided to consider adopting FRCP 68. Pending.**	Comments on proposed "offer of judgment rule." No proposed rule was enclosed. Presume this would be like Federal Rule. By Charles R. Haworth and Hugh Hackney.	Subcommittee will consider this proposal.	The Federal rule may have beneficial effect if implemented in Texas practice.
100	Pg 240-241 **On 9/20/96, [p. 6208], SCAC decided to take no action. No change.**	$5 research fee demanded by Dist. Clerk is "one of the most stupid applications of money grubbing I have every heard." E.J. Wolt.	No action. There is no Rule 100.	Letter accomplished its purpose.

103	Pg 242-243 **On 9/20/96, [p. 6210], full Committee decided to take no action. No change.**	Threshold of qualifications for process servers is too low. By Robert Hurlbut.	Recommend no action. Can't solve by Rule. Legislature has declined to act on this point.	
	Pg 244 "	Proposed Rule 103 imposing requirement that process servers be registered with the Secretary of State. Also permit private process servers to serve writs of garnishment. By [unknown].	Recommend no action. This proposal was taken to the Legislature, but bill failed to pass. This is a legislative issue, not a rule issue.	
	Pg 245-246 "	Bexar County local rules re: private process servers, and req. of $100,000/ 300,000 liability insurance.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 247 "	Private process server advertisement.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 248-249 "	Do not allow private process servers to serve eviction notices. By Joe G. Bax.	Recommend no action. Failed at Legislature. This is a legislative issue, not a rule issue.	
	Pg 250 "	Allow for service by any person authorized in writing by the plaintiff and eliminate requirement of written order. Judge Louis Lopez.	Recommend no action. Recommend that court remain involved in private process serving, by approving individual who is serving process.	

103	Pg 251-252	Requesting clarification of statement from the Court. By Bill Clayton.		
105	Pg 253 **On 9/20/96, [p. 6212], SCAC rejected proposal. No change.**	To protect officer or other person, add clause that officer or person may delay execution upon request of issuing party or their attorney. By: Unknown.	Reject change. The writ is a gov't mandate; to stop it, you should go to court and ask it to be called back.	Formal process should be handled formally and on the record. Avoid factual disputes.
106	Pg 254-255 **On 9/20/96, [p. 6212], SCAC rejected proposal. No change.**	Amend rule to permit delivery to an occupant over 16 at the defendant's place of abode. By: Unknown.	Recommend no action. Delivery to another person in lieu of defendant should remain as substituted service, requiring prior court approval.	Court involvement desired. Critical part of litigation process, and it should remain under court control.
107	Pg 569-571 **On 1/17/97, SCAC voted to make no change. Not a problem. No change.**	To eliminate requirement that return of citation be on file for 10 days prior to granting default judgment as to family violence orders under Family Code.	Recommend no change.	Family Code creates an exception to Rule 107. Not all exceptions can be recited in the Rules.
111	Pg 256-257 **Refer to TRAP Committee. Referred.**	This letter does not address Rule 111. By Bruce Pauley.	Recommend no action.	Not applicable.
114	Pg 258-259 **Refer to TRAP Committee. Referred.**	This letter does not address Trial Rule 114. It refers to Appellate Rule 114. By Bruce Pauley.	Refer to Appellate Rules Subcommittee.	Not applicable.

117(a)(6)	Pg 260-261 **On 9/20/96, [p. 6214], it was determined that this change had already been made and approved. Changed.**	Delete the paragraph saying "[I]f this citation is not served within 90 days after the date of its issuance, it shall be returned unserved," so that citations do not have to be reissued. By Bexar County District Clerk, David J. Garcia.	We recommend this change.	Eliminate unnecessary expenditure of effort and needless expense.
124	Pg 262-266 **On 9/20/96, [p. 6214], SCAC approved suggestion. Changed.**	Delete parenthesis. Should be Rule 21a instead of 21(a). By Stephen G. Howell.	Okay. Make change.	Corrects an error.
145 146	Pg 267-273 **Proposed change to TRCP 145 already approved by SCAC. Changed.** Pg 180 **Referred.**	Court clerks should be able to challenge indigency affidavit. Pro bono attys with clients referred by IOLTA programs should be able to use certificate of indigency. By Karen Johnson and Julie Oliver. Should be able to appeal J.P. judgment by cash bond. By Herbert Finkelstein.	Amend Rule 145 to permit clerks to contest affidavits; permit pro bono attys to establish indigency by IOLTA certificate. Refer to Judge Till's Committee.	Clerks should be able to contest indigency affidavits. If clients are prescreened for indigency, pro bono attorneys should not have to go through contest proceedings.
148	Pg 180 **Refer to Judge Till's Subcommittee. Referred.**	Should be able to appeal J.P. judgment by cash bond.	Refer to Judge Till's Committee.	

156	Pg 274 **Approved by SCAC on 11/22/96. Changed.**	Rules 90, 156, 216(1), 307, 542 say "non-jury" and Rules 324(a) and Rule of Judicial Administration 6(b)(2) say "nonjury." Be consistent in using either "non-jury" or "nonjury." Should be consistent in all rules. By Charles Spain.	Good suggestion. Go with non-jury throughout the Rules.	Achieves consistency.
162	Pg 275 **On 11/22/96, SCAC voted "no change." No change.**	Submitted notice of amendment of Federal Rule of Civil Procedure 41, regarding terminating non-jury trials on the merits, and provided judgment on partial findings in Rule 52(c). By John K. Chapin.	Recommend no change. The submitted language relates to directed verdict. Unrelated to TRCP 162 (non-suit).	Unclear why item was submitted.

165	Pg 276-279 **On 1/17/96, SCAC rejected change. <u>No change</u>.** Pg 280 **Approved by SCAC on 11/22/96. <u>Changed</u>.** **On 1/17/97 [p. 7238-40], SCAC decided to redraft Rule 165a to deal with issue of overruling by operation of law and fact that plenary power is not extended.** Pg 281-293 **<u>Referred</u>.**	Should be amended to provide that notice of dismissal be given in excess of 45 days to allow time to set the case for trial. By Howard Hasting. The word "judgment" should be replaced with the words "order of dismissal" in the first sentence in the last paragraph of 165a.3. By Prof. J. Hadley Edgar. Article by Brent Keis on discovery rules. By Prof. J. Hadley Edgar.	Subcommittee thinks request is reasonable and proposes to amend rule to recognize differences between the different grounds for DWOP. Adopt change. Refer to Discovery Subcommittee.	Dismissal for inactivity should be handled differently from dismissal based on failure to appear, discovery sanctions, etc. Extending notice of DWOP to sixty days gives one last chance to set case for trial.
45-47	SPg 28-31 **SCAC has already approved new language now reflected in current version of proposed Rule. <u>Changed</u>.**	Amend Rules 45 & 47 to make parties plead constitutional, statutory, or regulatory provisions relied upon. By Richard Orsinger.	Amend Rule 47 to require pleader to state the legal basis for each claim and give a general description of the factual circumstances suff. to give fair notice.	This change conforms the rule to existing case-law and is salutory.

87	SPg 32-34 **On 11/22/96, proposal tabled pending Subcommittee's completion of venue rule. Postponed.**	Amend Rule 87(2). Party who wishes to maintain venue in particular county has burden of proof, while party who seeks to transfer venue has burden to show venue maintainable in target county. Conflict? By Wendell Loomis.	Need to redo venue rules, in accord with statutes.	Statutory changes require changes to venue rules.
162	SPg 35 **Subcommittee's proposed language will be considered on 3/7/97. Postponed.**	After verdict is returned in 1st phase of bifurcated trial, can plaintiff non-suit his entire case before resting in 2nd phase of trial? By Supreme Court Justice Nathan Hecht.	Provide that plaintiff can nonsuit only as to bifurcated untried issues. Write new rule for bifurcated trials.	Case law and statute require punitive damages to be tried separately, upon proper request. Need rule to provide how to conduct bifurcated trials.
18a	SSp 47-49 **On 1/17/97, SCAC merged Rules 18a & 18b, and adopted new language. Changed.**	Where grounds for recusal not known until after 10 days before trial, motion to recuse can be filed but judge can continue to hear case and recusal hearing before other judge proceeds independently. By Jim Parker.	By 4-3 vote, adopt recommendation. See pg 1 of this Disposition Chart.	
Proposed General Rule 9, Replacing Rule 182	SSp 50-53 **SCAC voted "no action" on 11/22/96. No change.**	Combine appellate and trial rules regarding disqualification and recusal. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 5, Replacing Rule 21	SSp 54-58 **SCAC voted "no action" on 11/22/96. No change.**	Fold TRAP 4(e) and Rule 21 into new general Rule 5, regarding "Signing, Filing and Service." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has completed its review of appellate rules.	Might delay adoption of appellate rules.

21a	SSp 59-62 On 1/17/97, SCAC rejected any change. No change.	When constitutionality of statute, rule or ordinance is questioned, must notify AG, city attorney, or other appropriate person, or else constitutional challenge is waived. By Charles Spain.	Recommend that this suggestion be adopted.	Declaratory Judgment Act requires notice in declaratory judgment actions. TCP&RC § 37.006(b).
21a	SSp 63-65 On 11/22/96, SCAC voted to go with time that first page is delivered. Changed.	Telefax transmissions should be effective when last page is sent, receiver's time. By Jim Parker.	Recommend that this suggestion be accepted.	You don't have the document until you have received all of the pages.
Proposed General Rule 5, to replace present Rule 21a	SSp 66-67 Make consistent but do not combine. Subcommittee will evaluate inconsistencies.	Fold Rule 21a "Methods of Service" into new Rule 5, which applies to trial and appellate courts. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 5, to replace present Rule 21b	SSp 68-69 Make consistent but do not combine. Subcommittee will evaluate inconsistencies.	Delete Rule 21b "Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions," and fold into new Rule 5 "Signing, Filing and Service." Use generic description rather than list. By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has completed its review of appellate rules.	Might delay adoption of appellate rules.

63	SSp 70-79 **Tabled pending determination of whether there is a discovery window. Postponed.**	Deadline for amending pleadings would be 30 days prior to trial, not the current 7 days prior to trial. By SBOT Rules Committee.	Full SCAC should consider the proposal. Consider also Discovery Subcommittee proposed new Rule 63. The Subcommittee recommends the Discovery Subcommittee's approach. Also, let's define how to count backwards.	The Rules Committee has trial-related deadlines, while the Discovery Subcommittee has a discovery cut-off related deadline. The SCAC needs to reconcile the two approaches. Rules 66 & 67 should stay the same.
Proposed General Rule 5, to replace present Rule 74	SSp 80-81 **Make consistent but do not combine. Subcommittee will evaluate inconsistencies.**	Delete Rule 74 "Filing With the Court Defined" and fold into new Rule 5 "Signing, Filing, and Service." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has completed its review of appellate rules.	Might delay adoption of appellate rules.
Proposed General Rule 12, to replace present Rule 76	SSp 82-83 **Make consistent but do not combine. Subcommittee will evaluate inconsistencies.**	Delete Rule 76 "May Inspect Papers" and fold into Rule 12 "Attorney May Inspect." By Clarence A. Guittard.	Recommend no action at this time. Supreme Court has completed its review of appellate rules.	Might delay adoption of appellate rules.
76a	SSp 84-123 **On _____, SCAC rejected uniform statewide rules. On 1/17/97, SCAC voted to forward to the Supreme Court the Subcommittee's proposal, as a minority report.**	Texas should permit audio-video cameras in courtroom. By Court Television.	Adopt uniform statewide rules. Chip Babcock is preparing draft.	Currently local rules vary. Uniform statewide rules are desirable.

86	SSp 124-127 **On 11/22/96, SCAC decided to postpone, pending proposal from Subcommittee. Postponed.**	Waiver of venue change by one defendant shouldn't waive for all defendants. By Susan S. Fortney.	Venue rules must be rewritten to conform to new statutes. New rules still under construction.	Governed by legislation passed in 1995 Session.
90	SSp 128-136 **On 11/22/96, SCAC decided to postpone, pending Supreme Court decision on discovery window. Postponed.**	Exceptions to pleadings must be heard a reasonable time but not less than 30 days prior to trial. By SBOT Rules Committee.	Subcommittee thinks deadline for exceptions should work backward from close of discovery period.	Amended pleadings may affect scope of discovery.
103	SSp 137-186 **On 11/22/96, SCAC voted to make no change.**	Heard of instances where private process server served citation, interviewed defendant, and obtained admissions against interest, and was listed by plaintiff as a witness. By Larry L. Gollaher.	Subcommittee doesn't like this but doesn't think it can be effectively addressed by rule.	Impossible to micromanage service of process.
145	SSp 187-192 **SCAC has previously revised Rule 145 to permit this. No sanctions will be permitted. Changed.**	Clerks should be permitted to contest affidavits of inability. Clerks should be subject to Rule 13 provisions and sanctions. By Earl Bullock.	Done. See p. 12 above.	
Proposed General Rule 145	SSp 193-195 **Changed.**	Various edits to Rule 145, "Affidavit of Inability."	Make any appropriate changes to new version of Rule 145. See p. 12 above.	

165a	SSp 196-198 **On 11/22/96, SCAC voted to make no change.**	The merits of the case should be considered before it is put on the dismissal docket and subsequently dismissed. By Richard Worsham.		

RULES 15-165A SUBCOMMITTEE
SUPPLEMENTAL DISPOSITION TABLE
(March 7, 1997)

RULE NO.	PAGE NO. & ACTION TAKEN	CHANGE SUGGESTED/BY	RECOMMENDED ACTION	REASON
18	Pg 111	FRCP 63, regarding judge becoming disabled during trial, permits new judge to take over case by reviewing the record, certifying familiarity with the record, and determining that no party would be prejudiced by continuing the trial. In non-jury trial, successor judge must recall material witness upon request of party, and judge may recall any other witness.	No change.	Not a problem in Texas at present time, and should be cautious about adopting federal rules that are not clearly needed.
18a	Pg 112	Bill Willis says to change "Administrative Judicial Districts" to "Administrative Judicial Regions."	Adopt change.	
20	Pg 115-116	Bill Coker suggests that judges not have to sign minutes.	No change.	TRCP 20 has already been repealed by SCAC.
21	Pg 120	FRCP 5(d) regarding necessity for certificate of service, fax service, and clerk's inability to reject papers not in proper form.	No change.	We already require certificate of service, we already permit fax service, and no Texas rule permits clerk to reject filings due to lack of proper form.

21a	Pg 135-136	Bruce Pauley recommends that hand-delivery after 5:00 p.m. be deemed served the following day.	No change.	SCAC has already rejected this proposal.
21a	Pg 139-143	Dalton Tomlin suggests fax service only upon written stipulation of the attorneys filed with the Court. Additionally, Tomlin wants to prohibit service of contempt motions upon attorneys.	No change.	SCAC's fax service rule is fine and has been adopted. No need to specify regarding contempt motions. That law is of constitutional dimensions, trumps Rules of Procedure, and is well-understood. Can't recite in the Rules every exception.
21a	Pg 144-146	Alwin Pape wants to amend TRCP 21a to relieve government entities from having to send certified mail.	Eliminate certified mail requirement altogether as regards notice of motions in pending cases.	This works fine in federal court and certified mail costs more than it benefits.
21a	Pg 147-150	Howard Hasting objects to serving notice on party where party is represented by attorney. Hasting also wants to say service can be effected on last known address of authorized agent or attorney of record.	Already fixed by earlier vote of SCAC. No change.	 Too unlikely on occurrence.
21a	Pg 151-153	Scott Brann upset about giving notice to client when client represented by attorney.	Already fixed by earlier vote of SCAC.	

21a	Pg 154-156	Wendell Loomis upset about giving notice to client when client represented by attorney.	Already fixed by earlier vote of SCAC.	
21a	Pg 157-158	Norman Kinzy finds conflict of language in permitting service on party's attorney but requiring that it be at party's last known address. Kinzy also dislikes reference to court order in connection with TRCP 21 and 21a.	Problem eliminated in rewrite pursuant to earlier vote of SCAC. Drop reference to TRCP 21 from Rule 21b.	 Eliminate discrepancy from Rule 21b.
63	Pg 182	FRCP 15(c) involving relation-back doctrine for amended pleadings.	No change.	There is no TRCP regarding the relation-back doctrine as to causes of action, and we don't need to write one. Relation back insofar as it applies to inadvertently dropped parties has been fixed by previously-approved changes to pleadings rules.

76a	Pg 209-210	Paul Harris dislikes TRCP 76a. Judge Brister's motion is still pending to drop 76a.2(c) regarding unfiled discovery. Supreme Court heard *General Tire v. Kepple* on Wednesday, 1/15/97.	No change. Postpone.	Don't eliminate TRCP 76a, unless Supreme Court directs us to. Wait on Judge Brister's motion until *Kepple* is decided, because Supreme Court may limit scope of 76a as regards unfiled discovery.
63 & 90	Pg 1-4	Gregory Enos wants to ban smoking from hearings, trials and depositions. Judges could still smoke in chambers and jurors could smoke in jury rooms where permitted.	No change.	Discovery Subcommittee already recommended against this rule. County commissioners will set rule in many courthouses and city council will set rule in many office buildings.
103	Pg Ssp 139-155	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide.	Reject proposal.	This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.

103	Pg Ssp 156-170	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide.	Reject proposal.	This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.
103	Pg Ssp 171-172	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide.	Reject proposal.	This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.
103	Pg Ssp 173-186	Suggestion that Supreme Court adopt rule requiring Secretary of State to certify private process servers statewide.	Reject proposal.	This is a highly controversial matter that has failed in the Legislature many times. Supreme Court has no power to require Secretary of State to do this, nor to appropriate funds for this.

11/20/96
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FACSIMILE TRANSMITTAL SHEET

DATE: 19 November 1996

TIME: 12:00 noon

TO: Luther H. Soules, III FAX: (210) 224-7073

FROM: Donald M. Hunt

RE: Supreme Court Advisory Committee

NUMBER OF PAGES: Letter Size
Legal Size (Including this page)

MESSAGE:

MATERIAL ALSO BEING MAILED:

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19 November 1996

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

Re: *Grossnickle v. Grossnickle*, 927 S.W.2d 687, 695 (Tex. App.—Texarkana 1996) and TEX. R. CIV. P. 297, 298

This letter responds to your letter of October 29, 1996, enclosing a copy of the *Grossnickle* case in which the court requested an amendment to Rule 298.

As you request, I am prepared a report on this matter at the next SCAC meeting on 22 November 1996. If I am to report in person, however, it must be done as the first order of business at that meeting, because my presence is required at the Regional Rounds of the National Moot Court Competition being held in San Antonio at that same time. I enclose a memorandum making that report if this would suffice without my presence.

This letter and memorandum are sent only because these two rules are part of the proposed amendments to the TEX. R. CIV. P. 296-331, as transmitted to the Supreme Court of Texas on July 30, 1996. If the Supreme Court were in the process of finalizing these rules, as a part of the release of the amendments to the Texas Rules of Appellate Procedure, a need to promptly consider the court of appeals' request may exist.

If my presence is needed, please let know. If not, please let this memorandum serve as a response for agenda action either at this meeting or an appropriate time in the future.

CARR, FOUTS, HUNT & WOLFE, L.L.P.

Donald M. Hunt

DONALD M. HUNT

xc: Lee Parsley

MEMORANDUM

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: DONALD M. HUNT and TEX. R. CIV. P. 296-331 SUBCOMMITTEE

DATE: 18 NOVEMBER 1996

RE: PROPOSED AMENDMENT TO TEX. R. CIV. P. 298

In *Grossnickle v. Grossnickle*, 927 S.W.2d 687 (Tex. App.—Texarkana 1996), the court made the following request, pointedly addressed to the Supreme Court Advisory Committee:

> 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.*

Id. at 695 (emphasis added). The opinion correctly states that present Rule 298 requires that a "request for these findings shall be made within ten days after the filing of the original findings and conclusions by the court." The court recognizes that a problem could exist if there was a delay in mailing or receipt of the original findings or they were misdirected in the mail. Thus, the court suggests that the rule should be changed to trigger the timing for requesting additional or amended findings from the date the findings were either mailed or received.

This committee has already anticipated and partially solved the problem by its proposed amendment to Rule 298. Rule 298(a), as proposed for adoption by the Supreme Court, now reads:

> *(a) Time for request.* After the judge files original findings of fact and conclusions of law, any party may file a request for specified additional or amended findings or conclusions within twenty days after the filing of the original findings and conclusions.

With this proposed amendment, along with the other proposed amendments to Rules 296-331, the process for making findings of fact and conclusions of law will fall under the following deadlines (assuming that an act or event is done on the last day of the applicable time period):

Day	Action	Rules
0	Judgment signed	N/A
20	Request for findings	296(a)
40	Judge files findings	297(a)
50	Notice of failure to file	297(b)
60	Extended deadline (if original late)	297(b)
60	Request for additional (if original timely)	298(a)
70	Judge files additional (if original timely)	298(b)
80	Request for additional (if original late)	298(b)
90	Judge files additional (if original late)	298(b)

Under this carefully crafted scheme, the district clerk would then have 30 days within which to prepare and file the transcript, since the timely request for findings of fact and

conclusions of law triggers the extended 120-day deadline to file the transcript. Proposed Rule 305(b) recognizes that a trial court has plenary power for 105 days if a party has timely filed a request for findings of fact and conclusions of law. Proposed Rule 305(c)(4) authorizes the filing of findings and conclusions after the expiration of plenary power if a timely request has been filed.

Thus, as structured under the proposed rules, the time limits work to accommodate parties, judges and clerks. If the time for requesting additional findings were extended until mailed or received, the whole schedule could be altered in an adverse way—particularly if received is used. Notice that the extension in the deadline from 10 days to 20 days in which to request additional findings should accommodate almost every imaginable fact situation that could come within the problem recognized by *Grossnickle*. After all, a party must absolutely do something by day 50 in order to determine if the judge has failed to file at all. Since that burden is placed on the party on day 50, it is no more burdensome to determine the need for a request for additional findings by day 60.

In short, the problem envisioned by *Grossnickle* has already been solved, unless a need exists to make a fundamental change and trigger these internal deadlines on a date other than the date of the act or event.

Redraft 1/22/96 WVD III

SECTION 3
Pleadings and Motions

Rule 20. Pleadings Allowed; Separate Pleas and Motions

(a) **Pleadings.** Pleadings include a complaint and an answer; a reply to an answer, including a reply to a counterclaim; an answer to a cross-claim; a third-party complaint, if a person who was not an original party is served under the provisions of Rule 27; and a third-party answer, if a third-party complaint is served.

[Current Rate: Tex. R. Civ. P. 78, 80, 85, 98].

(b) **Motions and Pleas.** An application to the court for an order, whether in the form of a motion, plea, application or other form of request, unless made orally during a hearing or trial, shall be made in writing, state the grounds for the request and set forth the relief or order sought.

[Current Rule: Tex. R. Civ. P. 21 (part of first paragraph)].

(c) **General Demurrers.** General demurrers must not be used.

[Current Rule: Tex. R. Civ. P. 90 (first sentence)].

Rule 21. General Rules of Pleading.

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross-claim, or third-party claim, shall contain: **(1)** a short statement of the claims, stating the legal theories and describing in general the factual bases of the claims sufficient to give fair notice, and **(2)** a demand for judgment for all of the relief sought by the claimant, provided that in all claims for unliquidated damages for more than $50,000 the demand must state only that the damages sought are within the jurisdictional limits of the court. Upon special exception, the court must require the pleader to amend and to specify the maximum amount claimed.

such discovery as is relevant, including deposition testimony on file, may be attached to, or incorporated by reference in, the affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

(3) Transferred To What County. If the motion to transfer is granted, the cause shall be removed:

(A) If from a district court, to any county of proper venue in the same or an adjoining district;

(B) If from a county court, to any adjoining county of proper venue;

(C) If (A) or (B) are not applicable, to any county of proper venue;

(D) If a county of proper venue (other than the county of suit) cannot be found, then if from

(i) A district court, to any county in the same or an adjoining district or to any district where an impartial trial can be had;

(ii) A county court, to any adjoining county or to any district where an impartial trial can be had; but the parties may agree that venue shall be changed to some other county, and the order of the court shall conform to such agreement.

[Current Rule: Tex. R. Civ. P. 257-259].

(4) Consent. At any time the parties may file written consent to transfer the case to any other county and the judgment order the transfer.

[Current Rule: Tex. R. Civ. P. 255].

Rule 26. Counterclaim and Cross-claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a

pending action, which at the time of the filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against a opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount of different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules _____ (currently Rules 38, 39 and 40).

(g) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule ____ (currently Rule 174), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

[Current Rule: Tex. R. Civ. P. 97].
[Original source: Federal Rule 13].
[Official Comments]:

Change: Subdivisions (d) and (f) of the Federal Rule have been omitted and the subdivisions relettered. Subdivisions (d), (e), (f) in part, and (h) above, correspond to subdivisions (e), (g), (h), and (i) respectively of the Federal Rule. In (a) above, the compulsory counter-claim has been limited to a claim within the jurisdiction of the court. In (c), a similar limitation has been embodied. Other subdivisions have minor textual changes.

Change by amendment of March 31, 1941. The proviso in subdivision (f) takes place of the last sentence of subdivision (f) in the original Rule 97, and subdivision (g) has been added. Subdivision (in original Rule 97 has been changed to (h).

Change by amendment effective January 1, 1971. Provisio concerning effect of judgment based upon settlement or compromise of claim of one party to a transaction has been added to subdivision (a).

Change by amendment effective April 1, 1984. Subdivision (f) is rewritten.

Rule 27. Third-Party Practice.

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff or to the plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than thirty (30) days after serving the first responsive pleading. Otherwise, the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant shall make any defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule ____ (currently Rule 97). The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses and any counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to the third-party defendant or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) **Liability Insurers.** This rule does not permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

[Current Rule: Tex. R. Civ. P. 38].

[Original Source: Federal Rule 14, with minor textural change]. [Official Comments]:

Change by amendment effective April 1, 1984. The rule removes the need to get leave of court to begin third-party action; makes textual changes to clarify terminology.

Rule 28. Amended Pleadings

(a) Amendment Defined. The object of an amendment is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense permissible to the suit.

[Current Rule: Tex. R. Civ. P. 62]. [Original Source: Texas Rules 12 and 15 (for District and County Courts) combined, with minor textural changes].

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

[Current Rule: Tex. R. Civ. P. 65]. [Original Source: Texas Rule 14 (for District and County Courts) with minor textural changes].

(b) When to Amend; Amended Instrument. Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be

ordered by the judge under Rule ____ (currently Rule 166), shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

[Current Rule: Tex. R. Civ. P. 63].
[Original Source: Arts. 201, subdivisions 1 and 2].
[Official Comments]:

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

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

Change by amendment effective September 1, 1990. To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.

The party amending must file a substitute pleading or motion that is entitled "first amended complaint," or "second amended answer," or "third amended motion to transfer venue."

[Current Rule: Tex. R. Civ. P. 64].
[Original Source: Texas Rule 13 (for District and County Courts)].

(c) Trial Amendments. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention o f the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the

allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

[Current Rule: Tex. R. Civ. P. 66].
[Original Source: Federal Rule 15(b) (last two sentences) with minor textual change].

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

[Current Rule: Tex. R. Civ. P. 67].
[Original Source: Federal Rule 15(b)].

SECTION 2
Commencement of Action; Service of Process, Pleadings, Motions and Orders

Rule 5. Commencement of Suit.

A civil suit in the district or county court shall be commenced by a complaint filed in the office of the clerk. No civil suit shall be commenced on Sunday, except in cases of injunction, attachment, garnishment, sequestration or distress proceedings.

[Current Rule: Tex. R. Civ. P. 22 and the applicable part of Rule 6.].
[Original Source: Art. 1974, unchanged and Art. 1971, with minor textual change].

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period is to be included unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays must not be counted for any purpose in any time period of five days or less in these rules, except for purposes of the three-day periods in Rules ____ (current Rule 21) and _____ (current Rule 21a), extending other periods by three days when service is made by registered or certified mail or by facsimile, and for purposes of the five-day periods provided for under Rules ____ (current Rules 748, 749, 749a, 749b, and 749c).

[Current Rule: Tex. R. Civ. P. 4]

Changes to Rule 4:
Change: Omission of the Federal provision excluding intermediate Sundays or holidays when the period of time is less than seven days and the

Federal reference is to half-holidays.
Change by amendment effective January 1, 1961. The word "Saturday" was added in last sentence.
Change by amendment effective September 1, 1990. Amended to omit counting Saturdays, Sundays and legal holidays in all periods of less than five days with certain exceptions.

(b) Enlargement. When by these rules, by a notice given thereunder or by order of a court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if an application is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act; but it may not extend the time for taking any action under Rules ____ (current Rules, 306a, 329b), except under the conditions stated in them.

(c) Use of United States Postal Service. If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing the document, it shall be filed by the clerk and be deemed timely filed if it is received by the clerk not more than ten days after the filing deadline. A legible post-mark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

[Current Rule: Tex. R. Civ. P. 5].
[Original Source: Federal Rule 6].
[Official Comments]:

Changes to Rule 5:

Change: The second clause in the Federal rule requires a showing that the failure to act "was the result of excusable neglect." Also, specific reference is made in this rule to the time limitations relating to motions for new trial and for rehearings, and to appeals and writs of error, while in the Federal Rule the cross reference to such subjects is by Rule number.
Change by amendment effective March 1, 1950. The first proviso was

added at the end of the rule.

Change by amendment effective January 1, 1971. The language of the first proviso has been changed to eliminate the requirement that the date of mailing be shown by a postmark on the envelope and an additional proviso has been added to make a legible postmark conclusive as to the date of mailing.

Change by amendment effective February 1, 1973. The words "affixed by the United States Postal Service" have been inserted in the final proviso.

Change by amendment effective January 1, 1976. A legible postmark shall be prima facie, not conclusive, evidence of date of mailing.

Change by amendment effective September 1, 1986. Amended to delete any reference to appellate procedure. The phrase "or motions for rehearing or the period for taking an appeal or writ of error from the trial court to any higher court or the period of application for writ of error in the Supreme Court" and the phrase "motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error" have been deleted.

Change by amendment effective September 1, 1990. To make the last date for mailing under Rule 5 coincide with the last date for filing.

Rule 7. Issuance and Service of Process; Citation

(a) **Form.** The style of all writs and processes shall be "The State of Texas;" and unless otherwise specially provided by law or these rules every such writ and process must be directed to any person authorized by law or these rules to serve process and must include a return of service.

[Current Rule: Tex. R. Civ. P. 15].
[Original Source: Art. 2286].
[Official Comments]:

Change: Elimination of the former requirement that the writ be addressed to the sheriff or any constable of a specific county and that the writ be returnable to a term of court. Compare Rule 101.

(b) **Endorsement.** For all process, every officer or authorized person must endorse the day and hour on which the person received them, the manner of

service, and the time and place the process was served and the person must sign the returns officially.

[Current Rule: Tex. R. Civ. P. 105, 161.
[Original Source: Art. 6875, with minor textual changes].
[Official Comments]:

Change by amendment effective January 1, 1988. Article 3926A, effective September 1, 1981, authorizes the commissioner's court of each county to set a "reasonable" fee for service of process; mileage is no longer an authorized expense for serving process.

(c) **Fees.** No sheriff or constable may be compelled to execute any process in civil cases, unless the fees allowed by law for service of process are paid in advance, except when an affidavit of inability has been filed and endorsed on the process by the court clerk. The clerk of the court may collect the service fee. Service fees must be taxed as costs.

[Current Rule: Tex. R. Civ. P. 126]. Tex. R. Civ. P. 17, which conflicts with Tex. R. Civ. P. 126, is repealed.

Change: Addition of the matter to the first comma.

(d) **Citation.** Upon the filing of the complaint and when requested, the clerk of the court must issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the complaint. Upon request, separate or additional citations must be issued by the clerk of the court.

(1) be styled "The State of Texas," and unless otherwise specially provided by law or these rules shall be directed to any person authorized by law or these rules to serve process;

(2) be signed by the clerk of the court under seal of court;

(3) contain the name and location of the court;

(4) contain the date of filing of the complaint;

(5) show the date of issuance of the citation;

(6) contain the file number;

(7) contain the names of parties and the style of the case;

(8) be directed to the defendant;

(9) contain the name and address of the lead attorney for the plaintiff; otherwise the address of the plaintiff;

(10) contain the address of the clerk of the court; and,

(11) contain the following notice: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation within thirty days after you were served this citation and complaint, a default judgment for the relief demanded in the complaint may be taken against you."

(e) **Copies of Pleadings to be Served with Citation.** The party filing any pleading upon which citation is to be issued and served shall furnish the clerk of the court with a sufficient number of copies for use in serving the parties to be served, and when copies are so furnished the clerk of the court may not charge for the copies.

[Current Rule: Tex.R.Civ.P. 99].
[Original Source: Art. 2021].
[Official Comments]:

Change: The rule authorizes the clerk to issue as many citations for the defendant or defendants as the plaintiff may request, without the delay of securing a return on any prior citation.

(f) **Who May Serve.** Except where otherwise expressly provided by law or these rules, citation and other process may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit may serve any process. Service by registered or certified mail must, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee may be imposed for issuance of such order. Subpoenas for a hearing or trial may be served by any person who is not a party and is not less than eighteen years of age.

[Current Rule: Tex.R.Civ.P. 103; 178].

[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The rule is amended to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court.
Change by amendment effective January 1, 1988. The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve citation. Further, Sheriffs or Constables are not restricted to service in their county. The last sentence is added to avoid the necessity of motions and fees.
Change by amendment effective January 1, 1978. The spelling of the word "indorse" was corrected to "endorse."

(g) **Method of Service of Citation.**

(1) Personal Delivery or Certified Mail. Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by subdivision (d) by:

(A) delivering to the defendant, in person, a true copy of the citation with a copy of the pleading attached, or

(B) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the pleading attached.

(2) Alternative Service; Motion Practice. Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (1)(A) or (1)(B) at the location named in the affidavit but has not been successful, the court may authorize service:

(A) by leaving a true copy of the citation, with a copy of the pleading attached, with anyone over sixteen years of age at the location specified

in the affidavit, or

(B) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

[Current Rule: Tex. R. Civ. P. 106].
[Original Source: Art. 2026].
[Official Comments]:

Change: The officer is directed to note upon the copy of the citation, which he delivers to the defendant, the date of delivery. He delivers a copy of the petition in all cases.
Change by amendment effective January 1, 1976. Service "by registered or certified mail" is authorized in certain instances.
Change by amendment effective January 1, 1978. Subdivisions (b) and (e) are new. The rule is rewritten.
Change by amendment effective January 1, 1981. The rule is reorganized to clarify its meaning. Alternate methods of service are authorized if either (a)(1) or (a)(2) are tried without success. Both methods are not required.
Change by amendment effective January 1, 1988. Conforms to amendment to Rule 103.

(h) **Return of Service.**

(1) In General. The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by subdivision (g), the return by the officer or authorized person must also contain the return receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if the defendant's whereabouts are ascertainable.

Where citation is executed by an alternative method as authorized by subdivision (f), proof of service shall be made in the manner ordered by the court.

(2) Filing of Citation and Return; Default Judgment. No default judgment shall be granted in any cause until the citation and the return of service have been on file with the clerk of the court for ten days, exclusive of the day of filing and the day of judgment.

[Current Rule: Tex. R. Civ. P. 107].
[Original Source: Arts. 2034 and 2036].
[Official Comments]:

Change: That part of the rule derived from Art. 2034 has been changed only textually. The last sentence of the rule supersedes Art. 2036 in the District and County Courts in harmony with the new rules making the time for answer date from the day of service.
Change by amendment effective January 1, 1978. Provides manner of return when service by mail or by an alternative method.
Change by amendment effective January 1, 1981. The only changes are the references to Rule 106.
Change by amendment effective January 1, 1988. Amendments are made to conform to changes in Rule 103.
Change by amendment effective September 1, 1990. To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rules 108 or 108a.

(i) Defendant Not In State. Where the defendant is absent from the State, or is a nonresident of the State, the defendant may be served with citation by any disinterested person competent to make oath. The return of service in such case must be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice is required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

[Current Rule: Tex. R. Civ. P. 108].
[Original Source: Arts. 2037 and 2038].
[Official Comments]:

Change: This rule supersedes the former statutes governing non-resident notice. Form of citation and method of service is to be the same as provided for resident defendants.
Change by amendment effective January 1, 1976. The words after "State" in the last sentence are new. Its purpose is to permit acquisition of in personam jurisdiction to the constitutional limits.

(j) **Service in Foreign Country.**

(1) Manner. Service of process may be effected upon a party in a foreign country if service of the citation and complaint is made:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(B) as directed by the foreign authority in response to a letter rogatory or a letter of request;

(C) in the manner provided by Rule ____ (current Rule 106);

(D) pursuant to the terms and provisions of any applicable treaty or convention;

(E) by diplomatic or consular officials when authorized by the United States Department of State; or

(F) by any other means directed by the court that is not prohibited by the law of the country where service is to be made.

The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. A defendant served with process under this subdivision is required to appear and answer in the same manner and

time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

(2) Return. Proof of service may be made as prescribed by the law of the foreign country, by order of the court, by a method provided in any applicable treaty or convention, or as provided in subdivision (h).

[Current Rule: Tex. R. Civ. P. 108a].
[Original Source: ?].
[Official Comment: New rule effective April 1, 1984].

(k) Acceptance of Service. After the action is commenced, the defendant may accept service of process, or waive the issuance or service, by a written memorandum signed by the defendant or by a duly authorized agent or attorney, if such memorandum is sworn to before a proper officer, excluding any attorney in the case, and filed with the court. Such acceptance or waiver will have the same force and effect as if the citation had been issued and served as provided by law. The party signing the memorandum must be delivered a copy of plaintiff's complaint, and the memorandum must state that it was received by the party. In every divorce action the memorandum shall also include the defendant's mailing address.

[Current Rule: Tex. R. Civ. P. 119].
[Original Source: Art. 2045].
[Official Comments]:

Change: Addition of requirement that the waiver of service be sworn to before an officer authorized to administer oaths.
Change by amendment effective December 31, 1941. It is provided that the officer shall be "other than an attorney in the case," and the last sentence is added.
Change by amendment effective January 1, 1955. Last sentence added.
Change by amendment effective January 1, 1961. Requirement added that written memorandum constituting acceptance of process or

waiver of issuance and service thereof be signed "after suit is brought."

(l) **Amendment.** At any time in its discretion and upon such notice and on such terms as it dems just, the court may allow any process or return of service to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[Current Rule: Tex. R. Civ. P. 118].
[Original Source: Art. 2044, Federal Rule 4(h)].
[Official Comments]:

Change: The rule authorizes amendment in the process as well as in the proof of its service.

Rule 8. Citation by Publication

(a) **In General.** Upon oath made by a party to a suit, his agent or attorney that one or more of the following situations exist, the clerk of the court must issue citation for a defendant for service by publication:

(1) if the residence of any defendant is unknown to the party,

(2) if the defendant is a transient person whose whereabouts are unknown and cannot be ascertained through the exercise of diligence or

(3) if the defendant is absent from or is a nonresident of the State and the party has been unable to obtain personal service as provided in Rule (7).

In all such cases it shall be the duty of the court to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of citation on the nonresident before granting any judgment.

[Current Rule: Tex. R. Civ. P. 109].
[Original Source: Art. 2039 First sentence, with minor textual change].

[Official Comments]:

Change by amendment effective January 1, 1976. The word "continental" before "United States" in the last sentence is deleted.
Change by amendment effective April 1, 1984. The last sentence of the former rule is deleted.

(b) Effect of This Rule on Other Statutes. Where a statute authorizing citation by publication provides expressly for requisites of such citation, these rules shall not govern. Otherwise, the provisions of these rules shall govern.

[Current Rule: Tex. R. Civ. P. 110].
[Original Source: New Rule].

(c) Contents. Where citation by publication is authorized by these rules, the citation shall contain the requisites prescribed by Rule 7 (current Rules 15 and 99), unless otherwise stated in this rule but no copy of the plaintiff's complaint must be published with the citation. The citation shall be directed:

(1) to the defendant or defendants by name, if known, or to the defendant or defendants as designated in the complaint, or such other classification as may be fixed by any statute or by these rules;

[Current Rule: Tex. R. Civ. P. 114].

(2) if the plaintiff, his agent, or attorney, shall make oath that the names of the heirs or stockholders against whom an action is authorized by Section 17.004, Civil Practice and Remedies Code, are unknown to the affiant, such citation shall be addressed to the defendants by a concise description of their classification, as "the Unknown Heirs of A.B., deceased," or " Unknown Stockholders of _____ Corporation," as the case may be, or

[Current Rule: Tex. R. Civ. P. 111].

(3) in suits authorized by Section 17.005, Civil Practice and Remedies Code, all persons claiming under a land conveyance whose names are known to plaintiff shall be made parties by name and cited to appear, in the

manner now provided by law as in other suits; all other persons claiming any interest in such land under such conveyance may be made parties to the suit and cited by publication under the designation "all persons claiming any title or interest in land under deed heretofore given to _____ of _____ as grantee" (inserting in the blanks the name and residence of grantee as given in such conveyance). It shall be permissible to join in one suit all persons claiming under two or more conveyances affecting title to the same tract of land.

[Current Rule: Tex. R. Civ. P. 112, 113].

(d) **Form.** The citation must contain the names of the parties, a brief statement of the nature of the suit (which need not contain the details and particulars of the claim) a description of any property involved and of the interest of the named or unknown defendant or defendants, and, where the suit involves land, the number of acres of land involved in the suit, or the number of the lot and block, or any other plat description that may be of record if the land is situated in a city or town, the survey on which and the county in which the land is situated, and any special pleas which are relied upon in such suit.

Where there are two or more defendants or classes of defendants to be served by publication, the citation may be directed to all of them by name and classification, so that service may be completed by publication of the one citation for the required time.

[Current Rules: Tex. R. Civ. P. 114, 115].

(e) **Issuance.** If issued from the district or county court, the citation shall command the parties to appear and answer at or before 10 o'clock a.m. of the first Monday after the expiration of 42 days from the date of issuance, specifying the day of the week, the day of the month, and the time of day the defendant is required to answer. If issued from the justice of the peace court, such citation shall command such parties to appear and answer on or before the first day of the first term of court which convenes after the expiration of 42 days from the date of issue thereof, specifying the day of the week, and the day of the month, that such term will meet.

[Current Rule: Tex. R. Civ. P. 114]

(f) **Manner of Publication.** The citation must be published in the English language one time in some newspaper published in the county

(1) where the suit is pending in all suits which do not involve the title to land or the. partition of real estate and if there is no newspaper published in the county, then in an adjoining county where a newspaper is published

(2) where the land or a portion thereof is situated in all suits which involve the title to land or partition of real estate and if there is no newspaper published in the county, then in an adjoining county to the county where the land or a part thereof is situated

(3) in which the property is located in suits for delinquent ad valorem taxes and if there is no newspaper published in the county, then the publication may be made in a newspaper in an adjoining county.

The newspaper must have been in general circulation for at least one year immediately prior to the first publication and shall in every respect answer the requirements of the law applicable to newspapers which are employed for such a purpose, the first publication to be not less than twenty-eight days prior to the return day fixed in the citation; and the affidavit of the editor or publisher of the newspaper giving the date of publication, together with a printed copy of the citation as published, shall constitute sufficient proof of due publication when returned and filed in court.

The maximum fee for publishing the citation shall be the lowest published word or line rate of that newspaper for classified advertising. Should the newspaper require advance payment of publication fees or payment other than on a contingency basis if and when the fees are collected as costs or if the publication of the citation in a suit for delinquent ad valorem taxes cannot be had for the lowest published word or line rate fee, chargeable as costs and payable upon sale of the property, as provided by law, and this fact is supported by the affidavit of the attorney for the plaintiff or the attorney requesting the issuance of the process, then service of the citation may be made by posting a copy at the courthouse door of the county in which the suit is pending, the citation to be posted at least twenty-eight days prior to the return day fixed in the citation. Proof of the posting of the citation shall be made by affidavit of the attorney for the plaintiff, or of the person

posting it. When citation is served as here provided it shall be sufficient, and no other form of citation or notice to the named defendants therein shall be necessary.

[Current Rule: Tex. R. Civ. P. 116, 117a (part)].

(g) **Return.** The return of the officer executing such citation shall be endorsed or attached to the same, and show how and when the citation was executed, specifying the dates of publication, be signed by him officially and shall be accompanied by a printed copy of such publication.

[Current Rule: Tex. R. Civ. P. 117].
[Original Source: Art. 2043, unchanged].

(h) **Amendment.** At any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[Current Rule: Tex. R. Civ. P. 118].
[Original Source: Art. 2044; Federal Rule 4(h)].
[Official Comments: New rule effective December 31, 1947].

Change: The rule authorizes amendment in the process as well as in the proof of its service.

(i) **Other Substituted Service.** Whenever citation by publication is authorized, the court may, on motion, prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice. When such method of substituted service is authorized, the return of the officer executing the citation shall state particularly the manner in which service is accomplished, and shall attach any return receipt, returned mail, or other evidence showing the result of such service. Failure of defendant to respond to such citation shall not render the service invalid. When such substituted service has been obtained and the defendant has not appeared, the provisions of Rules ____ (current Rules 244 and 329) shall apply as if citation had been served by publication.

[Current Rule: Tex. R. Civ. P. 109a].
[Original Source: New rule effective January 1, 1976].

SCAC Subcommittee Comment: A new subdivision combines Rule 116 and the publication part of Rule 117a. The service is removed from Rule 116 because Rule 103 states who may serve. Publication time changed to one time for consistency with the divorce citation. The current rules required the regular citation to be published four consecutive weeks and the tax citation published one time a week for 2 weeks. Rule 116 does not include the affidavit of the editor; this new rule does. Should the posting part of this rule be applicable to all citations?

Rule 9. Citation in Suits for Delinquent Ad Valorem Taxes

In all suits for collection of delinquent ad valorem taxes, the rules of civil procedure governing issuance and service of citation shall control the issuance and service of citation therein, except as herein otherwise specially provided. The process shall conform substantially to the form set out for personal service and must contain the essential elements of the citation as provided in Rule ___ (currently Rule 99).

(a) Personal Service: Owner and Residence Known, Within State. Where any defendant in a tax suit is a resident of the State of Texas and is not subject to citation by publication under subdivision (c) below, the process must conform substantially to the form set out for personal service and must contain the essential elements of Rule ___ (currently Rule 99) and be served and returned and otherwise regulated by the provisions for service in these rules.

(b) Personal Service: Owner and Residence Known, Out of State. Where any such defendant is absent from the State or is a nonresident of the State and is not subject to citation by publication under subdivision (c), the process must conform substantially to the form hereinafter set out for personal service and must contain the essential elements of Rule ___ (currently Rule 99) and be served and returned and otherwise regulated by the provisions for service in these rules.

(c) Service by Publication: Nonresident, Absent from State, Transient, Name Unknown, Residence Unknown, Owner Unknown, Heirs Unknown, Corporate Officers, Trustees, Receivers or Stockholders Unknown,

Any Other Unknown Persons Owing or Claiming or Having an Interest. Where any defendant in a tax suit is a nonresident of the State, or is absent from the State, or is a transient person, or the name or the residence of any owner of any interest in any property upon which a tax lien is sought to be foreclosed, is unknown to the attorney requesting the issuance of process or filing the suit for the taxing unit, and such attorney shall make affidavit that such defendant is a nonresident of the State, or is absent from the State, or is a transient person, or that the name or residence of such owner is unknown and cannot be ascertained after diligent inquiry, each such person in every such class above mentioned, together with any and all other persons, including adverse claimants, owning or claiming or having any legal or equitable interest in or lien upon such property, may be cited by publication. All unknown owners of any interest in any property upon which any taxing unit seeks to foreclose a lien for taxes, including stockholders of corporations --defunct or otherwise -- their successors, heirs, and assigns, may be joined in such suit under the designation of "unknown owners" and citation be had upon them as such; provided, however, that record owners of such property or of any apparent interest therein, including, without limitation, record lien holders, must not be included in the designation of "unknown owners"; and provided further that where any record owner has rendered the property involved within five years before the tax suit is filed, citation on such record owner may not be had by publication or posting unless citation for personal service has been issued as to such record owner, with a notation thereon setting forth the same address as is contained on the rendition sheet made within such five years, and the sheriff or other person to whom citation has been delivered makes his return thereon that he is unable to locate the defendant. Where any attorney filing a tax suit for a taxing unit, or requesting the issuance of process in such suit, makes affidavit that a corporation is the record owner of any interest in any property upon which a tax lien is sought to be foreclosed, and that the attorney does not know, and after diligent inquiry has been unable to ascertain, the location of the place of business, if any, of such corporation, or the name or place of residence of any officer of such corporation upon whom personal service may be had, such corporation may be cited by publication as herein provided. All defendants of the classes enumerated above may be joined in the same citation by publication.

An affidavit which complies with the foregoing requirements therefor shall be sufficient basis for the citation above mentioned in connection with it but shall be held to be made upon the criminal responsibility of affiant.

Such citation by publication shall contain the requisites prescribed by Rule ___ (currently Rule 99), in so far as that they are not inconsistent herewith, provided that no copy of the plaintiff's complaint shall accompany the citation and the citation shall be directed to the defendants by names or by designation as hereinabove provided, shall be issued and signed by the clerk of the court in which such tax suit is pending, shall command such parties to appeare and defend such suit at or before 10 o'clock a.m. of the first Monday after the expiration of forty-two days from the date of issuance thereof, specifying such date when such parties are required to answer; and shall state the nature of the suit.

SCAC Subcommittee Comment: For consistency, this subdivision provides that all citations shall follow Rule 99 and deletes information that duplicates Rule 99. The last paragraph on publication has been moved to the new general publication rule, including the amendment approved by the SCAC on November 22, 1996 concerning advance payment of publication fees.

(d) Citation in Tax Suits: General Provisions. Any process authorized by this rule may issue jointly in behalf of all taxing units who are plaintiffs or intervenors in any tax suit. The statement of the nature of the suit, to be set out in the citation, shall be sufficient if it contains a brief general description of the property upon which the taxes are due and the amount of such taxes, exclusive of interest, penalties, and costs, and shall state, in substance, that in such suit the plaintiff and all other taxing units who may set up their claims therein seek recovery of the delinquent ad valorem taxes due on said property, and the (establishment and foreclosure) of liens, if any, secufing the payment of same, as provided by law; that in addition to the taxes all interest, penalties, and costs allowed by law up to and including the day ofjudgment are included in the suit; and that all parties to the suit, including plaintiff, defendants, and intervenors, shall take notice that claims for any taxes on said property becoming delinquent subsequent to the filing of the suit and up to the day ofjudgment, together with all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered therein without further citation or notice to any parties thereto. Such citation need not be accompanied by a copy of plaintiff's complaint and no such copy need be served. Such citation shall also show the names of all taxing units which assess and collect taxes on said property not made parties to such suit, and shall contain, in substance, a recitation that each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or

thereafter filed in said cause by all other parties therein, or who may intervene therein and set up their respective tax claims against said property. After citation or notice has been given on behalf of any plaintiff or intervenor taxing unit, the court shall have jurisdiction to hear and determine the tax claims of afl taxing units who are parties plaintiff, intervenor or defendant at the time such process is issued and of all taxing units intervening after such process is issued, not only for the taxes, interest, penalties, and costs which may be due on said property at the time the suit is filed, but those becoming delinquent thereon at any time thereafter up to and including the day ofjudgment, without the necessity of further citation or notice to any party to said suit; and any taxing unit having a tax claim against said property may, by answer or intervention, set up and have detemiined its tax claim without the necessity of further citation or notice to any parties to such suit.

(e) Form of Citation by Publication or Posting. The form of citation by publication or posting shall be sufficient if it is in substantially the following form, with proper changes to make the same applicable to personal property, where necessary, and if the suit includes or is for the recovery of taxes assessed on personal property, a general description of such personal property shall be sufficient:

THE STATE OF TEXAS)
COUNTY OF _____)

In the name and by the authority of the State of Texas
Notice is hereby given as follows:
TO:_____
_____
_____

and any and all other persons, including adverse claimants, owning or having or claiming any legal or equitable interest in or lien upon the following described property delinquent to Plaintiff herein, for taxes, to-wit:

_____
_____
_____

Which said property is delinquent to Plaintiff for taxes in the following amounts: $_____, exclusive of interest, penalties, and costs, and there is included in this

suit in addition to the taxes all said interest, penalties, and costs thereon, allowed by law up to and including the day of judgment herein.

You are hereby notified that suit has been brought by _____ as Plaintiffs, against _____as Defendants, by complaint filed on the _____ day of _____19___, in a certain suit styled_____ v. _____ for collection of the taxes on said property and that said suit is now pending in the District Court of_____County, Texas,_____ Judicial District, and the file number of said suit is _____, that the names of all taxing units which assess and collect taxes on the property hereinabove described, not made parties to this suit, are _____.

Plaintiff and all other taxing units who may set up their tax claims herein seek recovery of delinquent ad valorem taxes on the property hereinabove described, and in addition to the taxes all interest, penalties, and costs allowed by law thereon up to and including the day of judgment herein, and the establishment and foreclosure of liens, if any, securing the payment of same, as provided by law.

All parties to this suit, including plaintiff, defendants, and intervenors, shall take notice that claims not only for any taxes which were delinquent on said property at the time this suit was filed but all taxes becoming delinquent thereon at any time thereafter up to the day of judgment, including all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered herein without further citation or notice to any parties herein, and all said parties shall take notice of and plead and answer to all claims and pleadings now on file and which may hereafter be filed in said cause by all other parties herein, and all of those taxing units above named who may intervene herein and set up their respective tax claims against said property.

"You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation by 10:00 a.m. on the Monday after the expiration of forty-two (42) days from and after the date of issuance hereof, the same being the ____ day of _____, A.D., 19__ (which is the return day of such citation), a default -judgment may be taken against you." You are hereby commanded to appear and defend such suit before the _____ Judicial District Court of _____ County, Texas, to be held at the courthouse thereof, then and there to show cause why judgment shall not be

rendered for such taxes, penalties, interest, and costs, and condemning said property and ordering foreclosure of the constitutional and statutory tax liens thereon for taxes due the plaintiff and the taxing units parties hereto, and those who may intervene herein, together with all interest, penalties, and costs allowed by law up to and including the day of judgment herein, and all costs of this suit.

Issued and given under my hand and seal of said court in the City of _____, _____ County, Texas, this ___ day of _____, A.D., 19___.

_____
Clerk of the District Court
_____ County, Texas,
_____ Judicial District.

Name and Address of Attorney for Plaintiff:
_____
_____

Address:_____

Committee Comment: Added the "You have been sued... ", the address of the clerk and the name and address of the attorney according to Rule 99.

(f) **Form of Citation by Personal Service In or Out of State.** The form of citation for personal service shall be sufficient if it is in substantially the following form, with proper changes to make the same applicable to personal property, where necessary, and if the suit includes or is for the recovery of taxes assessed on personal property, a general description of such personal property shall be sufficient:

THE STATE OF TEXAS
To _____, Defendant, GREETING:

"You have been sued, You may employ an attorney. If you or your attorney do not file a written answer with the clerk of the court who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and complaint, a default judgment may be taken against you."

The complaint of Plaintiff was filed in the _____ Judicial District Court of ___ _____, Texas, at the Courthouse of said county in _____, Texas, said

Court on the __ day of _____ A.D., 19____, against _____, Defendant, said suit being number _____ on the docket of said Court, the nature of which demand is a suit to collect delinquent ad valorem taxes on the property hereinafter described.

The amount of taxes due Plaintiff, exclusive of interest, penalties, and costs suit being number ___on the docket of said Court, the nature of which demand is a suit to collect delinquent ad valorem taxes on the property hereinafter, is the sum of $_____, said property being described as follows, to wit:_____

_____

The names of all taxing units which assess and collect taxes on said property, not made parties to this suit, are:_____

_____

Plaintiff and all other taxing units who may set up their tax claims herein seek recovery of delinquent ad valorem taxes on the property hereinabove described, and in addition to the taxes all interest, penalties, and costs allowed by law thereon up to and including the day of judgment herein, and the establishment and foreclosure of liens securing the payment of same, as provided by law.

All parties to this suit, including plaintiff, defendants, and intervenors, shall taken notice that claims not only for any taxes which were delinquent on said property at the time this suit was filed but all taxes becoming delinquent thereon at any time thereafter up to the day of judgment, including all interest, penalties, and costs allowed by law thereon, may, upon request therefor, be recovered herein without further citation or notice to any parties herein, and all said parties shall take notice of and plead and answer to all claims and pleadings now on file and which may hereafter be filed in this cause by all other parties hereto, and by all of those taxing units above named, who may intervene herein and set up their respective tax claims against said property.

The officer executing this return shall promptly serve the same according to the requirements of law and the mandates hereof and make due return as the law directs.

Issued and given under my hand and seal of said Court at _____, Texas,

this the ____ day of A.D., 19__.

_____ Name and Address of Attorney
_____ for Plaintiff:

Clerk of the District Court of
_____County, Texas.
By _____, Deputy.
Address _____

COMMITTEE COMMENT. Added the "You have been sued..", the address of clerk and name and address of attorney according to Rule 99. Deleted the 90 day return to conform to Rule 99.

Rule 10. Service and Filing of Pleadings, Motions and Other Papers.

(a) **Filing and Serving Pleadings and Motions.** Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.

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

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.

After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

[Current Rule: Tex. R. Civ. P. 21].
[Original Source: Art. 2291].
[Official Comments]:

Change by amendment effective January 1, 1978. The phrase, "if it relates to a pending suit." was deleted from the end of the first sentence. The phrase, "If the motion does not related to a pending suit," was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981. The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

Change by amendment effective September 1, 1990. To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73.

(b) **Methods of Service.**

(1)General. Except as otherwise provided in these rules or by order of the court, every order required by its terms to be served, every pleading subsequent to the complaint, every paper relating to discovery required to be served upon a party, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, designation of record on appeal, request for finding of fact and/or law, and similar paper that is filed with the clerk of the court in writing, may be served by:

(A) delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record as the case may be, either in person or by agent;

(B) by courier receipted delivery;

(C) by certified or registered mail, to the party's last known address;

(D) by facsimile to the recipients current telecopier number; or

(E) by such other manner as the court in its discretion may direct.

(2) When Complete. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by facsimile, three days shall be added to the prescribed period.

(3) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service.

(4) Extension of Time. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and, upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(5) Cumulative. The provisions of this section relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

[Current Rule: Tex. R. Civ. P. 21a].
[Original Source: New Rule effective December 31, 1947].
[Official Comments]:

Change by amendment effective January 1, 1971. The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been

eliminated.

Change by amendment effective February 1, 1973. The words "Postal Service" have been substituted for "Post Office Department" and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978. The phrase "not relating to a pending suit" in the next to last sentence, is deleted.

Change by amendment effective January 1, 1981. The next to last sentence from the end of the former rule requiring three-day notice is deleted because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984. This rule consolidates Rules 21a and 21b.

Change by amendment effective September 1, 1990. To allow for service by current delivery means and technologies.

(f) Sanctions. If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules ____ (current Rules 21 and 2la), the court may in its discretion, after notice and hearing, impose an appropriate sanction available under Rules ____ (current Rule 215-2b).

[Current Rule: Tex. R. Civ. P. 21b].
[Original Source: New rule effective September 1, 19901.
[Official Comments]:

Repealed provisions of Rule 73-to the extent they are to remain operative-are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties].

Rule 188 Depositions in Foreign Jurisdictions.

(a) **In General.** Whenever the deposition, written or oral, is to be taken of a person located in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice as provided in Rule _____(current Rule 200) before a person authorized to administer oaths and to take a deposition under the law of the place in which the deposition is taken or under the law of the State of Texas, as if the deposition was taken and conducted in the State of Texas or (2) pursuant to a letter rogatory or a letter of request, or (3) pursuant to the means and terms of any applicable treaty or convention, or (4) by agreement of all parties or the litigation, or (5) by court order. A letter rogatory, or a letter of request must be issued by the clerk of the court on application to the court in which the action is pending and on terms that are just and appropriate, regardless of whether taking the deposition in any other manner is impracticable or inconvenient; and a proper notice, letter rogatory or a letter of request may be issued in proper cases.

(b) **Procedure.** Upon issuance of a proper notice to take a deposition of a person in another jurisdiction the deposition must be taken in that jurisdiction under the Texas rules for discovery regarding time limits, conduct, signature of the witness, certificate of officer and return and custody of original deposition.

(c) **Letter Rogatory.** Upon application for a letter rogatory,

the court in which the action is pending must issue a letter requesting the assistance of an appropriate authority in the jurisdiction in which the deposition is to be taken in taking and reporting the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory shall be addressed: "To the Appropriate Authority [here name the state, territory or country]." The letter must authorize and request the appropriate authority to summon the person to be deposed before the authority and to take the person's answers under oath to the oral or written questions which are addressed to that person; the letter must also authorize and request that the appropriate authority cause the testimony by letter rogatory of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the testimony by letter rogatory, with all exhibits, to be returned to the party requesting the letter rogatory.

(d) Letter of Request. Upon application for a letter of request, or any other device pursuant to the terms of an applicable treaty or international convention, to take the deposition by letter of request, written or oral, of any person outside the United States the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition by letter of request of the person named in the application at the time and place set out in the application for the letter request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition by letter of request is to be

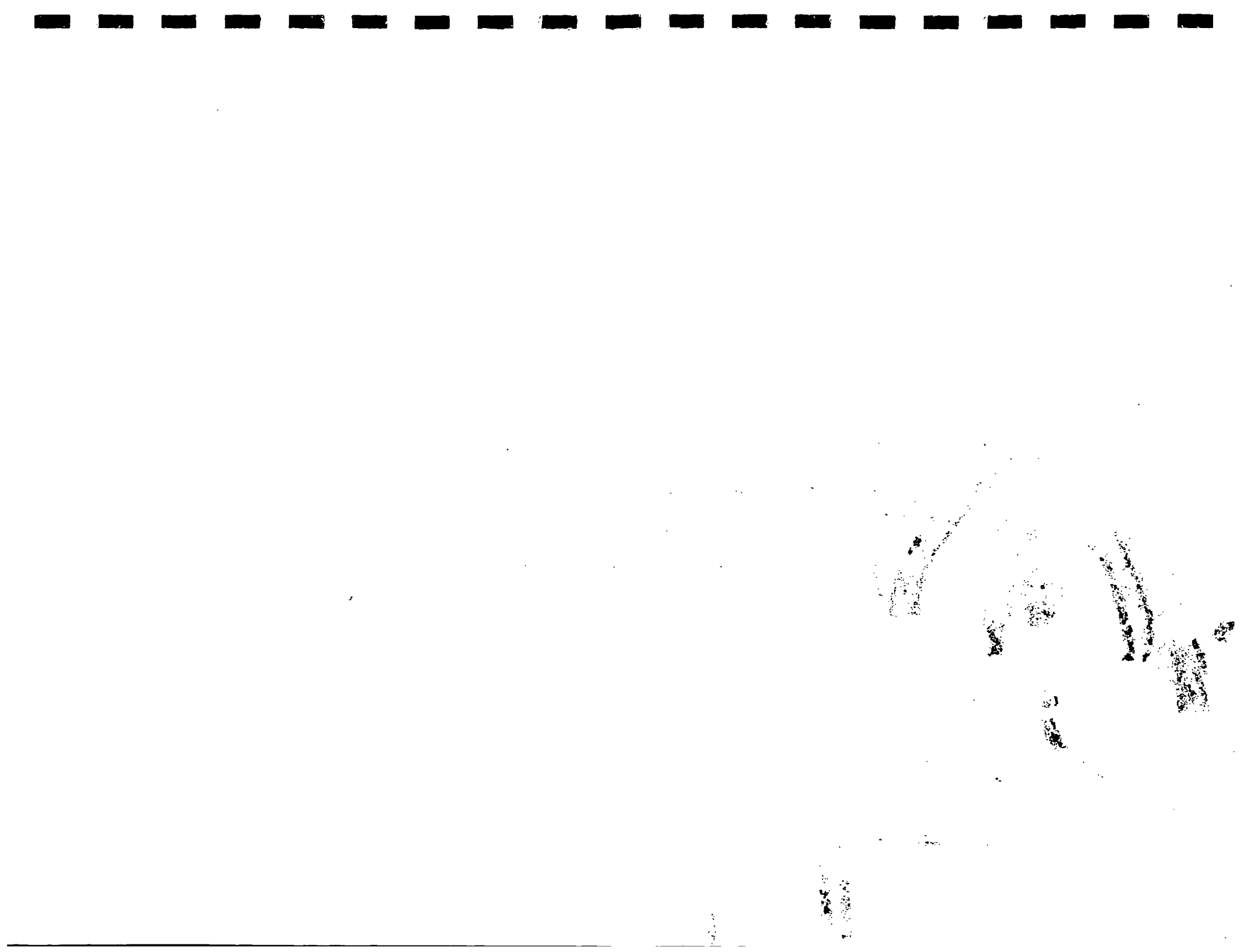
taken, such form to be presented to the clerk by the party seeking the deposition by letter of request. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time affixed in the order granting the letter of request or other device.

(e). Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements of depositions taken by letter rogatory or letter of request within the State of Texas under these rules.

(f). A deposition in a foreign jurisdiction may be taken by videoconference or teleconference under the provisions of Rule (202) so long as the terms of any applicable treaty or convention are met.

COMMENT: Civil Practice and Remedies Code Section 20.001 (Persons Who May Take a Deposition) provides a nonexclusive list of persons who are qualified to take a written deposition in Texas and who may take depositions (oral or written) in another state or outside the United States. Government Code 52.021 concerns "shorthand reporting in this state" and "depositions conducted in this state." Subdivision (a) of this rule authorizes persons who qualify as certified shorthand reporters in Texas under Government Code 52.021 to take depositions in other states and outside the United States.

AMENDED FINAL REPORT
OF THE
SUBCOMMITTEE ON TRCP 216-295
January 16, 1997



Rule 216. Request and Fee for Jury Trial

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

b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Notes and Comments

Subcommittee recommendation: Delete phrase "on the non-jury docket" because it does not contribute anything to the rule and is potentially confusing. (unanimous).

Full committee: Delete phrase.

Rule 216. Request and Fee for Jury Trial

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

b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Rule 217. ~~Oath~~ Affidavit of Inability to Pay

The deposit for a jury fee shall not be required when the party, ~~shall~~ within the time for making such deposit, ~~file~~ files an affidavit with the clerk ~~his affidavit to the effect~~ stating that he or she is unable to make such deposit, and that he or she ~~can not~~ cannot, by the pledge of property or otherwise, obtain the money necessary for the deposit ~~that purpose;, and~~ The court shall then order the clerk to enter the suit on the ~~jury docket~~ clerk's record.

Notes and Comments

Subcommittee: Unanimous vote to change "jury docket" to "clerk's record".

Full committee: Change "jury docket" to clerk's record".

Rule 217. Affidavit of Inability to Pay

The deposit for a jury fee shall not be required when the party, within the time for making such deposit, files an affidavit with the clerk stating that he or she is unable to make such deposit, and that he or she cannot, by the pledge of property or otherwise, obtain the money necessary for the deposit. The court shall then order the clerk to enter the suit on the clerk's record.

Rule 218. Jury Docket

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

Notes and Comments

Subcommittee: Unanimous vote to define "jury docket"

Full committee: Define "jury docket".

Rule 218. Jury Docket

The Jury Docket shall consist of the cases in which jury fees have been paid or an affidavit in lieu thereof has been filed as provided in the two preceding rules.

Rules 219. Jury Trial Day

The court shall designate the days for ~~taking up the jury docket and~~ the trial of ~~jury~~ cases on the jury docket. Such order may be revoked or changed in the court's discretion.

Notes and Comments

The Full Committee voted to approve the changes.

Rules 219. Jury Trial Day

The court shall designate the days for the trial of cases on the jury docket. Such order may be revoked or changed in the court's discretion.

Rule 220. Withdrawing Cause from Jury Docket

When any party has paid the fee for a jury trial, he or she shall not be permitted to withdraw the cause from the jury docket over the objection of the opposing parties ~~adversely interested~~. ~~If so permitted~~ If there is no objection, the court in its discretion may ~~by an order~~ permit ~~him~~ the party to withdraw ~~also~~ his or her cause from the jury docket. The court in its discretion may also permit a party to withdraw the jury fee ~~deposit~~. ~~Failure of a party~~ Failing to appear for trial shall be deemed a waiver ~~by him~~ of the right to ~~trial by jury~~ a jury trial.

Notes and Comments

The Full Committee voted to approve the changes.

Rule 220. Withdrawing Cause from Jury Docket

When any party has paid the fee for a jury trial, he or she shall not be permitted to withdraw the cause from the jury docket over the objection of the opposing parties. If there is no objection, the court in its discretion may permit the party to withdraw his or her cause from the jury docket. The court in its discretion may also permit a party to withdraw the jury fee. Failing to appear for trial shall be deemed a waiver of the right to a jury trial.

Rule 221. Challenge to the Array

When the jurors summoned have not been selected ~~by jury commissioners or by drawing the names from a jury wheel~~ as provided by law, any party to a suit which is to be tried by a jury may, before the jury is drawn challenge the array ~~upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party~~. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall hear evidence and decide without delay whether or not the challenge shall be sustained.

Notes and Comments

Subcommittee recommendation: Unanimous vote to delete phrase "jury commissioners..." because the phrase is obsolete. Also, the burden of having to prove corrupt or wilfull misconduct has been deleted to comply with current case and statutory law.

Full committee: Delete phrase "jury commissioners..." because the phrase is obsolete. Also, the burden of having to prove corrupt or willful misconduct has been deleted to comply with current case and statutory law.

Rule 221. Challenge to the Array

When the jurors summoned have not been selected as provided by law, any party to a suit which is to be tried by a jury may, before the jury is drawn challenge the array. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall hear evidence and decide without delay whether or not the challenge shall be sustained.

Rule 223. Jury Shuffle ~~(Jury List In Certain Counties)~~

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

Notes and Comments

Subcommittee recommendation: Eliminate shuffle (not unanimous). Change name of rule and delete the "interchangeable jury" requirement to reflect current practice.

Full committee decision (1/20/96): Keep shuffle procedure. Change name of rule and delete the "interchangeable jury" requirement to reflect current practice.

Rule 223. Jury Shuffle

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

Rule 224. Preparing Jury List

~~In counties not governed as to juries by the laws providing for interchangeable juries, when the parties have announced ready for trial the clerk shall write the name of each regular juror entered of record for that week on separate slips of paper, as near the same size and appearance as may be, and shall place the slips in a box and mix them well. The clerk shall draw from the box, in the presence of the court, the names of twenty-four jurors, if in the district court, or so many as there may be, if there be a less number in the box; and the names of twelve jurors if in the county court, or so many as there may be, and write the names as drawn upon two slips of paper and deliver one slip to each party to the suit or the party's his attorney.~~

Notes and Comments

Subcommittee recommendation: Unanimous vote to repeal because 224 duplicates and potentially conflicts with the Gov. Code Sec. 62.002-62.004, 62.011.

Full committee: Repeal because 224 duplicates and potentially conflicts with Gov. Code. Sec. 62.002-62.004, 62.011.

Rule 224. Preparing Jury List

Repeal.

Notes and Comments

Rule 224 has been repealed because the procedure for preparing jury lists is set forth in the Government Code.

Rule 225. Summoning Talesman

~~When there are not as many as twenty-four names drawn from the box, if in the district court, or as many as twelve, if in the county court, the court shall direct the sheriff to summon such number of qualified persons as the court deems necessary to complete the panel. The names of those thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding rules.~~

Notes and Comments

Subcommittee recommendation: Unanimous vote to repeal because 225 duplicates and potentially conflicts with Gov. Code Sec. 62.015.

Full committee: Repeal because 225 duplicates and potentially conflicts with Gov. Code Sec. 62.015.

Rule 225. Summoning Talesman

Repeal.

Notes and Comments

Rule 225 has been repealed because the procedure is set forth in the rule is governed by the Government Code.

Rule 226. Oath to Jury Panel

This rule has previously been amended and voted on.

Rule 226. Oath to Jury Panel

This rule has previously been amended and voted on.

Rule 226a. Admonitory Instructions to Jury Panel and Jury

This rule has previously been amended and voted on.

Rule 226a. Admonitory Instructions to Jury Panel and Jury

This rule has previously been amended and voted on.

Rule 228. "Challenge for Cause" Defined

A challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him or her to serve as a juror in the case or in any case, or which in the opinion of the court, renders him or her an unfit person to sit on the jury. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral.

Full committee: Make rule gender-neutral.

Rule 228. "Challenge for Cause" Defined

A challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him or her to serve as a juror in the case or in any case, or which in the opinion of the court, renders him or her an unfit person to sit on the jury. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.

Rule 230. Certain Questions Not to be Asked

In examining a juror, he shall not be asked a question the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by some legal accusation with theft or any felony.

Notes and Comments

Subcommittee recommendation: Repeal rule (unanimous).

Full Committee: Repeal rule.

Rule 230. Certain Questions Not to be Asked

Repealed.

Rule 232. Making Peremptory Challenges

If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor.

Notes and Comments

Subcommittee recommendation: Subcommittee unanimously agreed to table Batson rewrite until 1) it receives clarification from the Jury Reform Task Force as to which committee is addressing Batson, and 2) the Texas Supreme Court rules in Goode v. Shoukfeh.

Full committee: Rewrite rule to address Batson concerns.

Rule 232. Making Peremptory Challenges

If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor.

Rule 233. Number of Peremptory Challenges

Except as provided below, each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court.

Alignment of the Parties. In multiple party cases, it shall be the duty of the trial judge to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issued to be submitted to the jury, before the exercise of peremptory challenges.

Definition of Side. The term "side" as used in this rule is not synonymous with "party," "litigant," or "person." Rather, "side" means one or more litigants who have common interests on the matters with which the jury is concerned.

Motion to Equalize. In multiple party cases, upon motion of any litigant made prior to the exercise of peremptory challenges, it shall be the duty of the trial judge to equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In determining how the challenges should be allocated the court shall consider any matter brought to the attention of the trial judge concerning the ends of justice and the elimination of an unfair advantage.

Notes and Comments

Subcommittee recommendation: Delete the typographical error (unanimous).

Full committee: Delete the typographical error.

Rule 233. Number of Peremptory Challenges

Except as provided below, each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court.

Alignment of the Parties. In multiple party cases, it shall be the duty of the trial judge to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury, before the exercise of peremptory challenges.

Definition of Side. The term "side" as used in this rule is not synonymous with "party," "litigant," or "person." Rather, "side" means one or more litigants who have common interests on the matters with which the jury is concerned.

Motion to Equalize. In multiple party cases, upon motion of any litigant made prior to the exercise of peremptory challenges, it shall be the duty of the trial judge to equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In determining how the challenges should be allocated the court shall consider any matter brought to the attention of the trial judge concerning the ends of justice and the elimination of an unfair advantage.

Rule 234. Lists Returned to the Clerk

When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. The clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been ~~erased~~ struck; and if the case be in the county court, ~~he~~ the clerk shall call off the first six names on the lists that have not been ~~erased~~ struck; those whose names are called shall be the jury.

Notes and Comments

Subcommittee recommendation: Delete gender reference and change "erased" to "struck"

Full committee: Delete gender reference and change "erased" to "struck".

Rule 234. Lists Returned to the Clerk

When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. The clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been struck; and if the case be in the county court, the clerk shall call off the first six names on the lists that have not been struck; those whose names are called shall be the jury.

Rule 236. Oath to Jury

This Rule has already been amended and voted on.

Rule 236. Oath to Jury

This Rule has already been amended and voted on.

Rule 237. Appearance Day

If a defendant, who has been duly cited, is by the citation required to answer on a day ~~which is in term time,~~ such day is appearance day as to him or her. If ~~he~~ the defendant is so required to answer on a day in vacation, he or she shall plead or answer accordingly, and the first day of the next term is appearance day as to him or her.

Notes and Comments

Subcommittee recommendation: Delete the phrase "in term time." It is obsolete. Make rule gender-neutral. (unanimous).

Full committee: Delete the phrase "in term time". Make rule gender-neutral.

Rule 237. Appearance Day

If a defendant, who has been duly cited, is by the citation required to answer on a day such day is appearance day as to him or her. If the defendant is so required to answer on a day in vacation, he or she shall plead or answer accordingly, and the first day of the next term is appearance day as to him or her.

Rule 239. Judgment by Default

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may ~~in term time~~ take judgment by default against such defendant if he or she has not previously filed an answer, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral. Delete phrase "in term time." It is obsolete (unanimous).

Full committee: Make rule gender-neutral. Delete phrase "in term time."

Rule 239. Judgment by Default

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may take judgment by default against such defendant if he or she has not previously filed an answer, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.

Rule 239a. Notice of Default Judgment

At or immediately prior to the time ~~in~~ an interlocutory or final default judgment is rendered, the party taking the same or ~~his~~ the party's attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

Notes and Comments

Subcommittee recommendation: Delete typographical error and gender reference (unanimous).

Full committee: Delete typographical error and general reference.

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or the party's attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. Failure to comply with the provisions of this rule shall not affect the finality of the judgment.

Rule 243. Unliquidated Demands

If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, ~~a writ of inquiry awarded,~~ and the cause entered on the jury docket.

Notes and Comments

Subcommittee recommendation: Delete phrase "a writ of inquiry awarded." It is obsolete (unanimous).

Full committee vote: Look at what Professor Dorsaneo's task force put together on default judgment procedures for possible revision of this whole set of rules.

Rule 243. Unliquidated Demands

If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, and the cause entered on the jury docket.

Rule 244. On Service by Publication

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his or her services, to be taxed as part of the costs.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral (unanimous).

Full committee: Make rule gender-neutral.

Rule 244. On Service by Publication

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his or her services, to be taxed as part of the costs.

Rule 245. Assignment of Cases for Trial

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

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

~~**Rule 246. Clerk to Give Notice of Settings**~~

(c) Notice. ~~The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped.~~ Any party setting a case for trial shall immediately notify all other parties of the trial setting by written notice and shall file a copy of such notice with the clerk of the court. If the court on its own initiative sets the case for trial, the clerk of the court shall notify all parties of the setting by first class mail. Failure ~~of the clerk~~ to furnish ~~such information on proper request~~ notice shall be sufficient ground for

continuance or for a new trial when it appears to the court that such failure has prevented ~~the attorney~~ a party from preparing or presenting ~~his~~ its claim or defense.

Comment: This rule combines Rule 245 and Rule 246. It clarifies who shall give notice of trial settings.

Notes and Comments

Subcommittee recommendation: Unanimous vote to rewrite to comply with court clerk's version which the Full Committee has already approved.

Full committee: Rewrite to comply with court clerk's version which the Full Committee has already approved.

Rule 245. Assignment of Cases for Trial

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

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

(c) Notice. Any party setting a case for trial shall immediately notify all other parties of the trial setting by written notice and shall file a copy of such notice with the clerk of the court. If the court on its own initiative sets the case for trial, the clerk of the court shall notify all parties of the setting by first class mail. Failure to furnish notice shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented a party from preparing or presenting its claim or defense.

Rule 246. Clerk to Give Notice of Settings

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

Notes and Comments

Subcommittee recommendation: Unanimous vote to combine 246 and 245.

Full committee: Combine 246 with 245.

Rule 246. Clerk to Give Notice of Settings

Repealed.

Rule 252. Application for Continuance

If the ground of such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that ~~he~~ the party has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, ~~he~~ the party shall state the name and residence of the witness, and what ~~he~~ the party expects to prove by ~~him~~ the witness; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.

The failure to obtain the deposition of any witness residing within 100 miles of the courthouse of the county in which the suit is pending shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless such witness is about to leave, or has left, the State or county in which the suit is pending and will not probably be present at the trial.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral (unanimous).

Full committee: Make rule gender-neutral.

Rule 252. Application for Continuance

If the ground of such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that the party has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, the party shall state the name and residence of the witness, and what the party expects to prove by the witness; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.

The failure to obtain the deposition of any witness residing within 100 miles of the courthouse of the county in which the suit is pending shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless such witness is about to leave, or has left, the State or county in which the suit is pending and will not probably be present at the trial.

Rule 254. Attendance on Legislature

In all civil actions, including matters of probate, and in all matters ancillary to such suits which require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders, at any time within thirty days of a date when the legislature is to be in session, or at any time the legislature is in session, or when the legislature sits as a Constitutional Convention, it shall be mandatory that the court continue the cause if it shall appear to the court, by affidavit, that any party applying for continuance, or any attorney for any party to the cause, is a member of either branch of the legislature, and will be or is in actual attendance on a session of the same. If the member of the legislature is an attorney for a party to the cause, his or her affidavit shall contain a declaration that it is ~~his~~ the attorney's intention to participate actively in the preparation and/or presentation of the case. Where a party to any cause, or an attorney for any party to a cause, is a member of the legislature, ~~his~~ the affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until thirty days after adjournment of the legislature and the affidavit shall be proof of the necessity for the continuance, and the continuance shall be deemed one of right and shall not be charged against the movant upon any subsequent application for continuance.

The right to a continuance shall be mandatory, except only where the attorney was employed within ten days of the date the suit is set for trial, the right to continuance shall be discretionary.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral (unanimous).

Full committee: Make rule gender-neutral.

Rule 254. Attendance on Legislature

In all civil actions, including matters of probate, and in all matters ancillary to such suits which require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders, at any time within thirty days of a date when the legislature is to be in session, or at any time the legislature is in session, or when the legislature sits as a Constitutional Convention, it shall be mandatory that the court continue the cause if it shall appear to the court, by affidavit, that any party applying for continuance, or any attorney for any party to the cause, is a member of either branch of the legislature, and will be or is in actual attendance on a session of the same. If the member of the legislature is an attorney for a party to the cause, his or her affidavit shall contain a declaration that it is the attorney's intention to participate actively in the preparation and/or presentation of the case. Where a party to any cause, or an attorney for any party to a cause, is a member of the legislature, the affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until thirty days after adjournment of the legislature and the affidavit shall be proof of the necessity for the continuance, and the continuance shall be deemed one of right and shall not be charged against the movant upon any subsequent application for continuance.

The right to a continuance shall be mandatory, except only where the attorney was employed within ten days of the date the suit is set for trial, the right to continuance shall be discretionary.

Rule 257. Granted on Motion

A change of venue may be granted in civil causes upon motion of either party, supported by ~~his~~ the party's own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any following cause:

(a) That there exists in the county where the suit is pending so great a prejudice against ~~him~~ the party that he or she cannot obtain a fair and impartial trial.

(b) That there is a combination against ~~him~~ the party instigated by influential persons, by reason of which he or she cannot expect a fair and impartial trial.

(c) That an impartial trial cannot be had in the county where the action is pending.

(d) For other sufficient cause to be determined by the court.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral.

Full committee vote: This proposal was voted on by the full SCAC several years ago, and at that time the decision was made NOT to substantively change this rule. The SCAC will not revisit prior decisions regarding substantive amendments absent a change in circumstances. Change rejected (1/20/96). Unanimous.

Rule 257. Granted on Motion

A change of venue may be granted in civil causes upon motion of either party, supported by the party's own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any following cause:

(a) That there exists in the county where the suit is pending so great a prejudice against the party that he or she cannot obtain a fair and impartial trial.

(b) That there is a combination against the party instigated by influential persons, by reason of which he or she cannot expect a fair and impartial trial.

(c) That an impartial trial cannot be had in the county where the action is pending.

(d) For other sufficient cause to be determined by the court.

Rule 265. Order of Proceedings on Trial by Jury

The trial of cases before a jury shall proceed in the following order unless the court should, for good cause stated in the record, otherwise direct:

(a) The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of ~~his~~ the party's claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(b) The party upon whom rests the burden of proof on the whole case shall then introduce his or her evidence.

(c) The adverse party shall briefly state the nature of ~~his~~ the party's claim or defense and what said party expects to prove and the relief sought unless he or she has already done so.

(d) ~~He~~ The adverse party shall then introduce his or her evidence.

(e) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(f) The parties shall then be confined to rebutting testimony on each side.

(g) But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral (unanimous).

Full committee: Make rule gender-neutral.

Rule 265. Order of Proceedings on Trial by Jury

The trial of cases before a jury shall proceed in the following order unless the court should, for good cause stated in the record, otherwise direct:

(a) The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of the party's claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(b) The party upon whom rests the burden of proof on the whole case shall then introduce his or her evidence.

(c) The adverse party shall briefly state the nature of the party's claim or defense and what said party expects to prove and the relief sought unless he or she has already done so.

(d) The adverse party shall then introduce his or her evidence.

(e) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(f) The parties shall then be confined to rebutting testimony on each side.

(g) But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

Rule 266. Open and Close - Admission

Except as provided in Rule 269 the plaintiff shall have the right to open and conclude both in adducing his or her evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff is entitled to recover as set forth in the petition, except so far as ~~he~~ the plaintiff may be defeated, in whole or in part, by the allegations of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, whereupon the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause. The admission shall not serve to admit any allegation which is inconsistent with such defense, which defense shall be one that defendant has the burden of establishing, as for example, and without excluding other defenses: accord and satisfaction, adverse possession, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, release, res judicata, statute of frauds, statute of limitations, waiver, and the like.

Notes and Comments

Subcommittee recommendation: Make gender-neutral (unanimous).

Full committee: Make gender-neutral.

Rule 266. Open and Close - Admission

Except as provided in Rule 269 the plaintiff shall have the right to open and conclude both in adducing his or her evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff is entitled to recover as set forth in the petition, except so far as the plaintiff may be defeated, in whole or in part, by the allegations of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, whereupon the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause. The admission shall not serve to admit any allegation which is inconsistent with such defense, which defense shall be one that defendant has the burden of establishing, as for example, and without excluding other defenses: accord and satisfaction, adverse possession, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, release, res judicata, statute of frauds, statute of limitations, waiver, and the like.

Rule 268. Motion for Instructed Verdict

~~A motion for directed verdict shall state the specific grounds therefor.~~

Notes and Comments

Subcommittee recommendation: Repeal. The language of TRCP 208 has been moved to TRCP 301(f) (unanimous).

Full committee: Repeal. The language of TRCP 268 has been moved to TRCP 301(f).

Rule 268. Motion for Instructed Verdict

Repealed.

Rule 269. Argument

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

(b) In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his or her whole case as he or she relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

(c) Counsel for an intervenor shall occupy the position in the argument assigned by the court according to the nature of the claim.

(d) Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

(e) Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(f) Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

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

(h) It shall be the duty of every counsel to address the court from his or her place at the bar, and in addressing the court to rise to his or her feet; and while engaged in the trial of a case ~~he~~ counsel shall remain at his or her place in the bar.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral (unanimous).

Full committee: Make rule gender-neutral.

Rule 269. Argument

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

(b) In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his or her whole case as he or she relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

(c) Counsel for an intervenor shall occupy the position in the argument assigned by the court according to the nature of the claim.

(d) Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

(e) Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(f) Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

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

(h) It shall be the duty of every counsel to address the court from his or her place at the bar, and in addressing the court to rise to his or her feet; and while engaged in the trial of a case counsel shall remain at his or her place in the bar.

Rules 271-279 Have Already Been Amended and Voted On.

The Subcommittee has considered Professor Louis Muldrow's comments on the amended rules and unanimously agrees to the following:

Rule 271: No change to amended rule.

Rule 277: Discuss Professor Muldrow's comments at the next Full Committee meeting.

Rule 278: No changes to amended rule.

Rules 271-279 Have Already Been Amended and Voted On.

283. Duty of Officer Attending Jury

The officer in charge of the jury shall not make nor permit any communication to be made to them, except to inquire if they have agreed upon a verdict, unless by order of the court; and ~~he~~ the officer shall not before their verdict is rendered communicate to any person the state of their deliberations or the verdict agreed upon.

Notes and Comments

Subcommittee recommendation: Make rule gender-neutral (unanimous).

Full committee: Make rule gender-neutral.

283. Duty of Officer Attending Jury

The officer in charge of the jury shall not make nor permit any communication to be made to them, except to inquire if they have agreed upon a verdict, unless by order of the court; and the officer shall not before their verdict is rendered communicate to any person the state of their deliberations or the verdict agreed upon.

Rule 287. Disagreement as to Evidence

If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness' testimony on the point in dispute; but, if there be no such reporter, or if ~~his~~ the reporter's notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct ~~him~~ the witness to repeat his or her testimony as to the point in dispute, and no other, as nearly as he or she can in the language used on the trial; and on their notifying the court that they disagree as to any portion of a deposition or other paper not permitted to be carried with them in their retirement, the court may, in like manner, permit such portion of said deposition or paper to be again read to the jury.

Notes and Comments

Subcommittee recommendation: Delete gender reference (unanimous).

Full committee: Delete gender reference.

Rule 287. Disagreement as to Evidence

If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness' testimony on the point in dispute; but, if there be no such reporter, or if the reporter's notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct the witness to repeat his or her testimony as to the point in dispute, and no other, as nearly as he or she can in the language used on the trial; and on their notifying the court that they disagree as to any portion of a deposition or other paper not permitted to be carried with them in their retirement, the court may, in like manner, permit such portion of said deposition or paper to be again read to the jury.

Rule 292. Verdict by Portion of Original Jury

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

Notes and Comments

Subcommittee recommendation: 1) Add language providing that death or disability of a near relative is a proper basis for disqualification, and 2) amend the rule to allow alternate jurors to vote and participate fully.

Full committee vote: Unanimous vote to allow alternates to fully participate in place of original jurors. Rule will be amended.

Rule 292. Verdict by Portion of Original Jury

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

Amended Final

Holly -

Please make copies of this, too. They're Bonnie's notes from last meeting addressing some of this subcommittee's rules. Thanks!

VALERIE MOSMAN

Rule 216 FYI - Clerks will pursue fee to be placed in statute - until then - this will remain in Rule
Delete last sentence - See Clerks Rule "Record" See pg 22

Rule 217 Is this a Rule 145 affidavit? - If so, should reference be to Rule 145 -
Last sentence - Change "jury docket" to Clerk's record

Rule 218 Not common practice - Repeal
See Clerk's rule on "Record"

Rule 220 Remove reference to "Jury Docket" ??

Rule 221 1st sentence - "Jury Commissioner" - statute changed in 1971 to no longer allow - only ∃ in CCP for Grand Jury
1st sentence - "have not been selected" - the statutes state how jurors can be selected - is this Rule necessary
See Gov't Code 62.004 - 62.005 - 62.011

Rule may need to be rewritten to allow challenge on any panel?

Rule 223

This rule is only for interchangeable juries - by statute (Gov Code Sec 62.0016 - 62.017) 2 or 3 District Courts or More. Would you want a shuffle in other Counties?

The statute states how jurors are placed on panel except it does not include how jurors are returned to the general panel (line 4 + 5)

Rule 224 Repeal - Statutes state how prepare See Gov Code Sec ~~62~~ 62.002 - 62.004 62.011

Rule 225 - Repeal - See Gov Code 62.015

Rule 229 - Is 1st sentence okay - ?

Rule 234 - Is "erased" the proper term ?

Rule 239a - See Clerk's Rule - pg 5

Rule 246 - See Clerk Rule - pg 22

~~Rule 240~~ -

DAVID W. EVANS, JUDGE
County Court of Dallas County at Law No. 1

Thursday, November 21, 1996

Honorable Nathan Hecht
TEXAS SUPREME COURT
P.O. Box 12248
Capitol Station
Austin, TX 78711

RE: Requested Change to TEX. R. CIV. P. 243 to Permit Default Prove-up of Unliquidated Claims by Affidavit Submitted by Mail

Dear Justice Hecht:

This letter requests that the Supreme Court amend Rule 243 to authorize trial courts to grant default judgments on unliquidated claims based on a record composed solely of affidavits submitted by mail. For your convenient, quick reference, footnotes supply the authorities for the propositions stated.

SUGGESTION: Please consider the merits of amending Rule 243 as follows:

> RULE 243. UNLIQUIDATED DEMANDS
>
> If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages[1] either on the record in open court or by affidavit testimony submitted without further record and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket.

PROBLEM: Currently, Rules 241 and 243 require a hearing on the record for unliquidated default judgments — no provision permits the use of affidavits in lieu of

[1] May I suggest further adding at this point in the rule, "and causation" for clarity to all lawyers. *See, infra,* n.4 (proximate causation and damages not admitted by default in personal injury case).

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such a hearing.[2] Thus, insurance subrogation lawyers must appear in court, request a record and call the insurance adjuster to testify before the trial judge[3] in order to prove-up default judgments on their unliquidated[4] car-wreck claims against uninsured drivers. Alternatively, the lawyer may appear alone, mark an affidavit of the adjuster's testimony as an exhibit, ask for a record, move for the admission of the exhibit and then move for judgment.[5] This same procedure must be followed for collection cases on notes and credit cards[6] when the judge cannot compute the

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[2] *Alvarado v. Reif*, 783 S.W.2d 303 (Tex. App. – Eastland 1989, no writ) (affidavit to prove unliquidated damages is not a substitute for a default prove-up hearing recorded by official court reporter); *see, also Rogers v. Rogers*, 561 S.W.2d 172, 173-74 (Tex. 1978) (court reporter's inability to produce a statement of facts due to non-attendance at default prove-up required reversal and remand); *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 496(Tex. 1988) ("when damages are unliquidated or not proved by an instrument in writing, the court must conduct a hearing as to damages before a final default judgment may be granted" citing TEX. R. CIV. P. 243).

[3] Evidence of unliquidated damages must be presented by the plaintiff in the presence of the trial judge. *UNL Inc. v. Oak Hills Photo Finishing, Inc.*, 733 S.W.2d 402, 408 (Tex. App. – San Antonio 1987, no writ).

[4] *Otis Elev. Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993); *Jones v. Andrews*, 873 S.W.2d 102 (Tex. App. – Dallas 1994, no writ); *see, also, First Nat'l Bank v. Shockley*, 663 S.W.2d 685, 689 (Tex. App. – Corpus Christi 1983, no writ). A no-answer default judgment operates as an admission of the material facts alleged in the plaintiff's petition, except for unliquidated damages. *Holt Atherton Indus.*, 835 S.W.2d at 83; *Morgan v. Compugraphic Corp*, 675 S.W.2d 729, 731 (Tex. 1984); *Transport Concepts, Inc. v. Reeves*, 748 S.W.2d 302, 304 (Tex. App. – Dallas 1988, no writ). A court rendering a default judgment must hear evidence of unliquidated damages. *See* TEX. R. CIV. P. 243; *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). A plaintiff in a personal injury action must present competent evidence to establish a causal nexus between the event sued upon and his injuries. *See Transport Concepts*, 748 S.W.2d at 304. Even if the defendant's liability has been established, proof of this causal nexus is necessary to ascertain the amount of damages to which the plaintiff is entitled. *Morgan*, 675 S.W.2d at 732. Evidence of unliquidated damages must be presented by the plaintiff in the presence of the trial judge. *UNL Inc. v. Oak Hills Photo Finishing, Inc.*, 733 S.W.2d 402, 408 (Tex. App. – San Antonio 1987, no writ); *see, also, Shields v. State*, 820 S.W.2d 831, 833 (Tex. App. – Waco 1991, no pet.) (documentary evidence only becomes part of the record when admitted as exhibits at a hearing).

[5] *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.) (citing TEX. R. CIV. EVID. 802 as sufficient for default judgment requirements of TEX. R. CIV. P. 243; there being no objection, a hearsay affidavit is admitted as substantive evidence); *Shields v. State*, 820 S.W.2d 831, 833 (Tex. App. – Waco 1991, no writ) (documentary evidence only becomes part of the record when admitted as exhibits at a hearing).

[6] *Irlbeck v. John Deere Co.*, 714 S.W.2d 54, 57 (Tex. App. – Amarillo 1986, writ ref'd n.r.e.) (citing

(continued...)

amount from the pleadings.[7] (In part, the necessity for a default prove-up on notes and credit cards is driven by careful lawyers' fears that the changes to Rule 185 will still not be applied to lawsuits based on "special agreements,"[8] so they do not use sworn account procedure for anything other than an open account. Unfortunately, most of the collection actions today are based on notes and credit card agreements.)

ACTUAL PRACTICE IN COURT: Justice, although the practice probably has not changed much since you presided over the 95th District Court, we see a lot of default judgments in the county courts so I thought it would be helpful to make some observations about the current state of practice. The insurance, subrogation lawyers have the hardest time understanding why they cannot mail in their adjuster's affidavit and obtain through the mail a default judgment. When they finally come to court to conduct a default prove-up, they always bring the adjuster ("just in case, Judge") even though my form letter states that counsel can appear alone, mark the adjuster's affidavit and move for judgment. I have several debt-collection lawyers well-trained now so that they and I conduct the following proceedings: routinely bringing a large volume of files, the collection lawyer appears in court on the record. Having become pretty expert in determining what is a good return of citation, I call the case on the

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[6](...continued)
TEX. R. CIV. P. 243; *Freeman v. Leasing Assocs., Inc.*, 503 S.W.2d 406, 408 (Tex. Civ. App. – Houston [14th Dist.] 1973, no writ); and *Burrows v. Bowden*, 564 S.W.2d 474, 476 (Tex. Civ. App. – Corpus Christi 1978, no writ)).

[7] *Kelley v. Southwestern Bell Media, Inc.*, 745 S.W.2d 447, 448-49 (Tex. App. – Houston [1st Dist.] 1988, no writ) (holding that exhibits so unclear as to be illegible did not supply factual evidence from which claim could be calculated, stating "A claim is liquidated only if the amount of damages can accurately be calculated from the written instrument and from factual, as opposed to conclusory, allegations in the petition" citing *Burrows v. Bowden*, 564 S.W.2d 474 (Tex. Civ. App. – Corpus Christi 1978, no writ); and "the petition and supporting documents must together show the dates and amounts of payments due so that the court may make an accurate calculation of the amount of damages to which the plaintiff is legally entitled" citing *Irlbeck v. John Deere Co.*, 714 S.W.2d 54 (Tex. App. – Amarillo 1986, writ ref'd n.r.e.)).

[8] *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App. – Houston [14th Dist.] 1993, no writ) (sworn account procedure inapplicable to suit on a note); *see, also, Great-Ness Prof. Svc.. v. First Nat'l Bank*, 704 S.W.2d 916, 917 (Tex. App. – Houston [14th Dist.] 1986, no writ) (sworn account inapplicable to suit on lease); *Murphy v. Cintas*, slip op. no. 12-94-0371-CV, 1996 Tex. App. LEXIS 750 at 2, 3 (Tex. App. – Tyler, February 23, 1996, n.w.h.); *Meineke Discount Muffler Shops, Inc. v. Coldwell Banker Prop. Management Co.*, 635 S.W.2d 135, 138 (Tex. App. – Houston [1st Dist.] 1982, writ ref'd n.r.e.); *but, see, Schorer v. Box Svc. Co.*, slip op. 01-95-01369-CV, 1996 Tex. App. LEXIS 2586, at 9-11 (Tex. App. – Houston [1st Dist.] [June 20,] 1996, n.w.h.) (Mirabal, J. dissenting).

record, quickly review and announce the facts pertaining to service and the return thereof and that I take judicial notice of all such matters appearing in the file and whether it is a good return or not. The lawyer then asks for the admission of several pre-marked exhibits which include an affidavit by the holder of the debt as to the amount of the debt now owed after allowance of all lawful offsets and credits (typically such affidavits are in form quite similar to Rule 185 affidavits). Having reviewed these, I grant or deny default judgment. I have done as many as 13 defaults in 15 minutes in this fashion (after a lunch break in the middle of a trial of an unrelated case repeating, "keep moving, Counsel").

JUST AS FAIR AS SUMMARY JUDGMENT PROCEDURE: I see no greater protection of the defaulting party's rights when a default judgment is conducted on affidavits than when it is conducted on the record. All other procedures having been complied with, I see no defect in constitutional protections and specifically no defects in due process protections, merely because the case is concluded on a paper record. In fact, I can see no difference between permitting default judgments to be granted on affidavits and summary judgments granted on the same basis.

CHANGE BY LOCAL RULE PROBABLY INEFFECTIVE: Although it would be nice to "fix" this situation by local rule as some have proposed, Rule 3a appears to limit the effectiveness of such a solution by not permitting local rules to overrule Supreme Court and appellate court decisions let alone an explicit rule of civil procedure. I can see no way to "fix" this other than to appeal to the Supreme Court and the rules committee to consider changing Rule 243 for a better, modern practice of law.

Nathan, thanks for taking my call yesterday and considering these matters. If there is anything further I could do to be of assistance please let me know.

Very truly yours,

D:\NEW\PROCEDUR\LTR\HECHT.001

David W. Evans, JUDGE, COUNTY COURT OF DALLAS COUNTY AT LAW NO. 1

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