November 28, 2000

SUPREME COURT ADVISORY COMMITTEE

SUBCOMMITTEE WORKING DRAFT

OF DISQUALIFICATION AND RECUSAL RULE PROPOSAL

Rule _____.[1] Disqualification and Recusal of Judges

(a) Grounds for Disqualification.[2] A Judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law in association with someone while that person 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.[3] A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned,[4]

(2) the judge has a personal bias or prejudice concerning the subject matter or a party,[5]

(3) the judge has been or is likely to be 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;[6]

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;[7]

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;[8]

(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;[9]

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone known or disclosed to the judge to have a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;[10]

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third[11] degree to a lawyer in the proceeding.[12]

(9) a *lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.*[13]

(10)[14] *the judge has accepted a campaign contribution, as defined in § 251.001 Election Code, which exceeds the limits in § 253.155(b) or § 253.157 Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in § 253.157(e) Election Code, unless the excessive contribution is returned in accordance with § 253.155 of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.*

(11) a direct campaign expenditure as defined in § 251.001 Election Code which exceeds the limits in § 253.061 or 253.062 was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was made.

(12) a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.

(c) Waiver.(15) Disqualification cannot be waived. *The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.*

(d) If a judge does not discover that there must be a recusal under subparagraphs (b)(7) until after substantial time has been devoted to the matter, the judge is not required to recuse if the person, with the financial interest, divests of the interest that would otherwise require recusal.

(e) Procedure.

(1) *Motion.* A motion to disqualify or recuse a judge, *associate judge, or statutory master,* other than a judge of the Supreme Court, Court of Criminal Appeals, Court of Appeals or Statutory Probate Court, must state in detail *the factual and legal basis* for recusal or disqualification and, if applicable, any exception under subparagraph (e)(2), and must be made on personal knowledge(16) or upon information and belief if the grounds for such belief are stated specifically.(17) A *judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion.*(18) A motion to recuse must be verified; **an unverified motion does not invoke the proceedings under this rule except for sanctions.**(19) *A motion to recuse a judge for any ground listed in subparagraph (b)(9) or (b)(10) may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.*(20)

(2) **Time to File.** *A motion to disqualify may be filed at any time. A motion to recuse is waived if filed later than the tenth day prior to the date the case is set for trial or other hearing except in the following instances:*

- *when the basis for recusal did not exist before ten (10) days prior to the date the case is set for trial or other hearing; or*
- *the judge who is sought to be recused was not assigned to the case before ten (10) days prior to the date the case is set for trial or other hearing; or*
- *the party filing the motion neither knew nor should have known of the basis for recusal before ten (10) days prior to the date the case was set for trial or other hearing; or*

- *for other good cause shown.*

Any motion filed after the tenth (10th) day prior to the date the case is set for trial or other hearing is governed by subparagraph (e)(4).[21]

(3) ***Referral.***

The judge in the case in which the motion is filed must promptly sign an order ruling on the motion prior to taking any other action in the case. If the judge voluntarily recuses or disqualifies pursuant to the motion, the case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with local rules. If the judge refuses to recuse or disqualify, the judge must promptly refer the motion to the presiding judge of the administrative region. *If the judge in the case in which the motion is filed does not promptly grant the motion or refer it to the presiding judge of the administrative region, the movant may forward a copy of the motion to said presiding judge and request the presiding judge to hear the motion or assign a judge to hear it. If the motion does not comply with subparagraph (e)(1), the said presiding judge may deny the motion without a hearing. If the motion complies with subparagraph (e)(1), the presiding judge of the administrative region shall hear the motion or immediately assign a judge to hear it. Notwithstanding any local rule or other law, after a motion to recuse or disqualify has been filed, no judge may preside, reassign, transfer, or hear any matter in the case, except pursuant to subparagraph (e)(4), before the motion has been decided by the judge assigned by the presiding judge of the administrative region.*

(4) **Interim Proceedings.**[22] *After referring the motion to the presiding judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of; except for good cause stated in the order in which the action is taken. However, in the following instances, the judge may proceed with the case as though no motion had been filed, pending a ruling on the motion:*

- *when the motion is subsequent to a motion to recuse or disqualify filed in the case against a judge by the same party which has been sanctioned pursuant to subparagraph (e)(11)(b) regardless of the facts and legal basis alleged;*[23] *or*
- *when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for conventional trial on the merits.*[24]

(5) ***Abatement of interim proceedings.***[25] *If all parties to the interim proceedings agree that the interim proceeding should be abated pending a ruling on the motion, the judge must abate all interim proceedings. The presiding judge of the administrative region or the judge hearing the motion to recuse or disqualify*[26] *may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.*

*(6) **Order entered during interim proceedings.**[(27)] If the judge who signed any order in an interim proceeding pursuant to subparagraph (e)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.*

*(7) **Hearing.**[(28)] Unless the presiding judge of the region has denied the motion without hearing pursuant to subparagraph e(3), a hearing must be scheduled to commence promptly. The presiding judge must promptly give 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 or electronic copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within three days of the last day of the hearing or the motion is deemed granted.*

*(8) **Disposition.** If a judge is disqualified or recused, the regional presiding judge must assign another judge to preside over the case and notwithstanding these rules or any local rule, the case shall not be reassigned to another judge without the consent of the presiding judge of the administrative region. If an associate judge or a statutory master is recused or disqualified, the district court to whom the case is assigned must hear the case or appoint a replacement.[(29)]*

*(9) **Appeal.** If the motion is denied, the order may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order may not be reviewed by mandamus or appeal.[(30)]*

*(10) **Assignment of Judges by Chief Justice of the Supreme Court**. The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.[(31)]*

*(11) **Sanctions**. Sanctions are authorized as follows:*

(a) If a party files a motion under this rule and it is determined, on motion of the opposite party, or on the court's own initiative, that the motion was brought for purposes of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2(b).[(32)]

(b) Upon denial of three or more motions filed in a case against a judge under this rule by the same party, the judge denying the third or subsequent motion shall enter an order awarding to the party opposing such motion reasonable and necessary attorneys fees and costs. The party making

such motion and the attorney for such party are jointly and severally liable for such fees and costs.

(c) A sanction order shall be subject to review on appeal from the final judgment.

(12) ***Justice of Peace Courts****. This recusal rule does not apply to Justices of the Peace.*

Comment 1: A motion to recuse or disqualify a statutory probate judge is governing by § 25.00255 Government Code.

Comment 2: Recusals where the judge is a member of a class that is represented by a lawyer or lawyer's law firm are decided on a case-by-case basis.

1. This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

2. Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

3. This section is derived from current Rule 18b(2).

4. From Current Rule 18b(2)(a).

5. From Current Rule 18b(2)(b).

6. Current Rule From 18b(2)(c) & (f)(iii).

7. From current Rule 18b(2)(b).

8. From current Rule 18b(2)(d).

9. From current Rule 18b(2)(f)(i).

10. From current Rule 18b(2)(f)(ii).

11. Currently first degree.

12. From current Rule 18b(2)(g).

13. Paragraph (9) is based on The Guide to Judiciary Policies and Procedures, Vol. 5, Section 3.6-2, published by the Administrator's Office of the United States Courts.

14. Paragraphs (10) and (11) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

15. This section is from current Rule 18b(5).

16. This requires details of facts and the legal basis for the motion, former rule required "grounds".

17. This sentence is from current Rule 18a(a).

18. This sentence is new.

19. This sentence is based on current Rule 18a(a).

20. This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

21. There is no ending date by which the motion must be filed if based on any of the exceptions in (e)(2)(a), (b), (c), or (d).

22. This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

23. This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

24. North East Independent School District v. Aldridge, 400 S.W.2d 893 (Tex. 1966).

25. This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." See subparagraph (e)(6), below.

26. See (e)(7), last sentence.

27. This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

28. The following two subparagraphs revise existing procedures to improve expeditiousness.

29. Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

30. From current Rule 18a(f).

31. From current Rule 18a(g).

32. This is from current Rule 18a(h).

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~~October 27~~ **November 28**, 2000

SUPREME COURT ADVISORY COMMITTEE

SUBCOMMITTEE WORKING DRAFT

OF DISQUALIFICATION AND RECUSAL RULE PROPOSAL

Rule _____.[1] Disqualification and Recusal of Judges

(a) Grounds for Disqualification.[2] A Judge is disqualified in the following circumstances:

(1) the judge formerly acted as counsel in the matter, or practiced law in association with someone while that person 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.[3] A judge must recuse in the following circumstances:

(1) the judge's impartiality might reasonably be questioned,[4]

(2) the judge has a personal bias or prejudice concerning the subject matter or a party,[5]

(3) the judge has been or is likely to be 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;[6]

(4) the judge has personal knowledge of material evidentiary facts relating to the dispute between the parties;(7)

(5) the judge expressed an opinion concerning the matter while acting as an attorney in government service;(8)

(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;(9)

(7) the judge or the judge's spouse is related by consanguinity or affinity within the third degree to anyone known or disclosed to the judge to have a financial interest in the matter or a party, or any other interest that could be substantially affected by the outcome of the matter;(10)

(8) the judge or the judge's spouse is related by consanguinity or affinity within the third(11) degree to a lawyer in the proceeding.(12)

(9) **a *lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.***(13)

(10)(14) *the judge has accepted a campaign contribution, as defined in § 251.001 Election Code, which exceeds the limits in § 253.155(b) or § 253.157 Election Code, made by or on behalf of a party, by a lawyer or a law firm representing a party, or by a member of that law firm, as defined in § 253.157(e) Election Code, unless the excessive contribution is returned in accordance with § 253.155 of the Election Code. This ground for recusal arises at the time the excessive contribution is accepted and extends for the term of office for which the contribution was made.*

~~*(10)*~~

(11) *a direct campaign expenditure as defined in § 251.001 Election Code which exceeds the limits in § 253.061 or 253.062 was made, for the benefit of the judge, when a candidate, by or on behalf of a party, by a lawyer or law firm representing a party, or by a member of that law firm as defined in § 253.157(e) Election Code. This ground for recusal arises at the time the excessive direct campaign expenditure occurs and extends for the term of office for which the direct campaign expenditure was*

made.

~~*(11)*~~

(12) *a lawyer in the proceeding, or the lawyer's law firm, is representing the judge, or judge's spouse or minor child, in an ongoing legal proceeding other than a class action, except for legal work by a government attorney in his/her official capacity.*

(c) Waiver.[(15)] Disqualification cannot be waived. *The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.*

(d) If a judge does not discover that there must be a recusal under subparagraphs (b)(7) until after substantial time has been devoted to the matter, the judge is not required to recuse if the person, with the financial interest, divests of the interest that would otherwise require recusal.

(e) Procedure.

(1) *Motion.* A motion to disqualify or recuse a judge, *associate judge, or statutory master,* other than a judge of the Supreme Court, Court of Criminal Appeals, Court of Appeals or Statutory Probate Court, must state in detail *the factual and legal basis* for recusal or disqualification and, if applicable, any exception under subparagraph (e)(2), and must be made on personal knowledge[(16)] or upon information and belief if the grounds for such belief are stated specifically.[(17)] A *judge's rulings may not be a basis for the motion, but may be admissible as evidence relative to the motion.*[(18)] A motion to recuse must be verified; **an unverified motion does not invoke the proceedings under this rule except for sanctions.**[(19)] *A motion to recuse a judge for any ground listed in subparagraph (b)(9) or (b)(10) may not be filed by any party, lawyer or law firm whose action constituted a ground for recusal.*[(20)]

(2) **Time to File.** *A motion to disqualify may be filed at any time. A motion to recuse is waived if filed later than the tenth day prior to the date the case is set for trial or other hearing except in the following instances:*

(a)when the basis for recusal did not exist before ten (10) days prior to the date the case is set for trial or other hearing; or

(b)the judge who is sought to be recused was not assigned to the case before ten (10) days prior to the date the case is set for trial or other hearing; or

(c)the party filing the motion neither knew nor should have known of the basis for recusal before ten (10) days prior to the date the case was set for trial or other hearing; or

(d)for other good cause shown.

Any motion filed after the tenth (10^{th}) day prior to the date the case is set for trial or other hearing is governed by subparagraph (e)(4).[21]

(3) ***Referral.***

The judge in the case in which the motion is filed must promptly sign an order ruling on the motion prior to taking any other action in the case. If the judge voluntarily recuses or disqualifies pursuant to the motion, the case shall be referred to the presiding judge of the administrative region for reassignment unless the parties agree that the case may be reassigned in accordance with local rules. If the judge refuses to recuse or disqualify, the judge must promptly refer the motion to the presiding judge of the administrative region. *If the judge in the case in which the motion is filed does not promptly grant the motion or refer it to the presiding judge of the administrative region, the movant may forward a copy of the motion to said presiding judge and request the presiding judge to hear the motion or assign a judge to hear it. If the motion does not comply with subparagraph (e)(1), the said presiding judge may deny the motion without a hearing. If the motion complies with subparagraph (e)(1), the presiding judge of the administrative region shall hear the motion or immediately assign a judge to hear it. Notwithstanding any local rule or other law, after a motion to recuse or disqualify has been filed, no judge may preside, reassign, transfer, or hear any matter in the case, except pursuant to subparagraph (e)(4), before the motion has been decided by the judge assigned by the presiding judge of the administrative region.*

(4) **Interim Proceedings.**[22] *After referring the motion to the presiding judge of the administrative region, the judge in whose case the motion is filed must take no further action in the case until the motion is disposed of; except for good cause stated in the order in which the action is taken. However, in the following instances, the judge may proceed with the case as though no motion had been filed, pending a ruling on the motion:*

(a) when the motion is subsequent to a motion to recuse or disqualify filed in the case against a judge by the same party which has been sanctioned pursuant to subparagraph (e)(11)(b) regardless of the facts and legal basis alleged;[23] *or*

(b) when the motion to recuse or disqualify is filed after the 10th day prior to the date the case is set for conventional trial on the merits.[24]

(5) ***Abatement of interim proceedings.***[25] *If all parties to the interim proceedings agree that the interim proceeding should be abated pending a ruling on the motion, the judge must abate all interim proceedings. The presiding judge of the administrative region or the judge hearing the motion to recuse or disqualify*[26] *may also order the interim proceedings abated pending a ruling on the motion to recuse or disqualify.*

(6) ***Order entered during interim proceedings.***[27] *If the judge who signed any order in an interim proceeding pursuant to subparagraph (e)(4) is subsequently recused, the judge assigned to the case shall, upon motion of a party, review such order but may, after reviewing the basis for such order, enter the same or similar order or vacate the order. In any case where a judge has been disqualified, the judge assigned to hear the case shall declare void all orders entered by such judge and shall rehear all matters that were heard by the disqualified judge.*

(7) ***Hearing.***[28] *Unless the presiding judge of the region has denied the motion without hearing pursuant to subparagraph e(3), a hearing must be scheduled to commence promptly. The presiding judge must promptly give 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 or electronic copies of documents filed in the case may be used in the hearing. The judge who hears the motion must rule within three days of the last day of the hearing or the motion is deemed granted.*

(8) ***Disposition.*** *If a judge is disqualified or recused, the regional presiding judge must assign another judge to preside over the case and notwithstanding these rules or any local rule, the case shall not be reassigned to another judge without the consent of the presiding judge of the administrative region. If an associate judge or a statutory master is recused or disqualified, the district court to whom the case is assigned must hear the case or appoint a replacement.*[29]

(9) ***Appeal.*** *If the motion is denied, the order may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order may not be reviewed by mandamus or appeal.* [30]

(10) ***Assignment of Judges by Chief Justice of the Supreme Court.*** *The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.*[31]

(11) ***Sanctions.*** *Sanctions are authorized as follows:*

(a) If a party files a motion under this rule and it is determined, on motion of the opposite party, or on the court's own initiative, that the motion was brought for purposes of delay and without sufficient cause, the judge hearing the motion may impose any sanctions authorized by Rule 215.2(b).[32]

(b) Upon denial of three or more motions filed in a case against a judge under this rule by the same party, the judge denying the third or subsequent motion shall enter an order awarding to the party opposing such motion reasonable and necessary attorneys fees and costs. The party making such motion and the attorney for such party are jointly and severally liable for such fees and costs.

(c) A sanction order shall be subject to review on appeal from the final judgment.

(12) ***Justice of Peace Courts****. This recusal rule does not apply to Justices of the Peace.*

Comment 1: A motion to recuse or disqualify a statutory probate judge is governing by § 25.00255 Government Code.

Comment 2: Recusals where the judge is a member of a class that is represented by a lawyer or lawyer's law firm are decided on a case-by-case basis.

---------- *COMPARISON OF FOOTNOTES* ----------

-FOOTNOTE 1-

This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

-FOOTNOTE 2-

Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

-FOOTNOTE 3-

This section is derived from current Rule 18b(2).

-FOOTNOTE 4-

From Current Rule 18b(2)(a).

-FOOTNOTE 5-

From Current Rule 18b(2)(b).

-FOOTNOTE 6-

Current Rule From 18b(2)(c) & (f)(iii).

-FOOTNOTE 7-

From current Rule 18b(2)(b).

-FOOTNOTE 8-

From current Rule 18b(2)(d).

-FOOTNOTE 9-

From current Rule 18b(2)(f)(i).

-FOOTNOTE 10-

From current Rule 18b(2)(f)(ii).

-FOOTNOTE 11-

Currently first degree.

-FOOTNOTE 12-

From current Rule 18b(2)(g).

-FOOTNOTE 13-

Paragraph (9) is based on The Guide to Judiciary Policies and Procedures, Vol. 5, Section 3.6-2, published by the Administrator's Office of the United States Courts.

*-FOOTNOTE ~~13~~ **14**-*

*Paragraphs ~~(9) and~~(10) **and (11)** are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.*

*-FOOTNOTE ~~14~~ **15**-*

This section is from current Rule 18b(5).

*-FOOTNOTE ~~15~~ **16**-*

This requires details of facts and the legal basis for the motion, former rule required "grounds".

*-FOOTNOTE ~~16~~ **17**-*

This sentence is from current Rule 18a(a).

*-FOOTNOTE ~~17~~ **18**-*

This sentence is new.

*-FOOTNOTE ~~18~~ **19**-*

This sentence is based on current Rule 18a(a).

*-FOOTNOTE ~~19~~ **20**-*

This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

-FOOTNOTE ~~20~~ 21-

There is no ending date by which the motion must be filed if based on any of the exceptions in (e)(2) (a), (b), (c), or (d).

-FOOTNOTE ~~21~~ 22-

This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

-FOOTNOTE ~~22~~ 23-

This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

-FOOTNOTE ~~23~~ 24-

North East Independent School District v. Aldridge, 400 S.W.2d 893 (Tex. 1966).

-FOOTNOTE ~~24~~ 25-

This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." See subparagraph (e)(6), below.

-FOOTNOTE ~~25~~ 26-

See (e)(7), last sentence.

-FOOTNOTE ~~26~~ 27-

This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

*-FOOTNOTE ~~27~~ **28**-*

The following two subparagraphs revise existing procedures to improve expeditiousness.

*-FOOTNOTE ~~28~~ **29**-*

Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

*-FOOTNOTE ~~29~~ **30**-*

From current Rule 18a(f).

*-FOOTNOTE ~~30~~ **31**-*

From current Rule 18a(g).

*-FOOTNOTE ~~31~~ **32**-*

This is from current Rule 18a(h).

---------- COMPARISON OF FOOTERS ----------

-FOOTER 1-

*~~October 27~~ **November 28**, 2000 -- Draft*

-FOOTER 2-

:

1. This rule would replace current Rules 18a and 18b of the Texas Rules of Civil Procedure.

2. Section (a) is a nonsubstantive recodification of current Rule 18b(1). Both provisions are based on constitutional grounds for disqualification.

3. This section is derived from current Rule 18b(2).

4. From Current Rule 18b(2)(a).

5. From Current Rule 18b(2)(b).

6. Current Rule From 18b(2)(c) & (f)(iii).

7. From current Rule 18b(2)(b).

8. From current Rule 18b(2)(d).

9. From current Rule 18b(2)(f)(i).

10. From current Rule 18b(2)(f)(ii).

11. Currently first degree.

12. From current Rule 18b(2)(g).

13. Paragraph (9) is based on The Guide to Judiciary Policies and Procedures, Vol. 5, Section 3.6-2, published by the Administrator's Office of the United States Courts.

14. Paragraphs (10) and (11) are based on proposals by the Judicial Campaign Finance Study Committee. Italicized print generally indicates new or changed language from the recodification or current Rule 18.

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17. This sentence is from current Rule 18a(a).

18. This sentence is new.

19. This sentence is based on current Rule 18a(a).

20. This sentence is new. It is part of the Judicial Campaign Finance Study Committees proposal.

21. There is no ending date by which the motion must be filed if based on any of the exceptions in (e)(2)(a), (b), (c), or (d).

22. This section, based on a concept from S.B. 788, seeks to deter untimely, multiple, and frivolous-recusal motions.

23. This provision is based on S.B. 788. Like S.B. 788, it refers to multiple recusal motions filed against "a judge." Some members of the Rules Advisory Committee questioned whether this provision was intended to prohibit only multiple recusal motions filed against a single judge or also successive recusal motions filed against various judges involved in the case.

24. North East Independent School District v. Aldridge, 400 S.W.2d 893 (Tex. 1966).

25. This section, which differs from S.B. 788, would enable trial courts to stop interim proceedings until the recusal motion is ruled on if the motion appears to be meritorious or if the parties agree that the proceedings should be stopped. It thus prevents waste of judicial resources on proceedings where the recusal motion likely would be granted and the interim rulings caused to be "undone." See subparagraph (e)(6), below.

26. See (e)(7), last sentence.

27. This section is based on S.B. 788 but clarifies how trial judges can "fix" orders entered in interim proceedings that are required to be vacated after a recusal motion is granted. It also clarifies that order entered in an interim proceeding while a disqualification motion is pending must be voided if the motion is granted.

28. The following two subparagraphs revise existing procedures to improve expeditiousness.

29. Masters and associate judges may be recused or disqualified. The preceding sentence clarifies the procedures for assigning replacements for such officers.

30. From current Rule 18a(f).

31. From current Rule 18a(g).

32. This is from current Rule 18a(h).

3

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December 21, 2000

Charles L. Babcock
Jackson Walker, LLP
901 Main Street, Suite 6000
Dallas, Texas 75202

RE: Proposed recusal rule

Dear Chip:

Enclosed please find a letter that I received from Judges Bob McCoy and Jeff Walker of Tarrant County concerning the proposed recusal rule. In accordance with our earlier discussions, I have extended an invitation to them to meet with the Rules Committee in Austin at the next meeting. Judge McCoy says that he will be there but that Judge Walker has a prior commitment.

I have spoken with Carrie Gagnon of your office, and she advises me that the recusal issue will be the second item on the agenda for the morning of Friday, January 12, following a report from Justice Hecht.

By copy of this letter, I am also advising Senator Harris and the other Tarrant County members of the Rules Committee of this development.

Please call if you have any questions.

Very truly yours,

Frank Gilstrap

FG/jln
Encls.
cc: Hon. Chris Harris
Hon. John Cayce
Hon. Jeff Walker
Hon. Bob McCoy
Ralph Duggins
Carrie Gagnon

BOB McCOY
DISTRICT JUDGE
48TH JUDICIAL DISTRICT OF TEXAS
401 W. BELKNAP
FORT WORTH, TEXAS 76196-0221

December 13, 2000

Senator Chris Harris
1307-A W. Abram
Suite 101
Arlington, Tx. 76013

Frank Gilstrap
1400 W. Abram
Arlington, Tx. 76013

Ralph Duggins
801 Cherry St.
Suite 2100
Fort Worth, Tx. 76102

Re: Revision of Rule 18a and 18b, T.R.C.P.

"There is a certain relief in change, even though it be from bad to worse." Washington Irving (1824).

Gentlemen,

The following are comments from Judge Jeff Walker and I regarding "The Supreme Court Advisory Sub-Committee Working Draft Disqualification and Recusal Rule Proposal", dated November 28, 2000.

Initially we have two observations in a general context about the proposed changes. First, Rule 18a and 18b have been in place for quite a while, are understood by practitioners, have been interpreted by the appellate courts of the state, and seem to be working well. While certain

portions of the rules do need some revision, we do not feel that there is any reason to rewrite both rules.

Second, if these proposed changes are, at least in part, meant to address Texas Civil Practices and Remedies Code § 30.016, they are well wide of the mark. If they are meant to encompass the letter or even the spirit of that statute, they obviously fail to do so. If they are not meant to do that, then what is the point? The enacted substantive law statute was passed by the House, passed by the Senate, signed by the Governor, and has been, is, and will be, effective unless repealed by those same entities.[1]

With that said, the following list addresses our comments about the proposed changes:

1. "Judge" should be initially defined so that it includes all judicial officers (which includes associate judges, statutory magistrates and statutory masters), excluding Appellate Justices.

2. The "Grounds for Recusal" on page one reads "A judge *must recuse* in the following circumstances...." This section then does not take into account that later in the same rule, a waiver is possible, nor does it address whether the judge is to recuse himself *automatically* if one of the grounds for recusal is met, or, if he is to recuse himself *if requested*, since undoubtedly in many situations the parties agree that the judge does not need to recuse himself and therefore no one requests that such a recusal occur. It is clearly incumbent upon the judge to reveal to the attorneys any grounds for recusal of which he is aware. We believe that Section (b) of the rule should be grounds for recusal, *if requested*, and after informing the attorneys of pertinent recusal facts of which they may be unaware.

3. Section (b)(9) is the same as (b)(12).

4. Section (b)(9) reads "a lawyer in the proceeding...." This is somewhat unclear and should probably read "a lawyer representing a party in a case filed in the court of the judge in question," since it leaves open the question, what is a *proceeding*? Also, what if the lawyer is not present at the proceeding? Moreover, are ad-litems and trustees subject to this rule?

5. Section (e)(1) is not completely in line with present case law. That rule says in part that a judge's rulings may not be a basis for the motion to recuse, but may be admissible as evidence to the motion. "An unfavorable disposition towards a party arising from events occurring during judicial proceedings may none the less support recusal if it is so extreme as to display a clear inability to render fair judgment." *Sommers v. Concepcion*, 20 S.W.3d @44 (Houston [14th Dist.]) 2000.

6. Section (e)(2) is entitled "Time to File". It is my belief (Judge Walker doesn't have a position on this) that the time to file a recusal motion should be within a certain period of time *after the attorney learns the reason for recusal* and not up until 10 days before trial. Otherwise, the attorney can learn about the recusal facts and wait to evaluate the court's rulings in determining whether or not to file a motion.

7. The sentence on the top of page five reads "any motion filed after the tenth (10th) day prior to the day the case is set for trial or other hearing is governed by sub-paragraph (e)(4)". Does this apply to *untimely* filed motions for which there is no excuse? Section (e)(2) indicates that an *untimely* filed motion that does not meet one of the enumerated excuses, including the nebulous "for other good cause shown," is waived and is in fact not governed by sub-paragraph (e)(4), yet, this referenced sentence reads "any motion".

8. Section (e)(3), second sentence, concludes with the phrase "unless the parties agree that the case may be reassigned in accordance with local rules." This phrase is unnecessary and unwise in that only the presiding judge of the administrative region should be able to assign a judge to hear a recusal and to assign a judge to hear a matter where a judge has been recused or disqualified. This phrase invites proposals to circumvent the authority of the administrative judge.

9. The last sentence of Section (e)(3) begins with the phrase "not withstanding any local rule or *other law*". Enacting these rules does not supersede statutes passed by the House, the Senate and signed by the Governor.

10. Also regarding Section (e)(3), I would point out [Judge Walker

does not agree] that case law indicates that a court may first, before recusing himself, or declining to do so and referring the case, hold a hearing to determine whether or not to recuse himself (as opposed to a hearing on the merits) and this is not reflected in this paragraph. See *In Re: Rio Grande Valley Gas Co.*, 987 S.W.2d @ 179 (Corpus Christi) 1999. Per Judge Walker, "The Corpus Christi court basically let the fox determine the need for security in the henhouse."

11. With regard to Section (e)(4), first "(a)", this revision should either encompass Texas Civil Practice and Remedies Code § 30.016, or it shouldn't address it at all.[1] Nevertheless, the phrase "against a judge" in the first sentence of this portion should be deleted because the intent of Texas Civil Practice and Remedies Code § 30.016 is to limit the number of the motions of recusal in a *case*, not recusals against a single *judge*. Further, we believe that the word "sanctioned" in this sentence should be changed to "denied". An attorney could file numerous recusal motions which may be denied but the judge, for whatever reason, may determine that it was not worthy of a sanction.

12. With regard to Section (e)(4), second "(a)", what is a "*conventional* trial"?

13. With regard to Section (e)(6), the first sentence, third line, should be changed from "the judge assigned to the case shall" to "the judge assigned to hear the case *on the merits* shall".

14. With regard to Section (e)(7), the second sentence, which presently begins with "the presiding judge must promptly give notice to..." should read "the presiding judge shall refer the matter to the clerk of the court who must promptly give notice...". Further, with regard to the third sentence of that paragraph, it should be recalled that this hearing is an evidentiary hearing and appearance by telephone and the use of fax or electronic copies may be impracticable. Further, the last sentence of that section, which reads "the judge who hears the motion must rule within three days of the last day of the hearing", should be changed to "the judge who hears the motion must rule within three days of the last day of the hearing, excluding weekends and holidays.

15. With regard to Section (e)(8), "statutory magistrate" should be added to the last sentence of this section, since if they are recused or disqualified, the district court will need to appoint a replacement.

16. With regard to Section (e)(11), the word "solely" should modify the word delay in section (e)(11)(a) and the words "or harassment" should be inserted after "delay".

17. With regard to Section (e)(11)(b), "against a judge" should be removed because, again, the intent of the § 30.016 addresses three motions to recuse in a case by a single party, not three against a single *judge*. Please also recall our general statement about whether or not the rule should address the civil procedure rule at all if it's not going to address it with uniformity.[1]

The case citations in the letter are in a short hand version. Thank you for your consideration of these observations.

Sincerely,

Bob McCoy Jeff Walker

[1] § 31(b) of the Texas Constitution reads "The Supreme Court shall promulgate rules of civil procedure for all courts no inconsistent with the laws of the state as may be necessary...."
§ 22.004 of the Government Code reads "(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant...." and subsection (c) reads "So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed."

5

Revised Draft

PROPOSED REVISIONS

TEXAS RULES OF APPELLATE PROCEDURE

Rules Committee, Appellate Section, State Bar of Texas

(Pamela Stanton Baron, Chair; Diana L. Faust; Stacy R. Obenhaus)

Introduction

The appellate rules committee of the Appellate Section undertook, beginning in the fall of 1999, to solicit comments on the new Texas Rules of Appellate Procedure, which took effect in September 1997. The committee solicited comments through notices in the Appellate Advocate and on the section web-site, as well as through letters to court attorneys and local bars through the section liaisons. The committee has received eleven sets of written comments (copies of which are attached to this report), as well as a few generated by telephone calls or by the committee itself (these latter comments are reflected only in the attached summary). The comments address approximately twenty rule sections.

The comments, for the most part, are directed to small problems with the rules that have only been discovered when particular circumstances are presented. The absence of larger complaints tends to suggest that the appellate rules are working quite well.

This report summarizes the comments received, sorts the comments by rule number, and identifies the source of the comments. It does not undertake at this time to recommend whether changes should be made to the appellate rules in response to the comments. It is the committee's understanding that the committee and the Subcommittee on the Texas Rules of Appellate Procedure of the Supreme Court Advisory Committee, chaired by Professor Bill Dorsaneo, will undertake to make recommendations as a joint project of the two committees.

The chair would like to thank the two committee members, Stacy Obenhaus and Diana Faust, for their work on this project. Stacy Obenhaus deserves special recognition for serving as reporter.

Report of Combined Committee

Representatives of the Subcommittee on the Texas Rules of Appellate Procedure and of the Rules Committee, Appellate Section, (the "Combined Committee") State Bar of Texas met on August 11, 2000 and respectfully submit the following report.

William V. Dorsaneo, III

Chair, SCAC TRAP Subcommittee

Rule 9.5

Service

(a) *Service of All Documents Required.* At or before the time of a document's filing, the filing party must serve a copy on all parties to the appeal or review. But a party need not serve a copy of the record.

Proposed change

By: John Gsanger

Rule 52.7 or rule 9.5 should require that the relator in an original proceeding serve on all real parties in interest a copy of the record filed with the appellate court in that proceeding. First, the record in an original proceeding is usually brief and, by definition, it is relevant. Second, the relator is typically the only party who has ordered a reporter's record of the relevant proceedings. Third, the record may contain affidavits not on file with the lower court. Fourth, courts working to expedite the disposition of an original proceeding will frequently limit access to the record so that it cannot be checked out.

Combined Committee recommendation

Amend Rule 9.5 (a) by adding "except in an original proceeding." Alternatively, amend Rule 52.7 to require the relator to file an additional copy or copies of the record so that other parties can have access to the record without interfering with the work of the appellate court.

Rule 10.1(a)(5)

Contents of Motions; Response

(a) *Motion*. Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

. . .

(5) in civil cases, contain or be accompanied by a certificate stating that the filing party conferred, or made a reasonable attempt to confer, with all other parties about the merits of the motion and whether those parties oppose the motion.

Proposed change

By: Pamela Stanton Baron, Stacy Obenhaus

Rule 10.1 (a)(5) or rule 49 should state that a certificate of conference is not required for the motion for rehearing. The motion for rehearing is really a brief on the merits, and no court appears to require the certificate anyway.

Combined Committee recommendation

Amend Rule 10.1 (a) (5) by adding the following sentence. "A certificate of conference is not required for a motion for rehearing."

Rule 11

Amicus Curiae Briefs

. . . An amicus brief must:

(a) comply with the briefing rules for parties; . . .

Proposed change

By: Stacy Obenhaus

Rule 11 should state that the amicus brief should comply with the rules for papers generally (rule 9) and that in terms of content the brief need contain nothing more than a table of contents, an index of authorities, a statement of interest (as provided in subsections (b) and (c) of rule 11), and an argument. It could provide that the amicus may include any other matters required by rule 38.1 for an appellant's brief.

Combined Committee recommendation

The current general language of Rule 11 is sufficient as written.

Rule 13.1

Duties of Court Reporters

The official court reporter or court recorder must:

(a) attend court sessions and make a full record of the

proceedings unless excused by agreement of the parties;

(b) take all exhibits

Proposed suggestions

by F. Scott McCown

Judge, 345th District Court

Travis County, Texas

Rule 13.1(a), as written, seems to require a record to be made of everything unless on the record people say they don't want a record. At the time the rule was adopted, trial judges were assured that the new rule was not intended to require court reporters to make a full record of all proceedings absent an agreement made on the record excusing what the rule literally requires. "The original purpose of the rule was to do away with the need for lawyers to make a 'super request' to get the court reporter to record voir dire or opening statments." "I think we need to suggest to the Court an amended version to do only what was intended." McCown letter to Babcock dated 12/23/99. *See Polasek v. State*, 16 S.W.3d 82.

Combined Committee recommendation

Amend Rule 13.1 to state

The official court reporter or court recorder must:

(a) attend court sessions and make a full record of the proceedings

when requested by the court or any party to the case.

Rule 18

Mandate - Issuance

The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed when one of he following periods expires: . . .

Proposed change

By: Stacy Obenhaus

Rule 18 should require that when the mandate issues the appellate court clerk must mail a copy of the mandate to all counsel of record. The date the mandate issues is an important date for the parties. In cases where a judgment has been superseded, immediate notice that the court has issued the mandate is arguably as important as immediate notice of the opinion, judgment, or order on motion for rehearing.

Combined Committee recommendation

Amend Rule 12.6 to provide that ". . . the clerk of an appellate court must promptly send a notice of any judgment, mandate or other court order to all parties to the proceeding." Also amend Rule 18.1 to state that: "The clerk . . . must issue a mandate in accordance with the judgment and send it to all parties to the proceeding and to the clerk of the court to which it is directed when one of the following periods expire:

Rule 25.1(d)

Contents of notice.

The notice of appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to appeal;

(4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts;

(5) state the name of each party filing the notice; . . .

Proposed changes

By: Carlos Mattioli

Rule 25.1(d) might require that the notice of appeal list the names of all parties against whom the appellant intends to appeal. In most cases, the appellant will wish to appeal against all parties, and can simply state so. However, in some cases, not all parties in the trial court need be named as parties or required to participate in the court of appeals.

For instance, our firm represented a defendant in a case in which the trial court granted our client a directed verdict. After the jury rendered judgment against remaining defendants, appeal was taken by a co-defendant. Neither in the trial court, nor on appeal were any issues raised or briefed against the directed verdict granted to our client. The court of appeals did not schedule a briefing deadline as to our client like it did with all other remaining parties. After briefs were filed by the appellant, we moved to dismiss our client from the appeal. Only after this motion was filed did the appellant claim the directed verdict was improper as to our client.

Although there is an appellate remedy, a lot of the court's and client's resources could have been conserved if the appellant was required to state in its notice which parties it intends to appeal against (using a good faith standard).

By: Brenda Norton/Lily Pleitez

The rule might require that a party attach to the notice of appeal a copy of the order or judgment being appealed. If there is a timeliness issue, the clerk's office normally has to ask the trial court clerk for a copy of the judgment before determining whether the appeal is timely filed.

Combined Committee recommendation

The rule should not be amended to complicate the notice of appeal process.

Rule 25.2(b)(3)

(b) *Form and sufficiency of notice.*

(3) But if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:

(A) specify that the appeal is for a jurisdictional defect;

(B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or

(C) state that the trial court granted permission to appeal.

Proposed change

By: Brenda Norton/Marilyn Houghtalin

The rule should be amended to resolve the split of authority among courts of appeals with regard to whether an appellant sentenced pursuant to a plea bargain must obtain the trial court's permission to appeal voluntariness of the plea.

Combined Committee recommendation

Judge Paul Womack has advised that the question of whether an appellant sentenced pursuant to a plea bargain must obtain permission from the trial judge to appeal the voluntariness of the plea is before the Court of Criminal Appeals in *Terry Wayne Cooper v. State*, No. 1100-99, which should be decided after the Court's summer recess ends. Whether the appellate rule needs amendment should be clearer after that decision. Chief Justice John Cayce of the Fort Worth Court suggests the following amendment to Rule 25.2(b)(3) :

(A) . . .

(B) . . .

(C) specify that the appeal concerns the voluntariness of a plea bargain; or

(D) state that the trial court granted permission to appeal.

Rule 26.1(a)(4)

Time to Perfect Appeal: Civil Cases.

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

. . .

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure of, if not required, could properly be considered by the appellate court; . . .

Proposed change

By: Buddy Hanby

Rule 26.1(a)(4) should provide that a timely request for findings extends the time regardless of whether findings are appropriate in a particular case. The amendment would eliminate a trap and would make subdivision (a)(4) consistent with the principle that a timely motion for new trial or motion to modify imposes a 90-day time period no matter how poorly worded or frivolous and no matter how trivial the modification requested.

Combined Committee recommendation

Amend Rule 26.1(a)(4) to state:

(4) a request for findings of fact and conclusions of law even if findings and conclusions are not proper or required by the Rules of Civil Procedure.

As an alternative, the Combined Committee recommends that Rules 26.1 and 35 be amended to state:

26.1 Civil Cases.

(a) Ordinary appeals. In an ordinary appeal, a notice of appeal must be filed within 90 days after the judgment is signed.

(b) Accelerated appeals. In an accelerated appeal the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) Restricted appeals. In a restricted appeal the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) Notice of Cross-appeal. If any party timely files a notice of appeal, another party may file a notice of appeal within the applicable time period stated above or 14 days after the first filed notice of appeal, which ever is later.

Rule 35 Time to File Record; Responsibility for Filing Record.

35.1 Civil Cases. The appellate record must be filed in the appellate court:

(a) if Rule 26.1(a) applies, within 120 days after the judgment is signed.

(b) if Rule 26.1(b) applies, within 10 days after the notice of appeal is filed; or

(c) if Rule 26.1(c) applies, within 30 days after the notice of appeal is filed.

The Combined Committee believes that there is no good reason to retain two appellate timetables. Originally, the trial court and appellate timetables were connected. This has not been the case for some time. If this change is approved Tex. R. Civ. P. 329b(g) will also require amendment.

Rule 29.5

Further Proceedings in Trial Court

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and may proceed with a trial on the merits . . .

Proposed change

By: Buddy Hanby

Rule 29.5 should be amended to eliminate the provision allowing a trial on the merits during the pendency of an appeal of an interlocutory order. That provision conflicts with the statute on interlocutory appeals, which provides: "An interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal." Tex. Civ. Prac. & Rem. Code Ann. § 51.014(b).

Committee recommendation

Amend Rule 29.5 to state:

"While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits."

Add in the Comment to 2000 change a reference to Tex. Civ. Prac. & Rem. Code § 51.014(b) which prohibits commencement of trial on the merits only in the type of cases covered by subsection (a) of Tex. Civ. Prac. & Rem. Code.

Rule 33.1

Preservation of Appellate Complaints

(a) *In General.* As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that . . . (A) stated the grounds for the ruling . . . and (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure . . .

Proposed change

By: El Paso Court of Appeals

Rule 33.1 should be harmonized with rule 324b of the Texas Rules of Civil Procedure, for the reasons discussed in *Wyler Industrial Works, Inc. v. Garcia*, 999 S.W.2d 494, 505-06 & n.8 (Tex. App.--El Paso 1999, n.p.h.). The rule should also state whether an objection to the trial court's findings of fact is required to preserve any legal and factual sufficiency challenge to such findings. Language from the prior rule obviating the need to object to preserve these errors in a nonjury trial was deleted in the 1997 amendments.

Combined Committee recommendation

At a minimum, the Combined Committee recommends that Rule 33 be amended by adding the last sentence of former Appellate Rule 52(d) as a separate paragraph in subdivision 33.1 as follows:

(d) Sufficiency of evidence complaints in nonjury cases. A party desiring to complain on appeal in a nonjury case that the evidence is not legally or factually sufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court is not required to present the complaint in the trial court to preserve it for appellate review.

Add a Comment to 2000 change stating that the last sentence of former Appellate Rule 52(d) has been reinstated to clarify the procedure for preserving evidentiary review complaints in nonjury cases.

A more comprehensive report concerning Appellate Rule 33 is being prepared by Professor Dorsaneo. This report will also deal with the relationship of Evidence Rule 103 to Appellate Rule 33.1(a).

Rule 34.6(f)

Reporter's Record

(f) *Reporter's Record Lost or Destroyed.* An appellant is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or -- if the proceedings were electronically recorded -- a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the parties cannot agree on a complete reporter's record.

Proposed change

By: Diana Faust

The rule for the clerk's record (rule 34.5(e)) contains express language allowing the trial court to substitute copies or reproductions of lost or destroyed parts of the clerk's record, while the rule for reporter's record does not include this express language. With regard to exhibits that are part of the reporter's record, Rule 34.6(f) should contain language similar to this express language in rule 34.5 (e), thus allowing the trial court, when an exhibit is lost or destroyed, to "determine what constitutes an accurate copy of the missing [exhibit] and order it to be included in the [reporter's] record." Also, the comment to rule 34 should be revised to reflect the origin of rule 34.6(f) in former rule 50(e).

Combined Committee recommendation

Amend Rule 34.6(e) as follows:

(e) Defects or inaccuracies in the reporter's record.

(1) Correction by agreement. The parties may agree to correct any defect or inaccuracy in the reporter's record without the reporter's recertification.

(2) Correction by trial court. If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, the parties agree that the record is inaccurate but cannot agree on corrections to the reporter's record, or if an exhibit designated for inclusion in the reporter's record

has been lost or destroyed and the parties cannot agree on what constitutes an accurate copy of the missing item, the trial court must - after notice and hearing - settle the dispute. After doing so, the court must order the court reporter to correct the reporter's record by conforming the text of the record to what occurred in the trial court by adding an accurate copy of the missing exhibit, and to certify and file in the appellate court a corrected reporter's record or a supplement.

Amend rule 34.6 (f) by adding "and has not been corrected or replaced" after "has been lost or destroyed."

Rule 34.6(g)

Original Exhibits

(g) *Original Exhibits.*

(1) *Reporter may use in preparing reporter's record.* At the court reporter's request, the trial court clerk must give all original exhibits to the reporter for use in preparing the reporter's record. Unless ordered to include original exhibits in the reporter's record, the court reporter must return the original exhibits to the clerk after copying them for inclusion in the reporter's record. If someone other then the trial court clerk possesses an original exhibit, either the trial court or the appellate court may order that person to deliver the exhibit to the trial court.

Proposed change

By: Buddy Hanby

It is not clear whether this rule **and Rule 34.5(f)** apply to original exhibits in a mandamus proceeding. The court reporter and court clerk should be subject the same limitations protecting original exhibits when preparing the record in mandamus proceedings as they are in preparing a record in a regular appeal. The court should also have the same power in such an instance to obtain original documents held by someone other than the trial court clerk.

Combined Committee recommendation

The Combined Committee believes that Rule 34.5 (f) does not apply to original exhibits in a mandamus proceeding. The subject is, however, covered by Civil Procedure Rule 75b, which probably should be amended to correspond with Appellate Rule 34.5(f). *See* Tex. R. Civ. P. 75b(b).

Rule 35.3

Time to File Record;

Responsibility for Filing Record

(c) *Courts to Ensure Record Timely Filed.* The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed . . . The appellate court may enter any order necessary to ensure the timely filing of the appellate record.

Proposed changes

By: Brenda Norton, on behalf of court attorneys of Dallas Court of Appeals

The rule should provide a specific, concrete procedure for contempt actions against clerk's and court reporter's who fail to obey the appellate court's orders to prepare and file a record. The rule should give the court power to impose a monetary sanction or assess costs for the court's expenses in taking the action.

Combined Committee recommendation

The Combined Committee believes that no change is needed.

Rule 38.1

Appellant's Brief

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel.

Proposed changes

By: Brenda Norton

The rule should require the brief to provide the names of all judges entering the orders that are the subject of the appeal, and all judges before whom hearings were held in the case. This is especially important with the increased use of visiting judges. The docket sheet only lists the judge who signed the final judgment or appealable order. It is common to have visiting judgment entering other orders in a case, and these orders may also be the subject of the appeal. These visiting judges may also work for the appellate court or be related to one of the justices.

Similar revisions might be in order with regard to rules 53.2(d)(2) and 55.2(d)(2).

Combined Committee recommendation

The Combined Committee believes that no action is needed.

Rule 38.1 (e)

Issues presented

(e) *Issues presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

Proposed change

Amend the appellate briefings rules prescribing the form for issues and providing examples.

Combined Committee recommendation

No change is needed at this time.

Rule 38.1

Appellant's Brief

(h) *Argument*. The brief must contain a clear and concise argument . . .

Proposed change

By: Stacy Obenhaus

The rule should state that parties may join in a brief and that any party may adopt by reference a part of another party's brief, as under federal practice. *See* Fed. R. App. P. 28(i). This probably should apply not just to the argument, but also to the statement of issues, statement of the case, statement of facts, summary of argument, and prayer for relief. It is particularly important with respect to the argument, however, as case law exists to the effect that failure to brief a point constitutes a waiver.

Combined Committee recommendation

Amend Rule 38 by adding the following new subdivision.

38.10 Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

In the Comment to 2000 change, identify the source as Fed. R. App. P. 28 (h).

Rule 38.6

Time to File Briefs

(d) *Modifications of filing time.* On motion complying with Rule 10.5(b), the appellate court may extend the time for filing the appellant's brief and may postpone submission of the case. A motion to extend the time to file the brief may be filed before or after the date the brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.

Proposed changes

By: Brenda Norton, on behalf of court attorneys of Dallas Court of Appeals; Stacy Obenhaus; Brenda Norton/Lisa Rombok

Rule 38.6 needs to state whether and on what terms the court of appeals may grant an extension of time for the filing of the appellee's principal brief or the appellant's reply brief. Most courts of appeals entertain such motions anyway, and there are even local rules addressing this gap in the rules. *See* Fifth Ct. App. Local R. 6. The amended rule could simply authorize the court to grant an extension of time for any principal or reply brief.

The rule might also clarify how the deadlines apply in cross-appeals, or state that the same deadlines apply for anyone who is an "appellant" and anyone who is an "appellee." Some clerks have difficulty determining the deadlines for filing of briefs in cross-appeals.

Combined Committee recommendation

The part of the proposed revision concerning extensions of time has been approved by the SCAC. The proposed change substitutes the word "briefs" for the words "the appellant's brief" in Rule 38.6 (d). Chief Justice John Cayce suggests that we should consider following federal practice concerning who is an appellant/appellee. See Fed. R. App. P. 4(a)(3) and 28(h). ("If a cross-appeal is filed, the party who files a notice of appeal first is the appellant . . . If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order . . ."). He reports that the Fort Worth Court allows appellees who also seek some additional relief to proceed by cross-point, as under our former practice, assuming that they have filed a notice of appeal.

Rule 43.2

Types of Judgment

The court of appeals may:

(a) affirm the trial court's judgment in whole or in part;

(b) modify the trial court's judgment and affirm it as modified;

(c) reverse the trial court's judgment in whole or in party and render the judgment that the trial court should have rendered;

(d) reverse the trial court's judgment and remand the case for further proceedings;

(e) vacate the trial court's judgment and dismiss the case; or

(f) dismiss the appeal.

Proposed suggestion

By: John Gsanger

Rule 43.2 lacks an efficient means for disposing of cases that have settled on appeal. Generally, I have had to request an abatement of the appeal and a remand of the cause of action for entry of an appropriate judgment followed by a motion for dismissal of the appeal after the trial court has entered judgment. Rule 43.2 should be amended to allow for entry of an agreed judgment, but this change should not undermine the purpose of the last sentence in rule 56.3.

By: Diana Faust

A similar problem arises with respect to motions to vacate a trial court judgment by the parties' agreement prior to submission. Whereas the Dallas court of appeals will do so (under authority from 42.1(a)(1) and 43.2(e)), the Amarillo court will not. Rather, it requires that the case first have been submitted. *Compare Boeing North American Servs., Inc. v. FBN Investments, Inc.*, 1999 WL 893923 (Tex. App. -- Dallas 1999) (no publication), with *Nordyke v. Bird*, 1999 WL 1133404 (Tex. App. -- Amarillo 1999) (no publication). Then the court reverses the case (on an agreed motion) and sends it back down to the trial court, where the parties can subsequently file a motion for dismissal.

Combined Committee recommendation

After much discussion the Combined Committee believes that Rules 42 and 43 need to be amended to clarify that the courts of of appeals do have authority to vacate a trial court's judgment and remand a case for rendition of judgment pursuant to a settlement. Pamela Stanton Baron is preparing a report on this subject to determine the best way to resolve this dilemma.

Rule 46.5

Voluntary Remittitur

If a court of appeals reverses the trial court's judgment because of a legal error that affects only party of the damages awarded by the judgment, the affected party may--within 15 days after the court of appeals' judgment--voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment. If the remittitur is timely filed and the court of appeals determined that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

Proposed changes

By: Steven L. Hughes

The problem with the rule is that the deadline for filing the voluntary remittitur--15 days from judgment--is also the deadline for filing a motion for rehearing. Consequently, the rule forces the affected party either to file a motion for rehearing to convince the appellate court it was wrong--and thereby forego any voluntary remittitur--or to file the voluntary remittitur and moot a motion for rehearing on the issue for which the court ordered remittitur.

It's possible that the rules contemplate by implication that in this situation one may file a *conditional* remittitur, one that does not moot a point in a motion for rehearing on the issue for which the court ordered remittitur. If so, the supreme court should amend the rule so as to authorize that expressly rather than by implication.

Alternative solution: amend the rule to allow a voluntary remittitur to be filed after a motion for rehearing has been filed and ruled upon by the court. A 15-day time period would allow the party sufficient time to make the decision, and would give the court of appeals ample time to make any adjustment to its judgment before the mandate is schedule to issue. *See* Tex. R. App. P. 18.1. If the motion for rehearing is denied, the party could then file the voluntary remittitur to avoid remand. The remittitur would moot the issue. The supreme court (if it has jurisdiction) would not be bothered with the issue, and the trial court would not be forced to retry the case.

At any rate, before having to resort to remittitur, a party should at least have the chance to point out to the court of appeals any error in the court's decision.

Combined Committee recommendation

Amend Rule 46.5 to state:

Rule 46. Remittitur in Civil Cases

46.5 Voluntary Remittitur. If a court of appeals reverses a trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may - within 15 days after the court of appeals' judgment - voluntarily remit the amount that the court of appeals determined should not have been awarded by the judgment by including a request for acceptance of such a remittitur in a motion for rehearing and requesting an affirmance of the trial court's judgment.

Rule 47.7

Unpublished Opinions

Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.

Proposed change

By: Carlos Mattioli

Clarify that unpublished opinions can be cited but are not precedent. The rule does not clearly preclude such use. Although sound reasons may exist for not publishing an opinion, appellate courts are public resources and are discharging a public duty in each opinion, published or not. Some unpublished opinions contain very persuasive analysis that can be a valuable resource to other courts. While the precedential value of unpublished opinions can remain restricted, I really do not see why an unpublished opinion could not be used as persuasive, although not binding, authority (much like out of state cases, treatises, etc.).

Combined Committee recommendation

Amend Rule 47.7 to state:

"Opinions not designated for publication by the court of appeals have no precedential value but may be cited as persuasive authority by counsel or by a court."

Rule 49.10

Length of Motion for Rehearing and Response

(Court of Appeals)

A motion or response must be no longer than 15 pages.

Proposed change

By: Pamela Stanton Baron

Page limits set out by this rule should exclude certain parts of the motion such as table of contents, index of authorities and certificate of service. In short, the rule on motions for rehearing should parallel the rule on briefs with respect to how one calculates the number of pages.

Combined Committee recommendation

Amend Rule 49.10 to state:

"A motion or response must be no longer than 15 pages, exclusive of pages containing the table of contents, the index of authorities, the issues presented, the signature, the proof of service, and the appendix."

Rule 52.7

Record (mandamus)

(a) *Filing by relator required.* Relator must file with the petition:

(1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and

(2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.

Combined Committee recommendation

Amend Rule 9.5 (a) by adding "except in an original proceeding." Alternatively, amend Rule 52.7 to require the relator to file an additional copy or copies of the record so that other parties can have access to the record without interfering with the work of the appellate court.

Rule 55.2

Briefs on the Merits

(e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.

Proposed change

By: Stacy Obenhaus

Change the word "petition" to the word "brief."

Combined Committee recommendation

Rule 55.2 (e) should be changed to state:

"The brief must state, without argument, the basis of the Court's jurisdiction."

Rule 64.6

Length of Motion for Rehearing and Response

(Supreme Court)

A motion or response must be no longer than 15 pages.

Proposed suggestion

By: Pamela Stanton Baron

Page limits set out by this rule should exclude certain parts of the motion such as table of contents, index of authorities and certificate of service. In short, the rule on motions for rehearing should parallel the rule on briefs with respect to how one calculates the number of pages.

Combined Committee recommendation

Amend Rule 64.6 to state:

"A motion or response must be no longer than 15 pages, exclusive of pages containing the table of contents, the index of authorities, the issues presented, the signature, the proof of service, and the appendix."

SOUTHERN METHODIST UNIVERSITY

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

MEMORANDUM

To: Chip Babcock, SCAC Chair
From: Bill Dorsaneo
Date: November 2, 2000
Re: Revised Rules of Appellate Procedure

Here are the revised Rules of Appellate Procedure considered by the Advisory Committee on October 20, 2000. Appellate Rule 47, Opinions and Publication, is not included because draft revisions of that rule have already been circulated.

I assume that the remainder of the Proposed Revisions, Texas Rules of Appellate Procedure, included in the 1st Revised Agenda for the October 20-21, 2000 SCAC meeting, together with a few additional matters that surfaced after the preparation of the report, will be on the November agenda. Please advise if this is so at your earliest convenience because it will be necessary for the Appellate Rules Subcommittee to meet to consider the new matters before the full committee meeting.

I estimate that these matters will not require more than 2 hours of SCAC time.

cc: Chris Griesel, Rules Attorney

School of Law
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214-768-2626 Fax 214-768-4330 wdorsaneo@mail.smu.edu

MEMORANDUM

To: Chip Babcock, SCAC Chair

From: Bill Dorsaneo

Date: January 10, 2001

Re: Proposed TRAP Revisions Discussed but Not Finished at November Meeting

Sent Via email

The SCAC Appellate Rules Subcommittee met by telephone conference call on Monday, January 8, 2001. As a result of the conference the attached proposal for revision of TRAP 9, by adding a new subdivision 9.7 based largely on Fed. R. App. P. 28(i), was approved by a majority of the subcommittee. During the same conference, a number of revisions were made in proposed redrafts of TRAP Rules 34.6(e), 34.6(f) and 46.5 These matters are now ready for consideration by the full SCAC.

This memorandum supersedes the one provided to you earlier, dated January 5, 2001.

cc: All SCAC members

Proposed TRAP Changes (1/9/01)

Changes to TRAP Rule 9

Amend TRAP Rule 9 by adding the following new subdivision:

Rule 9.7 *Adoption by Reference; Cases Involving Multiple Parties.* In a case involving more than one appellant, appellee, relator or respondent, including consolidated cases, any number of appellants, appellees, relators or respondents may join in a brief, petition, response, motion or other document filed in an appellate court, and any party may adopt by reference a part of another's brief, petition, response, motion or other filed document.

Changes to TRAP 34.6(e)

Amend TRAP Rule 34.6(e) as follows:

(e) *Inaccuracies in the Reporter's Record*

(1) *Correction of inaccuracies by agreement.* The parties may agree to correct an inaccuracy in the reporter's record without the court reporter's recertification.

(2) *Correction of inaccuracies by trial court.* If the parties dispute whether the reporter's record accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the reporter's record, or if the accuracy of an exhibit designated for inclusion in the reporter's record is disputed and the parties cannot agree on what constitutes an accurate exhibit, the trial court must - after notice and hearing - settle the dispute. After doing so, the court must order the court reporter to ~~conform~~ correct the reporter's record by conforming the text of the record to what occurred in the trial court or by adding an accurate

copy of the exhibit, and to certify and file in the appellate court a corrected reporter's record or a supplement.

(3) *Correction after filing in appellate court.* If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then ensure that the reporter's record is made to conform to what occurred in the trial court.

Changes to TRAP Rule 34.6(f)

Amend TRAP Rule 34.6(f) as follows:

(f) *Reporter's Record Lost or Destroyed* An appellant is entitled to a new trial under the following circumstances:

(1) If the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or - if the proceedings were electronically recorded - a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

~~(4) if the parties cannot agree on a complete reporter's record~~

(4) if the parties cannot agree on replacement of the lost, destroyed or inaudible portion of the reporter's record, or cannot agree on replacement of any lost or destroyed exhibit and the missing exhibit or exhibits cannot be replaced with copies that are determined to accurately duplicate the original exhibits with reasonable certainty by the trial court or the court of appeals.

Changes to TRAP Rule 46.5

Rule 46.5 *Voluntary Remittitur.* If a court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may - within 15 days after the court of appeal's judgment - voluntarily remit the total amount ~~that the court of appeals' determined should not have been awarded by the judgment~~ of the damages affected by the error.

A motion for rehearing may include a conditional request for acceptance by the court of appeals of a voluntary remittitur and an affirmance of the trial court's judgment as reduced by the remittitur, without waiving the movant's complaint that the court of appeals erred in ruling that a reversible error was committed in the court below. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the remittitur must be accepted and the trial court judgment affirmed.

NOTE TO SCAC APPELLATE RULES SUBCOMMITTEE MEMBERS

After our telephone conference, I checked to see whether Appellate Rule 46 actually revised former Appellate Rule 85 "without substantive change" as stated in the comment to Appellate Rule 46. I determined that it did not do so. Former Appellate Rule 85(e) was worded differently, as shown below, and the unintentional change, made sometime after the SCAC recommended changes in the appellate rules to the Court, make the current subdivision meaningless, i.e. not essentially different from Appellate Rule 46.2-3.

(e) Voluntary Remittitur. If a case appealed to the court of appeals is reversed because of an error of law that affects only part of the damages or judgment, the affected party may voluntarily remit such amount within 15 days after the court's opinion or judgment. If such remittitur is filed and the court of appeals is of the opinion that such voluntary remittitur cures the reversible error, then such remittitur shall be accepted and the cause affirmed.

SOUTHERN METHODIST UNIVERSITY

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

MEMORANDUM

To: Texas Rules of Appellate Procedure SCAC Subcommittee:

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Hill Gilstrap
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From: William V. Dorsaneo, III

Date: August 31, 2000

Re: Miscellaneous Proposals

At our August 25-26 meeting Justice Hecht provided me with the following material concerning the Texas Rules of Appellate Procedure:

1. Letter from Dave's Bar Association dated June 15, 2000 concerning TRAP 9.2.

2. Memorandum (anonymous) containing questions/suggestions received from the 2d, 10th and 14th court of appeals.

3. Eighth Circuit opinion in Anastasoff v. United States of America concerning unpublished opinions and declaring 8th Circuit Rule 28A(i) unconstitutional under Article III of the Constitution.

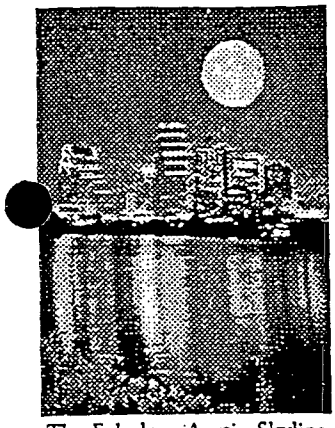
Also please consider the following communication on various subjects.

4. Letter from Paul Womack dated August 25, 2000 concerning TRAPs 9.5(a) and 13.1 (a).

5. Email messages from Justice Hecht concerning the August 24, 2000 report of the Combined Committee.

We need more work to be done on these matters, particularly on unpublished opinions. I am asking Frank Gilstrap to prepare a memorandum on this subject.

WVD/sam
Attachments



The Fabulous Austin Skyline

Dave's Bar Association

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June 15, 2000

Hon. Tom Phillips, Chief Justice
Texas Supreme Court
201 West 14th Street, Room. 104
Austin, Texas 78701

Hon. Mike McCormick, Presiding Judge
Texas Court of Criminal Appeals
201 West 14th Street, Room 106
Austin, Texas 78701

Re: Defects in Rule 9.2, Texas Rules of Appellate Procedure / Proposed Rule Changes

Dear Chief Justice Phillips and Presiding Judge McCormick:

Recent discussions between members of Dave's Bar Association has brought to light two defects in Rule 9.2 of the Rules of Appellate Procedure, the so-called "Mailbox Rule." That Rule, as you are aware, dates to at least the early 19th century, see *Adams v. Lindsell*, 106 ER 250 (K.B. 1818), and provides that a document is effectively delivered upon being deposited into the mail. For purposes of modern practice and integration of the principles of ancient practice, we are respectfully suggesting that the Courts consider two modifications to the Rule.

I

The more modern problem has been created by the use of postage meters, and now, the availability of Internet postage. As it most commonly affects documents filed by mail, the Texas version of the Rule provides that "a legible postmark affixed by the United States Postal Service" may be considered proof of timely mailing. Uniformly, Texas Courts have declined to treat mail bearing metered postage as timely mailed, absent a separate post-mark applied by the U.S. Postal Service. More recently, our Courts have been faced with letters which are ostensibly mailed in a timely fashion, but which bear postage purchased from Internet postage companies such as "e-stamp," "stamps.com" and "Pitney-Works," part of the Pitney Bowes company. There may be others, but their functions are not noticeably different from these three. It appears that the appellate courts are treating Internet postage in the same fashion they have treated metered postage.

?15 miles from the Clerk of the El Paso Court of Appeals and approximately 450 miles from the Clerks of your ourts. When needing to file a document with an appellate court, such practitioner is forced to use the Postal Service, but is also forced to do so at the risk that the document could be lost in the mail. This problem is not just limited to rural areas, but applies to many cases, for example, in Dallas and Houston when an appeal is transferred from the local appellate court to distant Courts of Appeals.

We suggest that the Courts modify Rule 9.2(b), governing filing by mail, by adding a subsection "3" which reads as follows:

(b) Filing by mail.

* * *

(3) Document not received within ten days: When a document filed under these rules is not received within ten days after the applicable filing date, the reviewing court shall permit the filing of a replacement document when:

(A) there is a sworn motion by counsel of record which states that:

(i) the original document was time filed pursuant to section (b)(1); and

(ii) the replacement document is an exact duplicate of the lost document, and

(B) such motion is accompanied by one of the forms of proof of mailing set out in section 2, or is accompanied by a written statement by opposing counsel that states that the opposing party timely received a copy of the document.

Because the distance between many Texas cities and the appellate court with which a practitioner must deal is so great, we respectfully recommend that the Courts considered the proposed addition to Rule 9.2 of the Appellate Rules. We also recommend the adoption of similar provisions to cover U.S. Postal Service filings of documents governed by the Rules of Civil Procedure and Code of Criminal Procedure.

Sincerely,

David A. Schulman, Director
Dave's Bar Association

DAS/hc

Bob, here are some of the questions/suggestions I received. Please try to include these in your discussion. Thanks, Karen (by the way, congratulations on your new job).

FROM THE 10TH COURT OF APPEALS:

1. Some trial court clerks don't notify us when a notice of appeal has been filed in civil cases. (Sometimes months pass before we discover that an appeal has been perfected) Most follow the same procedure they use in criminal cases (as provided by TRAP 25.2(c)). Rule 25.1(e) says a copy of the civil notice of appeal must be filed with the appellate court, but it doesn't really say who bears that responsibility, although the tenor of the rule suggests the burden is on the party filing the notice. Rule 25.1(a) requires the appellate court to "immediately" send a copy of a notice of appeal to the trial court clerk if it is mistakenly filed with the appellate court. We wonder if there ought to be:

a. a concomitant responsibility for the trial court clerk to send a copy to the appellate court similar to that provided for criminal cases; or

b. a direct statement that the party filing the notice must file a copy with the appellate court.

We would prefer "a." because problems usually arise in cases where the appellant's attorney is not taking care of business as he should.

FROM THE 2ND COURT OF APPEALS:

1. TRAP 20 (this rule is our most pressing problem)

Most of the time, indigency affidavits are filed by prose parties, who don't realize that their trial court affidavit doesn't extend into the appeal. The time to file it ("with or before the notice of appeal") is too soft. It seems there should be a set time (e.g., 10 days after NOA filed), which would also prevent unsuspecting parties from defaulting their appeal simply because they were concentrating on getting the NOA filed. Extra time would not harm any party because the date for filing a contest runs from the date the affidavit is filed. Further, with an inmate, the affidavit is taken as true at any contest hearing. What if the reporter or clerk merely challenges the affidavit on the basis that it does not meet the technical requirements of TRAP 20.1? Because a defective affidavit can be amended, where does that leave the trial court?

Also, what should the parties and the courts call the review of the trial court's indigency determination under *In re Arroyo*, Nos. 98-0152 & 98-0161, 1998 WL 716921 (Tex. Oct. 15, 1998) (orig. proceeding)? (Courts have used "a matter ancillary to the underlying appeal," "a prerecord motion," and "an interlocutory matter,").

2. PARENTAL NOTIFICATION: Should a copy of the court of appeals' judgment/opinion be sent to the trial court? Family Code section 33.04(c) does not list the trial court as receiving a copy of the judgment/opinion, although rule 1.4(b)(6) indicates a ruling or opinion may be released to the trial court. Also, does the Texas Supreme Court have any internal, non-

9. TRAP 43.4: Are costs also to be assessed in criminal cases, or does this rule implicitly direct that costs are not to be assess in criminal cases?

10. TRAP 47.5: Other than dissent to the denial of a motion for rehearing en banc (if one is filed), is there anything a non-panel member can do to publically show complete disapproval with a panel's opinion?

FROM THE 14TH COURT OF APPEALS:

1. Reporter's Records.

Amend rule 34.6(b). Appellant must request the reporter to prepare the record "[a]t or before the time for perfecting the appeal." A copy of the request must be filed with the trial court clerk, but not the appellate clerk. Consequently, this court does not know if the record has been requested or who the court reporter or reporters are. Harris County uses numerous substitute court reporters. Docketing statements sometimes provide this information, but no penalty for failure to file is included in the rules. Docketing statements are almost never filed in criminal cases. Particularly in criminal cases, our clerks must call various court reporters to locate which of the many substitutes may have reported various hearings, and the clerks must also determine whether payment has been made if the appellant is not indigent. Frequently, filing of the reporter's record may be delayed for several months due to lack of information or incorrect information. Accordingly, our staff proposes that the rule be amended as follows:

a. require appellant to file a copy of the request to the court reporter with the court of appeals within a specified period of time after the notice of appeal is filed (e.g., 15 days). The request must identify all court reporters, the dates testimony was taken, and state that payment, or satisfactory arrangements, has been made. An extension of time to file the record request should be permitted. If the request is not filed with the court of appeals, after notice and an opportunity to cure, the case will be submitted on the clerk's record alone.

b. Rule 34.6(b)(3) should be repealed. Requiring the court to accept the record even when no timely request has been made results in unnecessary delays in requests and preparation of the record.

2. Extensions for Appellee's Brief.

Modify rule 38.6(d) to include a provision for an extension of time for appellee's brief. This has not been a problem at our court as our court has continued to accept and rule on these motions. There is no reason not to make this simple change, however, to avoid confusion and promote more uniformity among the courts.

3. Reconsideration on PDR.

Modify rule 50 to permit the court of appeals to withdraw its opinion without having to issue a new one within 30 days. By the time our judges have reviewed the petition and determined they would like to change the opinion, the 30-day period has nearly elapsed. It

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3917EM

Faye Anastasoff,	*	
	*	
Appellant,	*	On Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Missouri.
United States of America,	*	
	*	
Appellee.	*	

Submitted: May 8, 2000
Filed: August 22, 2000

Before RICHARD S. ARNOLD and HEANEY, Circuit Judges, and MAGNUSON,[1] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Faye Anastasoff seeks a refund of overpaid federal income tax. On April 13, 1996, Ms. Anastasoff mailed her refund claim to the Internal Revenue Service for taxes paid on April 15, 1993. The Service denied her claim under 26 U.S.C. § 6511(b), which limits refunds to taxes paid in the three years prior to the filing of a claim. Although her claim was mailed within this period, it was received and filed on April 16,

[1]The Hon. Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

regulation was not cited in Christie, but the reasoning of the Christie opinion is squarely inconsistent with the effect taxpayer desires to attribute to the regulation.

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by Christie because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."

The Rule provides:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . ..

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Marbury v. Madison, 1 Cranch 137, 177-78 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991); Cohens v. Virginia, 6 Wheat. 264, 399 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the

from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government.[6] In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds.[7] By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself.[8] As Blackstone defined it, each exercise of the "judicial

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Private Law to 1750 428 (1986).

[6]Coke's struggle against the tyranny of the Stuarts, which the Framers identified with their own against King George, made him the legal authority most admired and most often cited by American patriots. Bernard Bailyn, The Ideological Origins of the American Revolution 30 (1967). Coke used precedent, and emphasized it to a greater degree than his predecessors, because it was his main weapon in the fight for the independence of the judiciary and limits on the king's prerogative rights. See Harold J. Berman and Charles J. Reid, Jr., The Transformation of English Legal Science: From Hale to Blackstone, 45 Emory L.J. 437, 450 (1996); J.G.A. Pocock, The Ancient Constitution and the Feudal Law 46 (1987). By contrast, the only criticism of the doctrine of precedent was associated with Thomas Hobbes, who regarded the authority of precedent as an affront to the absolute power of the Sovereign. See Thomas Hobbes, Leviathan 323-26 (Penguin ed. 1985).

[7]See, e.g., Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 595-602 (1987) (noting that the authority of precedent is commonly supported by arguments: (1) from fundamental fairness, i.e., that like cases should be treated alike; (2) from the need for predictability; and (3) as an aid to judicial decision-making, to prevent unnecessary reconsideration of established matters).

[8]Blackstone's great influence on the Framers' understanding of law is a familiar fact. See Schick v. United States, 195 U.S. 65, 69 (1904) ("At the time of the adoption

In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, Commentaries *258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions . . .." Id. at *259.

The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it.[10] Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case.[11] The Federalist No. 81, at 531 (Alexander Hamilton) (Modern Library ed., 1938). He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, juris dictio, or a speaking and pronouncing of the law," id., and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role

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[10]See Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in The Mind of the Founder: Sources of the Political Thought of James Madison 390, 390-93 (Marvin Meyers ed., rev. ed. 1981) (describing the "authoritative force" of "judicial precedents" as stemming from the "obligations arising from judicial expositions of the law on succeeding judges . . .."); James Wilson, II The Works of James Wilson 502 (1967) ("Judicial decisions are the principal and most authentick" proof of what the law is and . . . "every prudent and cautious judge will appreciate them [because] . . . his duty and his business is not to make the law, but to interpret and apply it." Id. See also Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 74 (1986); David M. O'Brien, Constitutional Law and Politics 73 (1995).

[11]James Wilson agreed: "judicium is quasi juris dictum . . . a judgment is a declaration of the law." II The Works of James Wilson 524 (1967).

difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents." Letter from James Madison to Samuel Johnson (June 21, 1789), in 12 Papers of James Madison 250 (Robert A. Rutland et al. eds., 1977). Although they drew different conclusions from the fact, the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases.[13] Finally, early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution. Grant Gilmore, The Ages of American Law 23 (1977); Peter Karsten, Heart Versus Head: Judge-Made Law in Nineteenth-Century America 28-32 (1997).

We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule, and they never drew that practice into question. Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states. Frederick G. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800-1850, 3 Am. J. Leg. Hist. 28, 34 (1959) (reviewing the history of American reports). As we have seen, however, the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. Although they lamented the problems

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[13]See, e.g., Essays of Brutus, XV (Mar. 20, 1788) in 2 The Complete Anti-Federalist, 441 (Herbert J. Storing ed., 1981): "one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them." By contrast, the danger in the Federal Farmer's view was that the federal courts had "no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion." Letters from The Federal Farmer No. 3 (Oct. 10, 1787), in 2 The Complete Anti-Federalist at 244.

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

III.

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published,

circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

IV.

For these reasons, we must reject Ms. Anastasoff's argument that, under 8th Cir. R. 28A(i), we may ignore our prior decision in Christie. Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. Willy v. Coastal Corp., 503 U.S. 131, 135 (1992). The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts "have always required a departure from precedent to be supported by some 'special justification.' " United States v. International Business Machines Corp., 517 U.S. 843, 856 (1996), quoting Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., concurring). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

PAUL WOMACK, JUDGE
COURT OF CRIMINAL APPEALS OF TEXAS

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August 25, 2000

William V. Dorsaneo III, Professor
School of Law
Southern Methodist University
Dallas, Texas 75275-0116

Dear Bill,

Thank you for the memorandum on the proposed revisions to the Rules of Appellate Procedure. I am writing to bring up points about the form of two rules that are up for revisions. The points are not related to the merits of the proposed changes.

Rule 9.5(a). It is proposed to add an exception to the second sentence so that it reads, "But a party need not serve a copy of the record, except in an original proceeding." This creates a contrast with the first sentence ("At or before time of the document's filing, the filing party must serve a copy on all parties to the appeal or review") which does not speak to original proceedings. One could infer that the first sentence does not apply to original proceedings. Should the first sentence be amended to say "the filing party must serve a copy on all parties to the appeal or other proceeding"?

Rule 13.1(a). It is proposed to replace the present requirement-unless-excused with a requirement-when-requested. Both the present rule and the proposed amendment seem ambiguous.

The rule has a compound predicate with two verbs ("must attend court sessions and make a full record of the proceedings"), followed by a participial phrase that is linked by a conjunction ("unless excused by agreement of the parties" [present rule]; "when requested by the court or any party to the case" [proposed rule]). Does the participial phrase apply to both verbs or only to the second verb?

In other words, under the present rule, may the agreement of the parties excuse the court reporter from attending court sessions *and* making a full record, or only from making a full record? This ambiguity may be inconsequential, since the reporter's attendance can be independently required by the court even if the parties agree to excuse attendance.

But under the proposed rule the ambiguity may have a real effect. Would the reporter be required to attend court sessions only on request of the court or a party, or is the court reporter's obligation to attend independent of a request? Suppose I am a party and I assume the participial phrase applies only to the predicate "make a full record." I file no request because I do not want a full record; I do not want voir dire and opening statements reported. Do I have a valid complaint when the reporter doesn't show up at the beginning of testimony (because the court didn't request it or the reporter forgot the request)? Or did I waive a full report of the testimony by failing to request attendance?

Would the intended meaning of the rule be expressed by this language: "The official court reporter or court recorder must: (a) attend court sessions unless excused by agreement of the parties and the court, and make a full record of the proceedings when requested by any party"?

With best wishes, I am,

Yours truly,

Paul

Paul Womack, Judge

SMU School of Law

Fror Nathan L. Hecht [nlhecht@worldnet.att.net]
Sen Friday, August 25, 2000 4:47 PM
To: wdorsane@mail.smu.edu

Re your 8/24 report on proposed TRAP revisions:

38.1: OK, but how do we get better issues? Issue-writing has improved greatly since we made a point of it in the last revisions, but while the good lawyers are getting better, the worse ones are not improving much. Should we put an example in a comment? Or direct people to some other writing that would help?

38.10: Yes, but apply to Supreme Court as well -- petitions for review, original proceedings, etc.

43.2: I agree, CAs can vacate and remand for settlement, but not for other reasons.

47.7: I think we need some change, and the proposal is helpful. But we need to rethink 47.4. Perhaps that part of the rule should be rewritten to say that opinions must be published unless, rather than saying that opinions should not be published unless. Even then, the standards should favor publication. I am coming to the view that it is hard to justify not publishing a case unless its result is absolutely dictated by controlling precedent, as distinct from falling under the rationale of prior decisions. If the result is not utterly clear, the opinion should be published. Maybe that goes too far, but I doubt it.

SMU School of Law

From: Nathan Hecht [Nathan.Hecht@courts.state.tx.us]
Sent: Friday, August 25, 2000 1:42 PM
To: Bill Dorsaneo

A panel of the 8th Circuit held on Tuesday that its rule forbidding citation of unpublished decisions as precedent is unconstitutional. Citing Marbury v. Madison, the Federalist Papers, Blackstone, Hobbes, Coke, etc., as expressing the understanding held by the Framers that all cases were to be considered suitable precedent, the panel decided that 8th Circuit Rule 28A(i) represents the exercise of an extra-judicial power beyond those conferred by Article III of the Constitution.

The link to the opinion is below.

http://www.ca8.uscourts.gov/opndir/00/08/993917P.pdf

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SECOND DISTRICT OF TEXAS

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MEMORANDUM

To: Professor Bill Dorsaneo
From: Chief Justice John Cayce
Date: December 27, 2000
Re: Elimination of Mandatory Parallel Briefing Tracks for Cross-Appeals

I am writing to ask that the appellate rules subcommittee consider recommending to the entire SCAC that the briefing rules be amended to eliminate mandatory parallel briefing tracks for ordinary cross-appeals in the courts of appeals.

Under the current appellate rules, any party who seeks to alter the trial court's judgment must file a notice of appeal and, because they are an "appellant," must file an appellant's brief. TEX. R. APP. P. 3.1(a), 25.1(c), 38.6(a), 38.8(a). As you know, one consequence of these rules is that when a cross-appeal is filed the same parties file twin briefs as *both* appellant and appellee. For example, in a simple two-party appeal in which the prevailing party in the trial court seeks a more favorable award of attorney's fees, and thus files a cross-appeal to complain of the attorney's fees award, the current rules permit a combined total of six briefs: two appellant's briefs, two appellee's briefs, and two reply briefs. By contrast, typical briefing under the former rules would have produced only three briefs (an appellant's brief, an appellee's brief containing a cross-point, and a reply brief).

Based on my unscientific poll of intermediate appellate court justices and appellate lawyers, no one favors parallel briefing in ordinary cross-appeals. Although the problems associated with parallel briefing are not unmanageable, processing twin sets of briefs filed by different parties having identical party designations is often confusing, inconvenient and wasteful. I, therefore, recommend that we return to the former practice of allowing cross-appeals in the courts of appeals to be briefed in the appellee's brief, rather than a separate appellant's brief. To accomplish this, I suggest the adoption of a rule similar to FED. R. APP. P. 28(h) which designates the first party who files a notice of appeal as the

"appellant" for briefing purposes. Under this federal rule, when a cross-appeal is filed, there is one appellant and one appellant's brief. Specifically, that rule provides in pertinent part:

> If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule . . . . If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the [requirements for the appellant's brief].

FED. R. APP. P. 28(h). Fifth Circuit Local Rule 28 goes on to provide that the appellee/cross-appellant should file "a single brief containing both the argument as an appellant and the response to the opening brief. The appellant/cross-appellee [may then] file a combined response and reply." 5th CIR. R. 28.4.

In cases involving multiple appellants, or where the nature and complexity of the cross-appeal justifies a separate briefing track for the cross-appellant, the courts of appeals should have the discretion to order separate briefing tracks, or make any other order "necessary for a satisfactory submission of the case." *See* TEX. R. APP. P. 38.9. We may also permit longer briefs under TEX. R. APP. P. 38.4.

Incidentally, I am not suggesting that the supreme court briefing rules be changed. Although there is parallel briefing in the supreme court when two or more parties file a petition for review, cross or conditional complaints in the supreme court are less common than in the courts of appeals and, under the petition for review procedures, probably result in fewer briefs and related documents to manage.

cc: Charles L. "Chip" Babcock
Chris Griesel, Rules Attorney

Changes to TRAP Rule 42

Rule 42. Dismissal; Settlement

42.1 ~~Voluntary Dismissal in~~ Civil Cases

(a) Voluntary Dismissal.

(1) The appellate court may dispose of an appeal as follows:

(A)~~(1)~~ in accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or

(B)~~(2)~~ in accordance with a motion of appellant to dismiss the appeal or affirm the appealed judgment or order, but no party may be prevented from seeking any relief to which it would otherwise be entitled.

(2)~~(b)~~A severable portion of the proceeding may be disposed of under (1) if it will not prejudice the remaining parties.

(b) Settled Cases. If a case is settled by agreement of the parties and all parties to the appeal move the appellate court to effectuate the agreement of the parties, without submitting the case and considering the merits:

(1) if no other disposition is requested, the court must dismiss the appeal;

(2) if requested by all parties, the court may:

(A) render a judgment effectuating the agreement of the parties;

(B) set aside the judgment of the trial court without regard to the merits and remand the case to the trial court for rendition of a judgment in accordance with the agreement; or

(C) abate the case to allow proceedings in the trial court to

effectuate the agreement.

(c) ~~In dismissing a proceeding t~~ Effect on Opinion. An agreement or motion ~~for dismissal~~ cannot be conditioned on withdrawal of the opinion. The appellate court will determine whether or not to withdraw any opinion it has already issued.

(d) Costs. In the absence of a motion or agreement concerning costs, in disposing of a case pursuant to this rule, the appellate court will tax costs against the appellant.

Comment to 2001 change. The changes are intended to clarify procedures for implementing settlements on appeal and to alter the rule followed by some courts that would require the cause, and not just the appeal, to be dismissed. *See Panterra Corp. v. American Dairy Queen*, 908 S.W.2d 300 (Tex. App.–San Antonio 1995, no writ).

Report of the Subcommittee on

Texas Rules of Civil Procedure 300-330[1]

The Subcommittee was asked to consider issues relating to the finality of judgments, motions for new trial, and extensions of plenary power and the appellate timetable. This report discusses these issues and the Subcommittee's recommendations for amendments to the appropriate rules in the Recodification Draft.

- **Final Judgments**

a. Issue-Many lawyers are not familiar with the finality rules established by case law, even in the context of a conventional trial on the merits. *See, e.g., North East Independent School District v. Aldridge*, 400 S.W.2d 893 (Tex.1966). But the finality problem is particularly acute in the summary judgment context. *See, e.g., Bandera Elec. Co-op., Inc. v. Gilchrist*, 946 S.W.2d 336 (Tex. 1997); *Inglish v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508 (Tex. 1995); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311 (Tex. 1994); *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). The issue continues to plague the courts of appeals and the supreme court. *See, e.g., Lehmann, et al. v. Har-Con Corp.*, 988 S.W.2d 415 (Tex. App.-Houston [14th Dist.] 1999, pet. granted); *Harris v. Harbour Title Co.*, No. 14-99-00034-CV, 1999 WL 211859 (Tex. App.-Houston [14th Dist.] April 8, 1999, pet. granted) (not designated for publication).

b. Subcommittee Recommendation-In light of the disarray in the case law, the Subcommittee recommends an amendment to Rule 100(b) of the Recodification Draft to prescribe when a judgment is final and appealable. Although the Subcommittee considered defining when a judgment is final, it rejected this approach because the contexts in which the issue arises are too varied and complex. Ultimately, the Subcommittee decided the best approach to the problem was a "final judgment clause" similar to that proposed by Douglas K. Norman, the chief staff attorney at the Thirteenth Court of Appeals.

Rule 100. Judgments, Decrees and Orders

- Final Judgment.
    - **Final Judgment Clause.** An order or judgment is final for purposes of appeal if and only if it contains the following language:

This is a final, appealable order or judgment. Unless expressly granted by signed order, any relief sought in this cause by any party or claimant is denied.

If this final judgment clause is to be included, it should be set apart as a separate paragraph at the end of the judgment or order immediately before the date and signature of the trial judge. However, a final judgment clause placed elsewhere in a judgment or order is nonetheless valid.

- **Separate Orders, Conflicts.** A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order. If any provision of an earlier order incorporated by reference conflicts with the final judgment, the final judgment controls.

2. Reasons for Granting a New Trial

a. Issue-Rule 320 permits a trial court to grant a new trial for good cause. Tex. R. Civ. P. 320. For all practical purposes, such an order is unreviewable. *See In re Bayerische Motoren Werke,* 8 S.W.3d 326 (Tex. 2000) (Hecht, J., joined by Owen, J., dissenting from denial of motion for rehearing of petition for mandamus). The Court Rules Committee has proposed requiring the trial court to state good cause for granting a new trial and subjecting the court's order to review by mandamus. *See* July 8, 1999 Letter From O.C. Hamilton to Chief Justice Phillips. The SCAC has also proposed, in Rule 102 of the Recodification Draft, listing situations in which a trial court may grant a new trial.

b. Recommendation-The Subcommittee recommends implementing the Court Rules Committee's recommendation to require a trial court to give reasons for granting a new trial. Whether to review such an order by mandamus would then be possible but within the courts' discretion. However, the Subcommittee also believes the reasons for granting a new trial are too numerous and varied to be codified.

Rule 102. Motions for New Trial

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

[delete (a)(1)-11)]

- **Order.** If a court grants a new trial, in whole or in part, it must state in the order granting the new trial or otherwise on the record the reasons for its finding that good cause exists.

3. TRCP 306a/Procedure

a. Issue-Rule 306a permits a litigant who has not been given notice or acquired actual knowledge of the signing of a judgment to restart the appellate timetable in certain circumstances. *See* Tex. R. Civ. P. 306a; Tex. R. App. P. 4.2(d). However, as pointed out by Pam Baron in her amicus letter in *Grondona v. State*, "Rule 306a is functioning as one big 'Gotcha!'" The courts of appeals differ on when a Rule 306a motion must be filed; the effect of an unverified, untimely, or incomplete motion; the date the movant must establish; and the date by which the trial court must rule on the motion.

b. Recommendation-The Subcommittee discussed these issues at length and agreed upon the following:

(1) Time Limit-The rule should not require that a Rule 306a motion be filed within a set period of time after learning of the judgment or order. There may be instances in which a party will not know it needs to do so. Consider, for example, the plaintiffs in *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam), who received notice of the June 16 judgment, but the notice erroneously stated the judgment had been signed on June 19. *Id.* at 267. The plaintiffs did not learn of the error until the Austin Court of Appeals notified them their motion for new trial was untimely. *Stokes v. Aberdeen Ins. Co.*, 918 S.W.2d 528, 529 (Tex. App.-Austin 1995), *rev'd, Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267 (Tex. 1996) (per curiam).

(2) Verification-The seriousness of substituting a new judgment date should dictate that a Rule 306a motion be verified. However, the lack of a verification should require a prompt objection.

(3) Amendments-The trial court should have discretion to permit amendments at any time before the motion is determined.

(4) Date-The movant should be required to establish the dates required by the current rule.

(5) Deadline for Ruling-There should be a deadline for ruling on the motion.

(6) Procedure in the Appellate Court-The Subcommittee discussed adding a paragraph regarding the procedure to be followed in the appellate court if it appears an initial or additional Rule 306a proceeding is needed. But, upon reflection, there appear to be too many "ifs" to draft the paragraph. However, the Subcommittee does recommend an addition to TRAP 4.5 (modeled after TRAP 24.3) to clarify the trial court's continuing jurisdiction to entertain Rule 306a proceedings.

Rule 104. Timetables

- **Effective Dates and Beginning of Periods**

(3) Notice of Judgment. When ~~the~~ a final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the date upon which the judgement or order was signed ~~signing~~ to each party or the party's attorney by first-class mail. Failure to comply with this rule shall not affect the periods mentioned in paragraph (e)(1), except under paragraph (e)(4).

(4) No change.

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

(a) Requisites of Motion. To establish the application of paragraph (e)(4), the party adversely affected must file a verified motion in the trial court setting forth:

- **The date the judgment or appealable order was signed;**
- **That neither the party nor its attorney received the notice required by paragraph (e)(3) of this rule nor acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and**
- **the date upon which either the party or its attorney first**
  - **received the notice required by paragraph (e)(3) of this rule; or**
  - **acquired actual knowledge that the judgment or appealable order had been signed.**

If an unverified motion is filed and the respondent does not object to the lack of a verification at any time before the hearing on the motion commences, the absence of a verification is

waived. If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect. In all other respects, a motion that is filed pursuant to but not in compliance with this paragraph may be amended with permission of the court at any time before an order determining the motion is signed.

- **Time to File Motion, Amendments. A motion seeking to establish the application of paragraph (e)(4) may be filed at any time.**

- **Hearing. Within ten days of the filing of its motion, the movant must request a hearing on its motion, and the court must hear the motion as soon as practicable. The court shall determine the motion on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, 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.**

- **Order. After hearing the motion, the court must sign a written order expressly finding:**

  - **whether the movant or its attorney received the notice required by paragraph (e)(3) of this rule or acquired actual knowledge of the signing of the judgment or appealable order within twenty days after the date the judgment or appealable order was signed; and**

  - **the date upon which the party or its attorney first either received the notice required by paragraph (e)(3) or acquired actual knowledge that the judgment or order was signed.**

TRAP 4.2(d)

- ***Continuing Trial Court Jurisdiction.* Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to hear and determine motions filed pursuant to Texas Rule of Civil Procedure 306.a.5.**

5. Motions That Extend Plenary Power

a. Issue-In 1988, the supreme court held "that 'any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power' restarts the appellate timetable." *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308 (Tex. 2000) (quoting *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)). More recently, however, the court held that "only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329(g)." *Lane Bank*, 10 S.W.3d at 313. Accordingly, a motion for sanctions will qualify as a Rule 329b(g) motion only "if it seeks a substantive change in an existing judgment." *Id.* at 314. Concurring in the judgment, Justice Hecht would have held "that under Rule 329b(g), a post-judgment motion requesting any relief that could be included in the judgment extends the trial court's plenary power over the judgment and the deadline for perfecting appeal." *Id.* at 314, 316 (Hecht, J., concurring).

b. Recommendation-The Subcommittee shares the concern that the *Lane Bank* construction of Rule 329b(g) may create a trap for the unwary. Accordingly, the Subcommittee recommends the rule be amended to clarify the types of motions that will extend the trial court's plenary power and the appellate timetable. The Subcommittee also recommends a parallel amendment to TRAP 26.1(a)(2).

Rule 105. Plenary Power of the Trial Court

- **Duration.** Regardless of whether an appeal has been perfected, the trial court has plenary power to modify or vacate a judgment or grant a new trial:
    - within thirty days after the judgment is signed, or
    - if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment or any other motion that requests relief that could be included in the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, within on [e] hundred and five days after the judgment is signed.

TRAP 26.1(a)(2)

a motion to modify the judgment or any other motion that requests relief that could be included in the judgment;

1. Chair: Sarah B. Duncan. Members: John Cayce, Ralph Duggins, Wendell Hall, Mike

Hatchell, and Steven Tipps. Frank Gilstrap joined the Subcommittee after its work was concluded; thus, his views may not be reflected in the Subcommittee's recommendations.

THE PROBLEM OF FINALITY

The courts are faced with a number of interlocking problems dealing with finality of judgments. These problems have become much more severe in this era of increased use of partial summary judgment and separate trial. Much of the problem arises from the fact that the court's judgment may easily consist of multiple pieces of paper, each of which disposes of only part of the case.

- Some problems concern the meaning of the judgment itself: if there are multiple orders in the case, some overlapping, and they're inconsistent with each other, which one is the enforceable judgment of the court?

- Other problems concern the duration of the trial court's plenary power and deadlines for appeal: when is an order a "final judgment" that starts the plenary power and appellate deadlines running?

- Justice Calvert, in the context of a conventional trial, suggested a solution to these problems: include a provision that "all relief not expressly granted is denied," aka the Mother Hubbard clause. Unfortunately, when used in the context of summary judgment, this "solution" has brought about further problems. Trial courts insert this language into orders that should not be final, either because claims have not been consciously disposed of or because the summary judgment granted goes beyond the summary judgment pleadings. This even happens when the claims "disposed of" by Mother Hubbard clause belong to parties who did not participate in the summary judgment proceedings. This again creates confusion about when deadlines begin to run and a very real possibility that a party will inadvertently lose its right to appeal.

- In addition, the Texas Supreme Court's tendency to treat the Mother Hubbard clause as requiring immediate appeal, and practice of *actually reviewing* the merits of what would otherwise be unappealable interlocutory orders, has in effect created a vehicle for providing interlocutory review of partial summary judgment orders.

Are there any workable solutions to these problems? Giving all of us brain transplants so that we are aware of all orders, always act consistently, and only enter final judgments when appropriate would be neat. Since that seems unlikely, here are some other possibilities, and their limits.

1. *The series of conflicting orders problem: Say the last one counts.* The rules could provide that if the provision of an earlier order conflicts with a later one, the later one controls. However, this runs the risk that an earlier order that was actually considered will be undone by mindless use of a Mother Hubbard clause. The Recodification Draft deals with this problem by providing that "no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied." This would generally provide a way to resolve the problem of conflict, and of dealing with later orders that don't really change anything except that they add new provisions to the judgment (interest; sanctions; attorney fees; etc). This approach, however, retains the unseemly appearance that the court is unaware of its own prior

orders. It's one thing to change a judgment on purpose, and something else again to change it by accident. It also seems to leave possible problems of later orders that use somewhat different language to deny relief they haven't really considered. Will they or won't they control over the earlier order?

2. *Series of conflicting orders: Require a Single Judgment.* Instead of piecing together several orders and decide how they logically fit together (if they do), require the trial court to enter a single "judgment." (Perhaps this is what the "one judgment rule" meant to require to begin with.) It could incorporate by reference prior orders, to decrease the risk of inconsistent provisions, but there would still have to be a single document wrapping up all the relief requested and denied. The disadvantage, of course, is that it would require more work of the overworked trial courts to actually be aware of their prior orders in the case. (Could this be offset by the parties' incentive to see everything included?) It could also create new problems if prior orders are not mentioned in this final single document. (Should the rules include a sort of backup provision like the Recodification Draft Rule 100(b)(3), or would that just encourage sloppiness?) The "one document" requirement would have the advantage of trying to maximize the possibility that the judge and the litigants have thought through the provisions of the judgment. It would also have the advantage of creating a clearer signal about the start of appellate timetables (see below).

3. *Confusion about time to appeal: Require a "final judgment" labeled as such.* The rule here would require a specific caption and a specific final judgment clause. It should either by its terms or by reference to earlier orders dispose of all the claims in the case. This could solve the confusion in problems arising out of a series of orders, when it's hard to say which one finally disposes of everything (the *Runnymede* problem). When the court issues this document, it's time to appeal. If it hasn't, your deadlines don't run yet. It creates a possible problem of delay (at the trial court level, getting the court to enter the order; at the appellate level, the need to dismiss the appeal if the case was appealed without such an order). On the other hand, the potential delay seems less serious than the problem of losing the right to appeal. It would also help with the problem of orders that are interlocutory but become effectively final when other claims are dropped.

This proposal is only a partial fix for the problem of erroneously final judgments. One would hope that trial courts would be *less* likely to enter this kind of final judgment erroneously than they are to throw Mother Hubbard language into a partial summary judgment. For example, it could eliminate the problem that arises when a trial court both notes that it is ruling only on the summary judgment motion before it and includes Mother Hubbard language (thinking–perhaps erroneously–that the MH language applies only to the motion before the court). It won't solve the problem of trial courts who think they have actually disposed of all claims when they haven't. But I'm not sure that any procedural rule can solve that problem, either when the parties also fail to note the problem or when the trial judge, despite a motion for reconsideration pointing out the existence of actually unresolved claims, refuses to retract the Final Judgment.

Chris Griesel

From: Sharon Magill [smagill@mail.smu.edu]
Sent: Wednesday, January 10, 2001 1:58 PM
To: chris.griesel@courts.state.tx.us
ubject: Continuing Discussion of the Final Judgment Problem


TRAPRevsnotfin.cb.wpd


Finality.Memo.wpd

Subject: Continuing Discussion of the Final Judgment Problem

To: Chip Babcock, SCAC Chair
Gilbert I. Low, SCAC Vice Chair
Hon. Sarah Duncan, Subcommittee Chair, Subcommittee TRCP 300-330

From: William V. Dorsaneo, III

Date: January 10, 2001

Subject: Continuing Discussion of the Final Judgment Problem

I am sending each of you copies of email correspondence concerning the final judgment debate which we will be continuing at our January meeting and a memorandum entitled "Problem of Finality." I look forward to seeing each of you on Friday.

cc: All SCAC Members

-----Original Message-----
From: William Dorsaneo [mailto:wdorsane@mail.smu.edu]
Sent: Wednesday, January 10, 2001 8:44 AM
To: 'Nathan.Hecht@courts.state.tx.us'
Subject: RE:

This is the same problem that we have been discussing by email recently. In the first place, the "one final judgment" rule is not really compatible with the idea that the judgment can consist of a series of orders that ultimately dispose of all claims and parties by express or implied disposition. Justice Guittard's explanation of Runnymede points out the problem of identifying the order triggering trial and appellate timetables, but the draft provision does more than solve that problem, or at least I believe that it was meant to do so. It was meant to require a final document of the type that was considered a nullity in Runnymede disposing of all claims and parties, This document could incorporate prior orders by reference rather than rehash everything, but the idea is to have one final order containing the one final judgment thereby avoiding all of these conundrums. The concept of disposition by implication is retained for the conventional trial situation, but that should cause no great difficulty, putting aside for the moment the fact that no particular, i.e. merits determination is meant to occur under this concept. Tentatively, at least, I believe that the draft provision, which has already been approved by the SCAC and sent to the Court is a sound approach, but that it could be improved by the addition of some special language which clearly identifies he order as a final order. The problem with Judge Calvert's recommended language is that it has proven itself to be ambiguous. The remaining

question would be, what if no such document is prepared? I suppose Judge Guittard would say that the case is not finished and the trial court retains jurisdiction for good or ill, but that this is the lesser evil. Buddy Low has sent me a long memo on this subject, which contains the idea, I think, that the order which identifies itself as the final order would supersede all prior orders. I don't think that this is necessary or even feasible. udgments always wrap all prior orders leading to judgment. The problem is to harmonize these rulings, if possible. That is where Quanaim is off the track.

-----Original Message-----
From: Nathan Hecht [mailto:Nathan.Hecht@courts.state.tx.us]
Sent: Wednesday, January 03, 2001 4:07 PM
To: wdorsane@mail.smu.edu
Subject: RE:

I don't know about resurrecting Mullins. The question is, is it dead? Neither Mullins or Check really works in Quanaim, I think. My sense of Quanaim is that the TC wanted to grant SJ every way possible and just kept signing the orders put in front of him. It seems unlikely that by signing a later order he intended to withdraw his ruling on the ground in the other motion. None of the orders was inconsistent. The answer may be that any lawyer that files separate motions for final summary judgment, rather than putting all the grounds in one, gets what he deserves. But should the rules resolve the conflict between Check and Mullins?

-----Original Message-----
From: William Dorsaneo [mailto:wdorsane@mail.smu.edu]
Sent: Tuesday, January 02, 2001 9:55 AM
To: Nathan.Hecht@courts.state.tx.us
Subject: QRE:

I will work on this issue today. My preliminary view, however, is that at he time when Civil Procedure Rule 329b and particularly subsection h was redrawn, the policy choice was made to worry less about continual tinkering with the trial court's judgment during the plenary power periods than had previously been the case. Mullins represents the earlier attitude about finality issues. This means that Check v. Mitchell was not something that happened by inadvertence. The problem about serial judgments was dealt with in the report prepared by Hunt and Guittard on Rules 296-331, as we discussed at our last meeting in November. I believe that the draft proposal, which is now in the Recodification Draft at Rule 300 is the right approach, although it needs more work. If, however, we include finality language of the type proposed by McCown and Duncan,we will have more or less solved the problem with serial judgments from several standpoints. In my view, Quanaim came up with the right answer, at least until it refused to read all of the orders together. Please let me know what you think about any need to resurrect Mullins.

-----Original Message-----

From: Nathan Hecht [mailto:Nathan.Hecht@courts.state.tx.us]
Sent: Friday, December 29, 2000 3:47 PM
To: Chip Babcock; Sarah B. Duncan; Bill Dorsaneo
Subject:

While we are trying to decide what makes a final judgment, we need to look at the problem of serial judgments. The recent case of Quanaim v. Frasco Restaurant & Catering, 17 S.W.3d 30 (Tex. App.--Houston [14th Dist.] 2000, pet. denied), sets out the problem caused by the tension between Mullins v. Thomas, 150 S.W.2d 83 (Tex. 1941), and Check v. Mitchell, 758 S.W.2d 755 Tex. 1988) (per curiam). The Court would like this to be studied. Merry Christmas and a Happy New Year. NLH

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November 22, 2000

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Mr. Chris Griesel
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Chris:

After I returned from our last meeting, I thought more about the suggestion that Judge Hecht made concerning final judgment and making it clear when a judgment is actually a final judgment. The more I thought of it, the more I began to realize that is probably the best approach rather than having it in an instrument that actually gives specific relief or denies relief. I am enclosing herein draft of a new rule that I would propose.

I ask that you look over this and talk with Justice Hecht about it. If the two of you think it is worth following up, I will mail it to Sarah. Now I will explain the various elements.

In the first sentence I used the word "cause" instead of case because if there is a severance there would be separate causes but they could be considered the same case and quite often a case is severed into a separate cause so that it will be final.

Skipping down to (a) 4 - I want this final judgment to be brief and be a separate and stand alone judgment, not combined with any order that gives any specific relief. The reason for this is there can be a "final decree of divorce" or "judgment of annulment" or "judgment of adoption" and that will not interfere with the way those particular items are captioned. Yet, in order for this to be final, you would have to have the separate document entitled "Final Judgment." All the cases referred to above do often speak of final judgment, although they are captioned differently.

Chris, look this over and give me a call.

Sincerely,

Buddy

Buddy Low

BL:cc

RULE 301a - FINAL JUDGMENT

When all claims of all parties in the captioned cause have been ruled on by the court, a final judgment shall be rendered. Only one final judgment shall be rendered in any cause except where is otherwise specifically provided by law [take this out of Rule 300 and insert it here].

(a) Form - The final judgment shall:

1. Be captioned "Final Judgment."

2. State that the case is finished and final, and this is a final judgment for all purposes of the Rules of Civil Procedure, including, but not limited to, (a) plenary power of the court; (b) timetables for all motions following final judgment; (c) timetables for appeal.

3. State that all relief not heretofore granted or denied by judgment or order currently in effect is hereby denied.

4. Not be combined with any order or judgment that grants or denies any specific relief other than the relief specified herein.

(b) Effect -

1. All relief not heretofore granted or denied by judgment or order currently in effect is denied.

2. The case is finished and final, and this is a final judgment for all purposes of the Rules of Civil Procedure, including, but not limited to, (a) plenary power of the court; (b) timetables for all motions following final judgment; (c) timetables for appeal.

(c) Compliance -

1. No other order or judgment shall be captioned "Final Judgment" or contain the words "Final Judgment." If an order or judgment does not comply with the requirements of this rule, it shall not be a final judgment for any purpose.

2. Other than the words "Final Judgment" as used herein, the exact language used to comply with this rule may vary slightly as long as clear notice is expressed as to the items stated in item (b) (Form) above and said order or judgment does not violate any of the requirements of this rule. However, the following language, appearing alone in a final judgment, following the cause number, the court and the style of the case, shall be sufficient to comply therewith:

Final Judgment

It having come to the attention of the court that all claims of all parties in the captioned cause have been ruled on by the court, and Final Judgment should be rendered, it is therefore ORDERED that this case is finished and final and that this is a Final Judgment for all purposes of the Rules of Civil Procedure, including, but not limited to, (a) plenary power of the court; (b) timetables for all motions following the final judgment; (c) timetables for appeal. It is further ordered that all relief not heretofore granted or denied by judgment or order currently in effect is hereby denied.

(d) Notice - Notice of the signing of final judgment shall be given as provided in Rule 306a.

Note: After 301a is passed, the following rules should be amended:

Rule 301 - Amend first sentence: The judgment of the court, except final judgment....
Rule 305 - Amend: "a proposed judgment, including final judgment" as to each place where the word "proposed judgment" is used.
Rule 306 - Amend: "the entry of judgment, except final judgment, shall contain....

PROPOSED ADDITION TO RULE 194.2

(l) In a suit in which spousal or child support is at issue:

(1) all policies, statements and descriptions of benefits for any medical or health insurance coverage available through responding party's employment to insure a spouse or child together with corresponding insurance card and health care provider list;

(2) responding party's income returns for the two previous years including schedules and amendments or if no return has been filed, responding party's forms, W-2, 1099s, and K-1s for such years;

(3) responding party's payroll check stubs for the preceding three months;

(m) In suits for divorce or annulment:

(1) the most recent statement for each financial institution in which responding party claims an interest;

(2) the most recent statement of account for all of responding party's employee benefit plans;

(3) the last financial statement prepared for a lending institution by responding party; and

(4) all deeds, deeds of trust, promissory notes or leases for any real estate in which responding party claims an interest.

RELEVANT INFORMATION REGARDING PROPOSED

ADDITION TO RULE 194.2

What percentage of civil cases filed in Texas are Family Law?

Between 09/01/99 and 08/3 1 /00: 60% of the civil cases filed in the State of Texas were Family Law. (222,764 cases out of 369,391 cases)

Out of the 60%: 22% of the family law cases filed were in Harris County

10% in Dallas County

7 % in Tarrant County

4 % in Travis County

9 % in Bexar County

Statistics furnished by David Mudd

Judicial Information Department at the Office of Court Administration

SUMMARY OF LOCAL RULES

Disclosure requirements, major counties:

Harris - attached

Tarrant - attached

Dallas - none

Travis - none

Bexar - none

HARRIS

4.4 Duty of Disclosure. Without waiting for a discovery request, each party to a suit for divorce, annulment, or a suit in which child or spousal support is in issue, has a duty of disclosure of certain information to the other party. "Disclosure" includes providing for inspection and copying the information in the party's "possession, custody or control," as that phrase is defined in Rule 166b(2)(b) of the T.R.C.P.. Different types of suits require disclosure of different information.

4.4.1 Disclosure in Suit for Divorce or Annulment. Each party to a suit for divorce or annulment shall, without waiting for a discovery request, provide to the other party the following information about property in which the party claims an interest:

1) all documents pertaining to real estate;

2) all documents pertaining to any pension, retirement, profiteering, or other employee benefit plan, together with the most recent account statement for any plan;

3) all documents pertaining to any life, casualty, liability, and health insurance;

4) the most recent account statement pertaining to any account located with any financial institution including, but not limited to, banks, savings & loans, credit unions, and brokerage firms.

4.4.2 Disclosure in Suit in which Child or Spousal Support is in Issue. Each party to a suit in which child support or spousal support is in issue shall, without waiting for a discovery request, provide to the other party the following information:

1) all policies, statements, and description of benefits which reflect any and all medical and health insurance coverage that is or would be available for the child or the spouse;

2) Unless the information has previously been exchanged in connection with a temporary hearing (Rule 4.1), a Financial Information statement for the party, together with that party's previous two years income tax returns and two most recent payroll check stubs, or, if no payroll check stubs are available, the party's latest Form W-2.

4.4.3 Failure to Comply. This rule providing. for the duty of disclosure shall constitute a discovery request under T.R.C.P., and failure to comply with this rule (or any of its subparts) may be grounds for sanctions, as prescribed by Rule 215 of T.R.C.P..

4.4.4 Method of Disclosure.

1) Timing of Disclosure. Disclosure required under this rule shall be made as

follows:

a) by a Petitioner or Movant within 30 days after the Respondent files Respondent's first pleading or makes a general appearance in the case;

b) by a Respondent within 30 days after he or she files Respondent's first pleading or makes a general appearance in the case, whichever occurs first.

2) Delivery of Disclosure. The disclosures required under rule shall be made by furnishing the information to the opposing party's attorney of record or, if the

TARRANT

before the time the hearing is set. If counsel is to be late for a hearing or is in another court, counsel or counsel's staff shall, by telephone or otherwise, notify the court or its bailiff, giving the reason for the delay in appearance and exactly which other courts counsel is appearing before. Failure to appear or check-in with the Associate Judge's or IV-D Master's Court within 30 minutes of the scheduled hearing time shall result in a default being granted or the hearing being passed, as appropriate. Although it is in the policy of the Courts to recognize the inevitable conflicts in an urban law practice and to be reasonably flexible, it is ultimately the responsibility of counsel to keep the Court accurately informed of counsel's whereabouts so that the Court's dockets will not be unduly disrupted. Violation of this Rule may result in sanctions against counsel.

(b) Documents Required. In all cases in which support of a espousal and/or child(ren) is in issue, whether temporary or final, each party shall be required to furnish the Court and opposing party true and correct copies of the following, at or before the time of hearing, if available:

1. Summary statement of monthly income and expenses in a form substantially similar to any form that may be adopted by the Court.

2. All payroll stubs or wage statements for the past 3 months.

3 If self-employed full Profit & Loss Statements, Balance Sheets, Income Statements or other evidence of earnings for the previous 12 months.

4. Federal Income Tax Returns, including all attachments and schedules for the two years immediately prior to the hearing, or if a return has not been prepared and filed for a particular year, all W-2's,1099s, K-ls or other evidence of income for such a year.

5 . Financial statements filed by the parties with stay financial institution within the past 3 years.

6. Any other documents as ordered by the Court, or properly subpoenaed by a party.

(c) Inventories. When ordered by the Court, each parry shall file a sworn inventory and appraisement within 60 days of the Court's order unless the Court or the parties extend or shorten such period. An

Inventory and Appraisement may be ordered in any case in which the character, value or division of property or debts is in issue and should be tried in a form substantially similar to the form provided in the Texas Family Practice Manual of the State Bar of Texas. Additionally, each party shall at the time of trial prepare for the Court and opposing counsel a written summary of that party's proposed division of property and debts.

DALLAS

e. Decline to set the case for trial, cancel a setting previously made, and/or

f. Dismiss the case for want of prosecution or grant a default judgment, if attorneys were ordered to appear, especially where there has been a previous failure to appear or where no amendment has been filed after exceptions were previously sustained.

g. Grant sanctions or other relief.

PART VI. DISCOVERY

(Reserved for expansion).

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COPY

December 7, 2000

Mr. Charles L. Babcock, Chair
SUPREME COURT ADVISORY COMMITTEE
Jackson Walker LLP
1100 Louisiana, Suite 4200
Post Office Box 4771
Houston, Texas 77210-4771

Re: Proposed Rule Changes to Rules 86, 87 & 89

Dear Chip:

Enclosed is a letter I recently received from Sterling Steves regarding Rule 3a(5) TRCP.

As I recall, Pam Baron reported on suggested changes to this rule at our last SCAC meeting but I do not recall whether subparagraph 5 was changed. I recall we did have some discussion about the availability of the rules.

I am sending a copy of this letter to Pam Baron.

Sincerely,

O. C. Hamilton, Jr.

OCH/msc
enclosure

cc: Pam Baron, Chair
SUPREME COURT ADVISORY COMMITTEE
ATTORNEY AT LAW
2403 Indian Trail
Austin, Texas 78703

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CHARLES L. BABCOCK

PAMELA STANTON BARON
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MEMORANDUM

To: Members of Supreme Court Advisory Committee

From: Subcommittee on Rules 1-14c

Date: January 11, 2001

Re: Tex. R. Civ. P. 3a

Our committee was asked to consider the attached letter from Sterling Steves concerning the availability of local rules. He has asked for a change to rule 3a that would require the clerk to send a copy within 10 days of any request, without charge for copying or postage. Mr. Steves also submits that availability of the local rules on the internet would not be a substitute for mailing a copy to the requesting person.

Bonnie Wolbrueck surveyed other clerks on the procedures employed across the state. What she found is that the length of local rules varies, with some quite short and others quite long, such as those in Williamson County, which include family law forms. Nine of the counties she contacted post the local rules on their web site. In all counties responding, the local rules are made available for inspection without charge in the clerk's office or library or the administrative judge's office. Most do not charge for copies, but a few that have lengthy sets of local rules impose a mailing cost of up to $3.50 or require a self addressed stamped envelope. Only one of the responding clerks charges for the copies at $1.00 per page, as provided by Tex. Gov't Code § 51.318.

Because the legislature had adopted a statute with respect to copying charges and because access to local rules does not appear to be a widespread problem, the subcommitte determined that we should not try to legislate copying and mailing costs in the TRCPs but should leave this procedure to the good sense of the clerks. The subcommitte, however, would recommend that local rules be posted (either directly or by link) on the Supreme Court's web site. Contrary to the comment received, the internet is widely available throughout the state and at many public libraries. This procedure should be easy to adopt for new local rules as the court could post them at the time of approval. Archiving rules adopted in the past would be a little more difficult but not all that many courts have local rules.

Main Identity

From: "Bonnie Wolbrueck" <bwolbrueck@wilco.org>
To: "PAMELA BARON" <psbaron@austin.rr.com>
Sent: Monday, January 08, 2001 1:52 PM
Subject: Local Rules Issue

Pam:

I have surveyed 20 clerks (received 15 responses) from all parts of the state regarding the local rules issue. The following is the information gathered:

1. All local rules are made available in the clerks office - -- and/or the judges office and law library. (no cost)
2. Two have no local rules - rural counties.
3. Most (nine) of the counties place the local rules on their web site.
4. Most do not charge for copies. Five counties request a self-addressed stamped envelope to cover mailing cost. Travis' mailing cost is $3.50 and ours (Williamson) is $2.84.
4. Only one clerk charges for copies of the rules - $1.00 per page (!!!!) according to Govt Code 51.318 - for a noncertified copy, for each page or part of a page...not to exceed $ 1.00. One clerk charges if requested to provide, but their rules are available from the court at no cost.

One clerk has had difficulty with a local attorney continuing to request copies which are used as a personal marketing tool for referral to "country attorneys".

I still agree that no rule is necessary on this issue. Placement of local rules on local web sites or the Supreme Court's site would seem the most workable.

Let me know if you need any additional information.

Bonnie J. Wolbrueck
District Clerk
Williamson County

§§ 51.318. Fees Due When Service Performed or Requested

(a) In addition to a fee under Section 51.317 the district clerk shall collect at the time the service is performed or at the time the service is requested the fees provided by Subsection (b) for services performed by the clerk.

(b) The fees are:

(1) for issuing a subpoena, including one copy	$8
(2) for issuing a citation, commission for deposition, writ of execution, order of sale, writ of execution and order of sale, writ of injunction, writ of garnishment, writ of attachment, or writ of sequestration not provided for in Section 51.317, or any other writ or process not otherwise provided for, including one copy if required by law	$8
(3) for searching files or records to locate a cause when the docket number is not provided	$5
(4) for searching files or records to ascertain the existence of an instrument or record in the district clerk's office	$5
(5) for abstracting a judgment	$8
(6) for approving a bond	$4
(7) for a certified copy of a record, judgment, order, pleading, or paper on file or of record in the district clerk's office, including certificate and seal, for each page or part of a page	$1
(8) for a noncertified copy, for each page or part of a page not to exceed	$1.

(c) The fee is the obligation of the party to the suit or action initiating the request.

(d) The district clerk may accept a bond as security for a fee imposed under this section.

(e) The district clerk may not charge the United States Immigration and Naturalization Service a fee for a copy of any document on file or of record in the clerk's office relating to an individual's criminal history, regardless of whether the document is certified.

Acts 1985, 69th Leg., ch. 480, §§ 1, eff. Sept. 1, 1985. Amended by Acts 1991, 72nd Leg., ch. 186, §§ 2, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 465, §§ 1, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 641, §§ 1.02, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 976, §§ 2, eff. Sept. 1, 1997.

DEC 0 4 2000

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Sterling W. Steves
Board Certified - Civil Trial Law and Personal Injury Trial Law Texas Board of Legal Specialization

November 30, 2000

O. C. Hamilton, Jr.
Chairman, Committee on Court Rules
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

RE: Rule 3a(5) Rules of Civil Procedure

Dear Carl:

Rule 3a(5) T.R.C.P. states as follows:

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

For approximately 20 years we have been compiling the "Local Rules of the District Courts in Texas." This came about because of an experience that I had in West Texas when I learned of a local rule to have all pending motions including a motion in limine heard prior to the Monday of trial. Since first published, the book has grown from a rather slim volume to a packed 2 volume set as judges have become aware of all the other local rules.

We feel that we make a contribution to the administration of justice by consolidating and compiling these rules and making them available to attorneys. The problem we have encountered in our endeavor to do this has been in the interpretation by individual counties of Rule 3(a)5 T.R.C.P. Even though, as a member of the State Bar, I submitted a written request for a copy of the local rules, clerks in some counties stated their position on the rule is that it means I have to physically make an appearance in their office to pick it up. Others stated that "We do not want to mail the local rules to you because we do not want to spend the postage on this." Several counties required us to pay varying amounts for a copy of their rules. Still others replied "It's available on our web site." The

latter option is not an option at all, of course, to an attorney who lacks internet access to the web site. As a result, we respectfully suggest that Rule 3(a)5 be clarified by stating as follows:

> The District Clerk shall mail a copy of the local rules or amendments, postage prepaid, upon written request of a member of the bar within 10 days of receipt of such request."

Very truly yours,

Sterling W. Steves

SWS:sjw

Proposed Revisions to Recodification Draft Rule 2
as approved at November meeting of SCAC:

Rule 2. Local Rules.

2.1. Exclusivity. No local rule, order, or practice can be applied in determining any matter unless it complies with the requirements of this rule.

2.2. Procedure for adoption. Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before these courts, provided:

(a) a proposed local rule or amendment is not effective until it is approved by the Supreme Court of Texas; and

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

2.3. Availability. The local rules must be available upon request.

2.4. Applicability.

(a) No local rule may:

(1) be inconsistent with these rules or with a rule of the administrative judicial region in which the court is located; or

(2) alter any time period provided by these rules.

(b) A local rule that would otherwise be invalid under 2.4(a) is valid if the Supreme Court order approving adoption of the rule explicitly states that it is valid notwithstanding the inconsistency.

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 3a. LOCAL RULES

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

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

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

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

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

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

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

II. Proposed Rule:

Rule 3a. LOCAL RULES

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

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

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

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

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

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

III. Brief statement of reasons for requested changes and advantages to be served by them:

The proposed change is intended to promote greater clarity and consistency in the expression of time, time periods and deadlines by (1) referring to the "date" or "day" on which an event occurs, as opposed to "time" which may be construed to mean a time of day, (2) describing a time period in a way that makes the first and last days clear, and (3) leaving no doubt about which is the last day on which action may be taken, in accordance with §7.28 of the Texas Legislative Counsel Drafting Manual.