REPORT TO SCAC-MAY 2002

Thank you all for traveling to be here. It's been busy since the last meeting and I wanted to update you on several things. This last week, the Court spent at the ALI annual meeting in Washington D.C.

In addition to exciting discussions on the restatement of the role of fiduciary duties in trust relationships, we did learn a couple of things that have application to our work here

[insert lessons learned from ALI re restatement of torts or evidence]

I wanted to quickly update you on the status of the rules before us. First, as we reported before, we've sent on to the Court of Criminal Appeals the proposals to the Texas Rules of Appellate Procedure. Last week, I talked with Judge Womack of the CCA. He indicated that the CCA is finishing up its review. He indicated that the CCA will have several substantive disagreements with the suggestions for changes. [Specifically, he indicated they have some concerns with the changes to Rule 47]

We both look forward to resolving the respective court's concerns and putting out a draft for comment this summer.

The court continues to work on the changes proposed to Parental notification, rules of evidence, and rules of civil procedure. And we hope to make substantial progress on these issues before the Court breaks for the summer.

I wanted to report on progress being made on a "sense of the committee" resolution passed last fall. As you will recall, Pam Baron led a committee looking at changes to Texas Rule of Civil Procedure 3, local rules. One of the suggestions was to make available the local rules available on the internet. After receiving that recommendation, I asked Carl Hamilton's state bar rules committee to assist the court in implementing that resolution by collecting from district clerks and courts of the state various local rules, including practices that haven't been approved under Rule 3. Carl's committee has taken a lot of time, and has been able to assemble a wide variety of sources from many different parts of the state. We are cross checking what the court's thinks are the

court's "local rules" against what is in the court's or clerk's file and we will start posting them on line soon. Carl's committee continues to look at other issues related to local rules and we look forward to seeing that work when it is ready.

The danger of doing good work is getting more work. And there is some more work to dole out for assignment. Three public officials, the Governor, The chair of the House Civil Practices Committee, and a constable from Harris County, have made suggestions for things to study.

In order of appearance in the Texas Constitution, we turn to their issues.

The Governor has asked the court to examine the operation of Rule 202, Texas Rules of Civil Procedure. The governor's concerns arise out of claims that the rule is "being abused" by lawyers in certain types of cases. As most of you remember, Rule 202 is a rewrite of former rule 187 that is broadened somewhat to expressly permit discovery depositions before filing suit and to investigate potential claims. Rule

202 replaced and limited the old "bill of discovery" under former rule 737. It was fashioned as an attempt to accommodate competing concerns of plaintiffs and defense bar regarding the extent to which a person should be permitted to obtain pre-suit or investigatory depositions without notice to potential parties.

There aren't a whole lot of appellate decisions under Rule 202. Most have focused on the question of whether a Rule 202 order is appealable. Others have focused on whether the trial court's protections of the opposing party or restriction on the moving party in granting the Rule 202 order were sufficient.

If I could ask the committee to examine the governor's allegations, any comments by bench or bar about the rule, as well as the cases to date along with the reasons for the initial adoption of the Rule and make a recommendation, if any, as to any changes that need to be made to the rule.

Next, is a suggestion from the chair of the House Committee on Civil Practice. Among their charges this interim is to "examine practices by courts and attorneys in product liability cases that may be detrimental

to public health and safety", including questions regarding "the sealing of records that might assist the public in assessing the dangers of using a product, agreements not to disclose information to the public or regulatory agencies, and any other rules, practices or laws deemed relevant by the committee".

On April 3, the Committee held their first interim committee hearing relating to this charge and heard testimony relating to sealing of documents that constitute a danger to public health and safety. A similar proposal, HB 3125, had been made during the last legislative session but had not passed. At the hearing, several consumers groups made suggestions as to potential modifications of Rule 76a. The Chair passed on to the rules attorney some proposed language relating to sealing.

It has been 12 years since Rule 76a was first adopted and I would like the Committee to look at Rule 76a in a broader context-in its operation since adoption, and review the previous proposed legislation, concerns raised at the interim hearing as well as the chair's suggestion to see if we need to make a change to the current sealing rules.

Ron Hickman, a Constable in Harris County, has some suggestions to the rules changes relating to executions, specifically the time, place and manner of Sheriffs's and Constable's sales taking place under Rules 646-653. The Constable presents a compelling case that requiring the sale of real property at certain limited times might, at least in his county, not be an effective method of execution. Since Tom Lawrence and Elaine seem to enjoy working in the 500 and 700 series of rules, I will ask the Committee to take a look at his concerns with the 600 series and let's us know if there is some rules change we might want to consider.

We also have from a Waco attorney a suggestion that TRCP Rule

87 might need an overhaul because of a statutory cross-reference that has been amended by the legislature.

Finally, we have a suggestion from the Harris County Attorney's office regarding Rule 103, service of process. This suggestion deals with what public servants may serve process. I believe a copy of the letter suggesting this change is already been posted on the website. If you could take a look at that also.

A quick update on the Jamail committee. It meet the week after the last SCAC meeting. This committee's comments were passed by Chip, Tommy, Elaine, and me and they set about making changes based on other comments. The committee's work was to be finished before this meeting, but conflicting schedules has stopped the group from finishing up its work. Hopefully, I'll have more to report in June.

{other news}

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
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CRAIG T. ENOCH
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Chip Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1100 Louisiana , Suite 4200
Houston, Texas 77002

Dear Chip,

I would like to make the following referral to your committee. Attached is a letter from Governor Perry requesting that the Supreme Court examine the use of Rule 202, Texas Rules of Civil Procedure. The governor's concerns appear to arise out of claims that the rule is being abused by lawyers in certain types of cases.

As you may recall, Rule 202 is a rewrite of former rule 187 that is broadened somewhat to expressly permit discovery depositions before filing suit and to investigate potential claims. Rule 202 replaced and limited the old "bill of discovery" under former rule 737. It was fashioned as an attempt to accommodate competing concerns of plaintiffs and defense bar regarding the extent to which a person should be permitted to obtain pre-suit or investigatory depositions without notice to potential parties.

Appellate decisions under Rule 202 have focused in two areas, the question of whether a Rule 202 order is appealable and whether the trial court's protections of the opposing party or restrictions on the moving party in granting the Rule 202 order were sufficient.

I would ask that the committee to examine the governor's allegations, any other comments by bench or bar about the rule, the cases to date, and the reasons for the initial adoption of the Rule and make a recommendation as to any changes, if any, that need to be made to the rule.

Nathan Hecht

April 2002

Ensuring Access, Safety and Fairness: Governor Rick Perry's Plan for Addressing the Medical Lawsuit Abuse Crisis

Every Texan deserves access to medical care. Today, in many parts of the state, access to quality health care is increasingly threatened by a medical lawsuit abuse crisis. Skyrocketing malpractice insurance rates are forcing many physicians to curtail or abandon their practices, leaving patients with limited access to medical care. As Governor, I am firmly committed to doing whatever it takes to end this crisis – including reining in abusive lawsuits, improving patient protections and reforming insurance regulations – to ensure patients have access to the best care possible.

-- Governor Rick Perry

Skyrocketing medical malpractice insurance rates – spurred primarily by growing numbers of frivolous lawsuits, and escalating jury awards, settlements and legal expenses – are threatening medical care in Texas.

Many doctors and other health care providers across the state have reported soaring insurance rate hikes – some as high as 400 percent – in the past year, while others have been unable to obtain malpractice insurance at any cost. This includes health care providers who have never had malpractice claims filed against them. As a result, some doctors are abandoning their practices, and access to quality medical care in some areas – particularly the border region – is deteriorating.

The medical lawsuit abuse crisis in Texas has the greatest impact on doctors with practices considered "high risk" by insurance companies – obstetricians, pediatricians, oncologists, neurosurgeons, radiologists and other specialists.

The problem is especially acute for doctors who practice in the Rio Grande Valley and other under-served areas of the state. Doctors in these areas frequently provide treatment at no charge to their patients or through government programs that offer limited reimbursement, making it even more difficult to pay soaring insurance premiums.

Some hospitals, particularly those located in regions where insurance rates and malpractice claims are highest, now find it difficult to recruit and retain physicians. Hospitals in Laredo and Corpus Christi, for example, report that some physicians are reluctant to accept job offers there because of the doctors' fear of lawsuits and the high cost of malpractice insurance in those areas. And some insurance carriers now refuse to provide medical liability insurance at any rate in those regions.

As access to appropriate primary and specialty care decreases, patients are left with few choices: Go without care; travel to other cities for their medical needs; or go to an

emergency room. All of these alternatives, which are unacceptable for *any* Texan, ultimately limit access and drive up medical care costs for *all* Texans.

Finding a Solution

If Texas is going to ensure access to quality, affordable medical care, then it must address the core problems with medical liability insurance: frivolous lawsuits, and escalating jury awards, settlements and legal fees.

Between 1996 and 2000, an average of one in four Texas physicians had a medical malpractice claim filed against them. In the Lower Rio Grande Valley, the situation is worse: Recent statistics suggest that each physician on average had at least one claim filed against him or her during this period -- and these figures are growing at a rate of 60 percent per year.

By some estimates, as many as 86 percent of medical malpractice claims filed in Texas are dismissed or simply dropped without payment to a patient. Yet providers and insurance companies must still spend millions of dollars defending themselves – even against baseless claims. As one South Texas doctor put it, "Even when we win, we lose."

At the same time, the amount paid on medical malpractice claims through damages or settlements has increased dramatically. Excluding the Lower Rio Grande Valley, with its flood of claims on which no payments were made, the average cost of a Texas medical malpractice claim against a doctor has increased 10 percent per year.

All of these factors are driving up the average cost of insuring a Texas doctor an average of 15 percent per year. And the chilling effect of these claims is clear: Insurers, anxious to limit their exposure, discourage physicians from practicing certain types of medicine by refusing to write new policies for high-risk specialists or for doctors who practice in regions of the state with exceptionally high rates of malpractice claims.

The Hostile Litigation Environment and its Effect on Medical Care

Even more damaging than the enormous economic impact of liability claims may be the terrorizing effect that a hostile litigation environment has on the practice of medicine in Texas. Some doctors report that they "feel like they're walking around with a big target on their backs." Doctors from across the state have recounted troubling incidents of fear and intimidation that have driven some from providing medical care for high-risk patients. Some have been forced to practice costly defensive medicine, sometimes at their liability carrier's insistence. Others have labored under constant threats of lawsuits from predatory lawyers (one plaintiff's lawyer even opened an office across the street from a children's hospital and advertised expertise in birth injury cases). And some doctors have finally just given up and left their area of practice, their town, or their profession to avoid the risk of litigation.

Governor Perry's Solution

An effective solution to the current medical lawsuit abuse crisis must address all of these factors while assuring Texans of access to a safe health care system. Governor Perry's plan is thus built around the following components:

- Meaningful lawsuit reforms.
- Patient safety reforms.
- Insurance reforms.

Proposal 1: **Place a $250,000 cap on recovery of subjective, non-economic damages to plaintiffs.**

The single biggest factor driving up the cost of claims and settlement value of cases, and creating incentives to file suit in the first place is the size of the potential damage award. **Tort damages should fairly and accurately compensate truly wronged plaintiffs for real injuries**. The recovery of medical expenses that can be objectively quantified and verified in court should not be limited. In medical malpractice cases, however, large and often disproportionate sums of money are sought and sometimes awarded as compensation for highly subjective damages like pain and suffering that cannot be accurately measured. Such claims are difficult to test in court and almost impossible to insure against. Reining in these types of "non-economic" damages is essential if Texas is serious about ensuring Texans have access to quality and affordable health care.

More than 20 other states have enacted limits on non-economic damages. These limits have been credited with significantly lowering liability insurance rates. A prime example is California, which responded to a severe medical liability insurance crisis in the 1970s by implementing non-economic damage caps; the state now has the third lowest medical liability insurance premiums in the nation.

Texas enacted limits on non-economic damages in the 1970s as part of a comprehensive set of reforms that responded to a medical liability insurance crisis of that era. Many of these reforms remain a part of Texas law; however, the Texas Supreme Court later declared the non-economic damage limits, in the form they had been enacted, unconstitutional in the 1980s. The Governor believes that these types of limits can be drafted in a way that will pass constitutional muster.

Proposal 2: **Designate special trial courts or judges to hear medical malpractice cases.**

Texas has enacted a number of procedures over the years that are designed to screen out baseless medical malpractice lawsuits before large defense costs are incurred, and to impose sanctions against lawyers who file frivolous suits. These requirements, however, are not enforced uniformly across the state. To ensure fair and uniform statewide enforcement of these laws, special courts should be designated or created to hear medical malpractice cases. Judges could be selected or assigned based on expertise, thus ensuring that these complicated cases are handled efficiently and correctly, and that truly harmed patients are justly compensated.

Proposal 3: **Limit personal injury trial lawyers' contingency fees.**

Plaintiffs' attorneys typically require their clients to agree to pay as much as 40 percent to 50 percent of any recovery before they will take a case. If large monetary damages are awarded at trial or in a settlement, plaintiffs' lawyers sometimes receive exorbitant fees that far exceed a reasonable payment. To prevent lawsuits from becoming a lottery for lawyers, while preserving access to justice for truly wronged plaintiffs, there should be a sliding scale of limits on lawyers' contingent fees, with allowable percentages decreasing as recoveries increase.

Proposal 4: **Expand lawsuit immunity to protect charity and indigent care providers.**

Among the regions hardest hit by the medical lawsuit abuse crisis are areas like the Lower Rio Grande Valley, where a disproportionate portion of patients are low income or indigent. Providers in these areas often receive little or no payment for their services and thus are especially vulnerable to the current dramatic insurance rate increases. To preserve access to health care in low-income areas, Texas should expand to these providers the lawsuit liability protections available to governmental units or charities, which limit damage awards to ensure that those entities can continue to provide their important services.

Proposal 5: **Allow periodic payment of future damages.**

Plaintiffs sometimes are awarded compensation for damages that the jury estimates the plaintiff will incur later in life, such as future medical expenses, future lost wages, and future non-economic damages. Under

the current system, these future damages must be paid as a lump sum at the time of trial, rather than as medical expenses or other damages are actually incurred. For some defendant doctors, the sheer size of the award can be impossible to pay in a lump sum, but manageable if paid over time. Second, an award of future damages may prove to grossly overestimate the damages that actually are incurred, amounting merely to a windfall for the plaintiffs, their heirs or the plaintiffs' lawyers.

For these reasons, 29 other states have enacted legal reforms that authorize or require courts to order periodic rather than lump sum payment of future damages in medical negligence cases. Usually the right to obtain periodic payment applies only to damages over a certain threshold amount. By allowing defendants to compensate the plaintiff as his or her damages are actually incurred, periodic payment assures greater accuracy of future damage awards and that these amounts go toward their intended purposes – rather than into a personal injury trial lawyer's pocket.

Proposal 6: **Call upon the Supreme Court of Texas and the State Bar of Texas to address abusive personal injury trial lawyer practices through their respective rulemaking processes.**

Although many reform proposals cannot be enacted until the 78th Legislature convenes next January, some abuses can be tackled immediately with the cooperation of the Texas Supreme Court and the State Bar. Specifically:

- The Governor requests that the Texas Supreme Court address complaints that some personal injury trial lawyers have abused court procedures and used pre-suit depositions to "set up" defendants, obtaining evidence against them without giving them the opportunity to be present and defend themselves.

- The Governor requests the State Bar of Texas amend its disciplinary rules of professional conduct to crack down on predatory personal injury trial lawyers who seek out and represent frivolous litigants.

Consistent with the separation of powers principle of our Texas Constitution, the Judicial Branch should have the first opportunity to address these problems. If the problems persist, however, they are a proper subject of legislation next session.

Proposal 7: **Improve the Board of Medical Examiners' ability to ensure the integrity of the medical profession and safeguard patient care.**

The Texas Board of Medical Examiners must have the resources to aggressively and consistently pursue disciplinary actions against bad doctors. Dr. Donald Patrick, the new executive director of the Board of Medical Examiners (BME) has identified several steps that could be taken to improve the Board's enforcement of existing licensing laws. Those steps include reorganizing the enforcement division of the BME, developing procedures to ensure consistent disciplinary actions, and refocusing the Board on its "public safety" mission. The Governor also will continue to work to see that physician licensing fees are dedicated to enabling the Board to implement these improvements

Proposal 8: **Develop processes in our health care system to reduce medical errors and swiftly discipline bad doctors.**

Beginning in May 2002, Governor Perry will invite doctors and other health care providers to help develop comprehensive patient safety measures in Texas, which will be presented to the 2003 Legislature. These measures will be aimed at:

1) Improving the quality of medical care offered in clinics and health systems.

2) Reforming laws governing the Board of Medical Examiners and other health care licensing agencies to emphasize patient safety.

3) Creating a "Center for Excellence" to provide training, current research, and assessment tools to assist the medical community in addressing doctors' errors.

4) Improving peer review systems to better address medical errors and work with physicians to provide re-training, re-education or other corrective action.

Proposal 9: **Provide a form of temporary emergency coverage for providers in instances where true competition does not exist.**

Allow the Joint Underwriting Authority (JUA) to offer temporary malpractice policies to providers having difficulty in obtaining coverage prior to the expiration of a malpractice policy. Further, to expedite

temporary coverage offerings, grant authority to the Commissioner of Insurance to require the JUA to provide temporary coverage policies after a finding that a reasonable degree of competition does not exist. Temporary policies would be limited to health care providers whose insurance is terminated for economic, but not practice-related, circumstances. Providers who have been sanctioned by a licensing agency or who have pending complaints would not be eligible for temporary coverage. Coverage would expire upon issuance of a new policy or after a defined number of months. This measure would not require the JUA to issue policies to all applicants; underwriting guidelines would remain applicable.

Proposal 10: **Allow the Joint Underwriting Authority to issue bonds to build up reserves for the purpose of quickly absorbing market share.**

Grant bonding authority to the Joint Underwriting Authority (JUA) for the purpose of rapidly capitalizing reserves. Currently, the JUA accumulates stabilization reserves through assessments on policyholders. This bond authority would enable the JUA to rapidly respond to market conditions without unduly burdening providers. While it is not anticipated that bonds would be necessary immediately following the session, the legislature should consider granting the bond authority in the event market trends continue for a prolonged period or worsen. Bonds could be amortized through surcharges on insurance policies or under current JUA assessment authority.

Proposal 11: **Allow the state to review rate information of medical malpractice insurance providers.**

Approximately 30 percent of the medical malpractice market is served by companies that are subject to rate review laws in Texas. The remainder of the market is served by entities other than traditional insurance companies that are not subject to rate review. In the medical malpractice line, premiums have generally reflected loss trends. But the state must be able to ensure that premiums continue to be commensurate with loss trends. While automatic rate filings would not be mandatory, disclosure of basic rating information to the Department of Insurance would be required upon request. Unjustified rate increases would be subject to reduction upon proper finding.

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Chip Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1100 Louisiana , Suite 4200
Houston, Texas 77002

Dear Chip,

I would like to make the following referral to your committee. Ron Hickman, a Constable in Harris County, has recently offered some observations and suggestions for changes to the Texas Rules of Civil Produre relating to the conduct of executions, specifically the time, place and manner of Sheriffs's and Constable's sales taking place under Rules 646-653.

The Constable presents a compelling case that requiring the sale of real property to certain limited times might, at least in the case of his county, not be an effective method of implementing the purpose of the rules. I ask the Committee to take a look at his concerns regarding the time, place, and manner of these sales and any related issues and report on whether there are any rules changes we might want to consider.

Nathan Hecht

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
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CRAIG T. ENOCH
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Chip Babcock
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Houston, Texas 77002

Dear Chip,

I would like to make the following referral to your committee. Attached is a draft of proposed legislation prepared by the Chairman of the House Civil Practices Committee, Representative Fred Bosse. Among that committee's charges this interim is to "examine practices by courts and attorneys in product liability cases that may be detrimental to public health and safety", including questions regarding "the sealing of records that might assist the public in assessing the dangers of using a product, agreements not to disclose information to the public or regulatory agencies, and any other rules, practices or laws deemed relevant by the committee".

On April 3, the Committee held their first interim committee hearing relating to this charge and heard testimony relating to sealing of documents that constitute a danger to public health and safety. A similar proposal, HB 3125, had been made during the last legislative session but had not passed. At the hearing, several consumers groups made suggestions as to potential modifications of Rule 76a. At the conclusion of the session, the chairman passed on to the rules attorney some proposed language relating to sealing.

It has been 12 years since Rule 76a was first adopted and I would like the Committee to look at Rule 76a in a broader context. Please examine the operation of the rule since its adoption, review the previous proposed legislation, concerns raised at the interim hearing as well as the chair's suggestion to see if we need to make any changes to the current sealing rules.

Nathan Hecht

By:_____ ___B. No. _____

A BILL TO BE ENTITLED

AN ACT

relating to the adoption of rules by the Texas Supreme Court for relating relating to the confidentiality of records and professional responsibility to protect public health and promote safety.

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

ARTICLE 1. JUDICIAL ACTION

SECTION 1.01. Not later than January 1, 2004, the supreme court shall adopt and amend rules governing practice and procedure, including the rules regarding sealing of records, to prevent the courts of this state from being used in a manner that constitutes a danger to the public health and safety.

SECTION 1.02. Not later than January 1, 2004, the supreme court shall adopt rules of professional responsibility and discipline that prevent attorneys practicing law in this state from engaging in conduct that constitutes a danger to the public health and safety. The rules must address the practice of attorneys for parties to litigation or potential litigation to enter into agreements to return, or maintain as confidential, information obtained by a party to an action that relates to a risk to public health and safety.

ARTICLE 2. EFFECTIVE DATE

SECTION 2.01. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2003.

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DAVID B. KULTGEN

March 28, 2002

Honorable Tom Phillips,
Chief Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Re: Needed Amendment To Rule 87 of the Texas Rules of Civil Procedure

Dear Chief Justice:

My firm has recently been involved in a case in which the trial court was required to rule on a motion to transfer. This brought the provisions of Rule 87(2)(a) of the Rules of Civil Procedure to our attention. That subsection of the Rules makes reference to "Section 15.001 (General Rule), Sections 15.011 - 15.017 (Mandatory Venue), Sections 15.031 - 15.040 (Permissive Venue) or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code." Comparing these references to the provisions of Chapter 15 of the Civil Practice and Remedies Code, it is apparent that they are not current. As a result of amendments made by the Legislature to Chapter 15 in 1995, "Venue: General Rule" is now set forth in Section 15.002 rather than 15.001. "Mandatory Venue" is provided in Sections 15.011 - 15.020, rather than in Sections 15.011 - 15.017, and "Permissive Venue" is provided in Sections 15.032 and 15.033, rather than in Sections 15.031-15.040.

We are not completely familiar with the process employed by the Court in amending the Rules, but it appears that Rule 87(2)(a) is in need of overhaul. This letter is sent with the request that you forward it to the appropriate party.

Yours respectfully,

David B. Kultgen

DBK:rm

Revised 1/15/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. Election By Governmental Units; Waiver.

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. **Service.** When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. **Offer To Settle.**

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. **Acceptance of Offer.**

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. **Withdrawing an Offer**

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. **Rejection of Offer.** For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. Award of Litigation Costs.

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in the action.

10. Attorney's Fees.

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. Evidence Not Admissible.

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

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TO: SCAC MEMBERS

FROM: Professor Elaine A. Carlson

RE: Offer of Judgment Proposal: Rule 166b

March 1, 2002

Chairman Babcock has requested the SCAC Offer of Judgment Subcommittee review the proposed Offer of Judgment Rule 166b generated by the Supreme Court Task Force Committee chaired by Joe Jamail. (Attachment A) We have reviewed the proposed rule and the literature surrounding the subject and set forth the following analysis and observations for your consideration.

I. Overview of Offer of Judgment Rule

An offer of judgment rule provides for the shifting of costs upon an offeree who fails to accept an offer of judgment from their adversary when the ultimate judgment in the case is less favorable than that offered. Federal Rule of Civil Procedure 68, as well as many parallel state rules or statutes, provide that if a defendant offers to have judgment entered against him, the plaintiff does not accept, and the plaintiff's judgment is not more favorable than the offer, then the plaintiff must pay the defendant's post-offer costs.[1] "The effect

[1] It has been reported that twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all. See Solimine & Pacheco,

is to reverse the usual rule that a losing party must pay the winner's costs."[2] State rules vary as to whether the offer of judgment mechanism extends to both plaintiffs and defendants and as to what is recoverable beyond costs, with some providing recovery for attorney's fees as well as expert fees under a myriad of offer of judgment schemes.

Proposed Rule 166b is an offer of judgment rule that applies to both plaintiffs and defendants. It provides for the shifting of litigation costs including costs of court, attorneys fees, as well as reasonable expert fees when an offer of judgment is rejected and the offeree suffers a less favorable judgment. A less favorable money judgment is defined by the rule as a judgment more favorable to the offeror when the amount of monetary damages awarded is equal to or great than twenty-five percent of the offer to settle. A more favorable nonmonetary judgment results when the "judgment is more favorable to the party who made the offer to settle the claims".[3]

A majority of our subcommittee is opposed to an offer of judgment rule. However, a majority of the subcommittee endorses a modification to rule 131 to clarify that the trial court has the discretion to tax costs against a prevailing plaintiff who receives less than the amount offered by a Defendant before trial. The following discussion reflecting our concerns is offered for the full committee's consideration.

II. Historical Overview of Fee and Cost Shifting

The United States has long rejected the "English Rule", followed in Great Britain and most European nations, that the loser must pay the successful party's attorney's fees.[4] The historical justification for the "American Rule"- that parties bear the costs of their own attorney's fees in litigation whether

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State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[2] Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 Law & Contemporary Problems 13, 13-14, Autumn 1988.

[3] See Appendix A. Proposed Rule 166b.

[4] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

they win or lose- is premised upon the American belief in liberal access to the courts to redress wrongs.[5] A deterrent, including the threat of paying the other sides attorney's fees if suit is unsuccessful, raises the concern that wrongs may go unremedied in our society, and that any such rule would disproportionately impact the plaintiff's access to the courts. It has been suggested that the differences in our two systems justifies these practices:

> England virtually abolished juries in civil cases (except for libel and malicious prosecution) more than 50 years ago. Cases are tried before judges whose decisions are narrowly bound by precedent, not only on liability but on damages as well. Outcomes, therefore, tend to be more predictable in England than in the United States..... Moreover, lack of predictability in American law is not limited to juries. Substantive and procedural law has undergone constant and sometimes dramatic change during the past 40 years. Law in America is more volatile and less precedent-bound than in England. Propositions that might at one time have been thought frivolous, or at least highly speculative, have become accepted. It is a rare case of which one can say with assurance that it cannot prevail.[6]

There are a number of exceptions to the American rule that permit recovery of attorney's fees by a claimant. For example, a party determined to have brought an action in bad faith may be responsible for the attorneys fees of an opponent. Further, a myriad of statutory provisions allow the recovery of attorney's fees by a prevailing party despite the American rule. Further, some states have adopted offer of judgment rules that allow for the shifting of attorney's fees when an offeree refuses his opponent's offer to settle and does no better at trial. (The state adoptions are both by rule and by statute).

Offer of judgment rules are intended to encourage settlements and avoid protracted litigation. Perhaps more precisely, the object of such rules are "to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases

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[5] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

[6] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 149-150.

before the heaviest expenses have been incurred".[7]

Federal Rule 68 provides for an offer of judgment mechanism. It "resembles the English practice, except that by its terms it is limited to court costs, generally only a fraction of attorney fees. As noted above, the rule permits a defendant at any time more than 10 days before trial to serve an offer of judgment for money or other relief and costs then accrued. If the plaintiff accepts the offer within 10 days, judgment is entered. If the plaintiff does not accept and the final judgment "is not more favorable (to the plaintiff) than the offer," it must pay the costs incurred after the making of the offer. If an offer is not accepted, a subsequent offer may be made."[8]

Federal Rule 68 was adopted in 1938, and since that time over thirty states have adopted by rule or statute an offer of judgment mechanism.[9] The Federal Advisory Committee on the Civil Rules, noted in its proposed 1983 amendment to Rule 68, that the rule "has rarely been invoked and has been considered largely ineffective in achieving its goals."[10] [11] In particular, the federal rule has been criticized as: (1) it only provides for a defending party to make an offer of judgment, (2) it only provides for the recovery of court costs, and not attorney's fees so there is insufficient incentive to utilize it, and, (3) the time to make and accept an offer is too limited to allow parties to assess whether the proposed offer should be accepted. Proposed

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[7] See Committee on Federal Rules of Civil Procedure, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Submitting Proposals for Amendment of the Federal Rules of Civil Procedure (Aug. 1984), reprinted in 102 F.R.D. 423, 423-24 (1984).)

[8] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147.

[9] See Solimine & Pacheco, State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[10] Wright, Miller & Marcus, Federal Practice & Procedure 2d, § 3001 (West Publishing, 2001).

[11] Fisher, Federal Rule 68, A Defendant's Sublte Weapon: Its Use and Pitfalls, 14 DePaul Bus. L. J. 89, 90 (Fall 2001): "Commentators claim that Rule 68 is not often utilized. More likely, its use is underreported. A Rule 68 offer that is not accepted will not be filed with the court. Thus, no reliable mechanism exists for counting the frequency of Rule 68 offers. In addition, a defendant may prefer to settle privately even though it has made a Rule 68 offer. The plaintiff usually loses nothing by settling privately and may gain additional concessions from the defendant, such as additional money for a confidentiality provision. In such situations, the parties will settle privately, outside the scope of Rule 68. While this will not be reported as a "successful" Rule 68 offer, the application of the rule was nonetheless an important force driving the settlement."

amendments to the federal rules to correct these deficiencies were not adopted. As observed by Professor Sherman:

> Although proposals for changes in Rule 68 have primarily focused on expanding it to apply to offers by plaintiffs and recovery of attorneys' fees, a number of proposals have also tinkered with the basic terms of what triggers cost shifting. One of the more interesting proposals came from the local rule experimentation fostered by the Civil Justice Reform Act of 1990 (CJRA). For example, the CJRA-generated plan adopted in 1993 by the United States District Court for the Eastern District of Texas [See Appendix B] provides that "a party may make a written offer of judgment" and "if the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by 10%, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected." "Litigation costs" is defined to include "those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition costs and fees for expert witnesses." If the plaintiff recovers either more than the offer or nothing at trial, or if the defendant's offer is not realistic or in good faith, the cost shifting sanctions do not apply. Chief Judge Robert M. Parker reported that in the rule's first two years, hundreds of parties made offers of judgment, generally resulting in settlement at a subsequently negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10% better than the offer. There is a question, however, as to whether such a local federal rule is inconsistent with Rule 68, and similar modification of Rule 68 has not been followed in other local rules. (citations omitted).

Indeed, the fifth circuit held the local rule to be invalid[12]:

> In Ashland Chemical Inc. v. Barco Inc., the Fifth Circuit held that an award of attorney's fees as litigation costs under a United States District Court for the Eastern District of Texas local rule was a substantive, rather than procedural, rule and thus required

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[12] Ashland Chemical Inc. v. Barco Inc., 123 F.3d 261, 268 (5th Cir. Sept. 1997).

> congressional approval..... The Fifth Circuit held that Congress must authorize substantive departures from the American rule, which requires each party to pay its own attorney's fees. After reviewing congressional history, as well as the Civil Justice Reform Act of 1990, the Fifth Circuit found that there was no congressional approval for the fee-shifting provision of the Eastern District's local rule. (citations omitted).[13]

The ABA proposed amendments to Federal Rule 68 are reproduced in Appendix C.

III. Propriety of Court Rule Making Power to Effectuate Fee Shifting

Is an offer of judgment rule that includes fee shifting within the rule making power of the courts? As noted above, federal rule 68 does not provide for shifting attorney's fees, only costs, so the issue has not been directly addressed in federal jurisprudence. However, the United States Supreme Court has expressed general disapproval of the judicial creation of fee-shifting provisions. Perhaps to compensate for the omission in the federal offer of judgment rule to allow for the recovery of attorney's fees, the private attorney general doctrine developed whereby federal courts could exercise their inherent equity powers to award fees "when the interests of justice so required." By 1970, intermediate court decisions permitted the recovery of fees in the absence of a fee-shifting statute by prevailing plaintiffs who "vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance."

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), however, the Supreme Court eliminated the private attorney general doctrine, holding that the federal judiciary had exceeded its authority in crafting the broad private attorney general exception to the American Rule. Justice White, writing for the majority opined that fee shifting was generally a matter within the legislative province and that federal courts could not play a role in creating substantive exceptions to the American Rule of attorneys' fees, "no matter how noble the purpose" Justice White wrote:

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[13] James M. McCown, Civil Procedure Survey, 30 Tex. Tech L. Rev. 475, 504 (1999).

> [The] rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."

Subsequently, Congress enacted a myriad of statutes allowing for the recovery of attorneys fees, some expressly providing for the recovery of attorney's fees as part of the plaintiff's costs.

One academician opines that *Aleyska* has been misinterpreted and concludes "that properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[14]

Attorney fee shifting has been allowed on a limited basis in federal practice. The United States Supreme Court in Marek v. Chesny, 473 U.S. 1 (1985), held that when a statute provides for an award of attorneys' fees to a prevailing party and the statute defines the fees as costs, a prevailing plaintiff who does not obtain a judgment more favorable than the defendant's offer of judgment loses the right to recover his or her attorneys' fees. In *Marek*, the successful Plaintiff lost its statutory right to recover attorney's fees as provided in the Civil Rights Attorney's Fees Award Act of 1976, due to its failure to accept an offer of judgment when the resulting judgment was less favorable and the fees were awarded as a part of costs. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees, according to the majority, are to be included as costs for purposes of applying Federal Rule 68.

Justice Brennan's dissent suggests that the majority's interpretation of Rule 68 to include attorney's fees as a part of costs in these types of cases

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[14] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

violates the separation of powers doctrine and is beyond the judiciary's rulemaking authority. Procedural rules or interpretation of rules that abridge, enlarge or modify a substantive right of a litigant are prohibited by the Federal Rules Enabling Act. (Citing: The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act, 98 Harv.L.Rev. 828, 844 (1985)). [Texas Rules Enabling Act has substantially the same limitation.] Justice Brennan opined that "The right to attorney's fees is substantive under any reasonable definition of that term" and that while the courts have "inherent authority to asses fees against parties who act in bad faith, vexatiously, wantonly or for oppressive reasons" it may not impose a mechanical per se rue awarding attorneys fees that supplants the congressionally prescribed reasonableness standard for imposing fees in civil rights cases. Justice Brennan noted that the September 1984 revised version of Rule 68, provided for the recovery of attorney's fee but only if a court determined that "an offer was rejected unreasonably," and the proposal sets forth detailed factors for assessing the reasonableness of the rejection. It would seem that a majority of the Court would view an Offer of Judgment rule that provides for the recovery of attorney's fees due to the unreasonable rejection of an offer of judgment as proper and within the rule making authority of the court. Our subcommittee considered inclusion of this restriction, but rejected it due to concerns that any reasonableness standard would provoke satellite litigation and needlessly consume judicial resources.

In 1991 the United States Supreme Court handed down its decision in Chambers v. NASCO, Inc.,[15] limiting the scope of Aleyeska's determination that fee shifting is substantive in nature and thus must be the subject of congressional approval. The district court, in reliance of its inherent powers, sanctioned the defendant for its bad faith conduct ordering the payment to plaintiff of approximately one million dollars in attorneys' fees and expenses. The Supreme Court upheld the award recognizing the trial court's inherent powers to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The Court further held that when a federal court sits in a diversity case, its inherent power to use fee shifting as a sanction for bad-faith conduct is not limited by the forum state's law regarding sanctions.[16]

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[15] 501 U.S. 32 (1991).

[16] Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

Two other United States Supreme Court decisions interpreting fee shifting under Rule 68 are noteworthy. In Evans v. Jeff, 475 U.S. 717 (1986), the Court expanded fee shifting under the rule holding that an offer of settlement in a class action could properly be conditioned upon the Plaintiff's attorney waiving his or her right to statutory attorney's fees. The Ninth Circuit viewed these types of offers of judgment as inherently unfair, noting the potential conflict that would exist between the plaintiff's attorney and the client. The Supreme Court, however, upheld the settlement offer as a proper offer of judgment, dismissed the conflict issue, and acknowledged "the possibility of a tradeoff between merits relief and attorney's fees." The Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), held that Rule 68 fee shifting is not implicated when the judgment is for the defendant, presenting the anomaly that a plaintiff may be better off under the fee shifting provision by a take nothing judgment that a plaintiff's verdict that was less favorable than the rejected offer. Academicians suggest that "The virtue of this literal interpretation of the rule...is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." [17]

A necessary corollary to the debate over rule making authority that is dependent upon whether fee shifting provisions are substantive or procedural in nature, is the question as to the law that should apply when the law of another state is controlling or Erie principles are implicated in federal court. One academician has concluded that "properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[18]

Assuming that rule making power supports an offer of judgment rule allowing for the shifting of attorney's fees, consideration should be given to

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[17] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1880-1881 (1998).

[18] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

the extensive legislative entrenchment in the recoverability of attorney's fees and the advisability of the court entering this arena.

IV. Pros vs Cons-Offer of Judgment Rule

Pros

Promotion of earlier settlement and serious consideration of offers to settle.

An offer of judgment rule serves to elicit realistic settlement offers early by giving parties a potential gain together with incentives for an adversary to take the offer seriously.

Settlement at an earlier stage than otherwise might occur, should lead to more dispositions of cases before the heaviest expenses have been incurred.

An offer of judgment that is not accepted, nonetheless may promote settlement on other terms.

An offer of judgment device affecting liability for post-offer fees should give parties with strong claims or defenses, who otherwise might have to yield more in negotiations than the merits seem to warrant (because of the threat of unrecoverable fees), an effective way of countering groundless opposition.

Offer of judgment rules may help fulfill a goal of remedial law, full compensation of injured plaintiffs. Rather than being limited to damages minus a large attorney's fee, a party with a strong claim who makes a reasonable, early offer seems likely to get an early settlement with relatively little fee expense or a judgment including a fee award. Similarly, a defendant could be compensated for expenses suffered because of a plaintiff's unjustified persistence.

Application of a properly constructed offer of judgment is within the rule making authority of the court and is equitable. Is it fair for a party that makes a reasonable offer to settle that is rejected to bear the post-offer costs and fees for preparing and trying the case successfully to judgment?

Criticisms of Offer of Judgment Rule

There is no preexisting procedural duty to settle. Parties who file suit do not have a duty to settle. Thus, the premise underlying an offer of judgment rule is faulty. An offer of judgment rule undermines access to the courts.

Gain from increased settlement is marginal and is offset by the complexity in applying an offer of judgment rule

Parties do not have an obligation to accurately predict the outcome of the suit.

An offer of judgment rule that shifts attorney's fees is arguably beyond the rule making authority of the court and is a matter for legislative determination. (See discussion above)

Prevailing parties should not be punished for losing a gamble or insisting on litigating a nonfrivolous claim. Offer of judgment rules are "Vegas rules" that "force a party to accept an offer of judgment, even if they reasonably believe that they are entitled to a larger judgment and even if they reasonably believe that they are entitled to adjudicate their legal claim in court--or they may gamble that they will receive more at trial than the offer, thereby risking their status as prevailing party for purposes of costs and, in some cases, attorneys' fees."[19]

Given the difficulty of predicting jury verdicts in many cases, is it illogical and incongruous to have a rule of civil procedure that punishes parties who reasonably believe that they will fare better at trial beyond that offered pre-trial?[20]

Rules of civil procedure should not punish litigants for nonfrivolous, nonvexatious, good faith pursuit of claims or defenses.

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[19] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145 (1999).

[20] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 148-49.

Auto Policy Litigation. Will an auto policy cover the additional costs and fees under an offer of judgment rule, or must the parties pick up those fees? If the latter, is this fair when the insurer directs the defense? Further, many offers to settle are already routine under the Stowers doctrine.

What is the harm we are trying to address? Ninety-five percent of cases settle. The federal offer of judgment rule was formulated before alternate dispute resolution. Today, a large percentage of cases settle after mediation. Further, sanctions rules allow for the imposition of attorney's fees in appropriate circumstances. Why allow attorney's fees under an offer of judgment rule in cases where the parties have bona fide differences as to the value of the case: example: cases where experts advance competing damage models.

An offer of judgment rule does more than promote or encourage settlements; it coerces settlement. Proposed Rule 166b provides a hammer to the defense, will likely result in lower settlements, and harms plaintiffs of limited means disproportionately. On the other hand, plaintiffs with no assets may actually value the claim higher with the potential increased recovery under an offer of judgment rule. Instead of encouraging settlements, litigants who believe they have a strong potential for offer of judgment recovery may "dig in" and not seriously entertain future bona fide offers. [21]

The savings from settlement are not evenly distributed between the parties and the rule favors wealthier litigants.

A defendant willing to offer a particular amount to settle without a cost- (or fee-) shifting rule will offer something less under an offer of judgment. Even with a bilateral rule, the detrimental effects on plaintiffs would remain in the many cases in which the plaintiff is more risk-averse than the defendant or when a prevailing plaintiff would already be entitled to costs (or fees) in the absence of an offer of judgment rule.[22]

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[21] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[22] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

VI. Issues To be Decided In Crafting an Offer of Judgment Rule

1) Time for Making Offer

a) The timing is important. Should a party be able to make an offer of judgment immediately after service of process when there has not been adequate time for discovery and to fairly evaluate clams and defenses? On the other hand, the offer should be made before trial and at such time as parties may seriously entertain settlement negotiations.
Reasonable time after discovery, after suit is filed? But no later than _____ days before trial?

Under federal rule, an offer may be made after the complaint is filed. This arguably leads to gamesmanship and does not allow for an honest evaluation of the value of the case before an offer must be responded to. It is arguably not desirable to allow an offer to be made too early in the litigation, as evidenced by the following strategies:

> Plaintiffs. "First, plaintiffs should conduct as much investigation and research as possible before filing suit. Second, plaintiffs should conduct all formal discovery as early in the case as possible. Third, when an unsatisfactory rule 68 offer is received, plaintiffs should immediately launch into intensive discovery before rejecting the offer. Fourth, when unable to evaluate an offer within ten days, plaintiffs should seek an extension of time to respond. Fifth, plaintiffs' attorneys should modify their fee arrangements in fee-shifting cases to account for the new situation created by Marek. Sixth, if a plaintiff ultimately obtains a judgment less favorable than a rejected settlement offer, the plaintiff should be prepared to argue vigorously that rule 68 does not apply."
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> Defendants. "Rule 68 allows a defendant to make an offer of judgment as soon as the complaint is filed. Defendants should take advantage of this right by making rule 68 offers as soon as possible, meaning as soon as the case can be roughly evaluated. If a defendant anticipates suit, then she should evaluate the anticipated suit and prepare a rule 68 offer to be served on the plaintiff immediately after the complaint is filed.
>
> Early offers have several advantages. First, if an offer is successful (i.e., if the offer equals or exceeds the judgment finally obtained by the

plaintiff), it stops costs from accruing at the earliest possible point. Especially in fee-shifting suits, cutting off costs at the earliest possible moment will make a substantial economic difference.

Second, an early offer may catch the plaintiff by surprise before the plaintiff has had an opportunity to evaluate the case. The plaintiff may then either accept an offer that is too low or reject one that is too high, saving the defendant money in either instance. More specifically, since the plaintiff is not ordinarily entitled to responses to interrogatories or document requests until forty-five days after the complaint is served, and since the plaintiff has only ten days to respond to the offer, an early offer may force the plaintiff to accept or reject the offer before taking any discovery.

Third, if the plaintiff rejects it, the rule 68 offer will hang over the litigation like a guillotine, influencing the plaintiff's behavior in several ways." (Citations Omitted) [23]

2) The Offer

a) Apply to Plaintiffs and Defendants.
Federal rule only applies to defendants. ABA proposal applies to both plaintiffs and defendants. Proposed Rule 166b allows plaintiffs as well as defendants to make offers of judgment.

b) As to all claims.
To qualify, an offer must extend to all claims. Otherwise, piecemeal settlement would be encouraged and the purpose of the offer of judgment rule would not be fulfilled.

c) Buffer. Should the rule include a buffer or a cap?
As proposed, the rule provides offerees a 25% margin of error before they can be subjected to cost shifting. This tracks the ABA proposal. "The 75%-125% percentages that trigger cost shifting were chosen in the belief that case evaluations by parties and their attorneys often lack exact precision and that a margin of error should be accorded to offerees before imposing cost shifting." See Sherman article. The offeree who rejects a more

[23] Simon, The New Meaning of Rule 68: Marek v. Chesney and Beyond, 14 N.Y.U. Rev. L. & Soc. Change 475 (1986).

favorable offer than she receives at trial must pay the offeror's costs, including all reasonable attorney's fees and expenses incurred after the date of the offer. However, this penalty provision does not operate to shift costs to the offeree unless the final judgment is greater than 125% of the amount of the offer. Similarly, an offeror cannot recover costs unless the final judgment obtained is less than 75% of the amount of the offer.

d) Cap.
The proposal specifically limits the maximum fee award to the amount of the judgment,

e) Joint Offers. Should multiple parties be entitled to make a joint offer of judgment, and if so, may they be conditioned upon acceptance by al the parties?

- Nevada's rule provides extensive provisions regarding multi-parties.
    a) Multi-parties may make a joint offer of judgment.
    b) A party may make two or more parties an apportioned offer of judgment that is conditioned upon acceptance by all the parties.
    c) The sanctions for refusing an offer apply to each party who rejected the apportioned offer, but not to a party who accepted the offer.
    d) An offer to multiple <u>defendants</u> only applies if:
        1) the same person is authorized to decide whether to settle the claims against all defendants; AND
        2) there is a single common theory of liability against all the defendants; OR
        3) the liability of one or more of the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made; OR
        4) the liability of all the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made

e) A similar provision applies to multiple plaintiffs.

- Wisconsin requires a plaintiff suing multiple defendants under multiple theories to make separate settlement offers. Wisconsin also allows defendants who are jointly and severally liable to submit joint offers of judgments to an individual plaintiff. [24]

- ABA Proposal. When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

f) Admissability. An offer of judgment is served by the offeror upon the offeree. It is not filed with the court and is inadmissible except on the issue of costs and attorneys' fees. The court will see the offer only if the offeror puts it at issue to recover its litigation expenses.

3) Time Period for Keeping the Offer Open

Revocability of Offer. Should an offer be irrevocable for a time period? How long should an offer be open to constitute an offer of judgment?

4) Terms of the Acceptance

Should the acceptance of the offer be unconditional to be effective for purposes of cost shifting?

5) The Fee Shifting Formula

a. What Litigation Costs Should be Shifted? Costs only, costs x10, attorney's fees, some cap on recovery of attorney's fees, expert fees?

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[24] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment.

b) Costs. Should costs include both taxable[25] and non-taxable costs?
c) Limits. Should the rule limit the offeror's recovery of costs, including attorneys' fees, to the total amount of the judgment.?

d) Fees. Plaintiff's Recovery of Contingent Fees. Ordinarily, Plaintiffs do not keep hourly time records, how would Plaintiff prove up reasonableness of fee after offer of judgment rejected by the Defense? Would a lodestar apply? Should factors for reasonable of attorney's fees be included in any offer of judgment rule?

e) Statutory Basis Exists Already for Recovery of Attorney's Fees. Does that mean a prevailing Plaintiff under the Offer of Judgment rule, gets to recover double as to those fees incurred after the Defense rejects the offer and the Plaintiff obtains a more favorable option? One option is to prohibit double recovery.

6) What is a more favorable judgment?

a) Is a more favorable judgment limited to a verdict, does it include summary judgment, or other final disposition of the case?

b) Fees and Costs incurred after the expiration of a refused offer. Should the same be excluded in determining whether a judgment is more favorable than the offer?

- Much of the comparison depends on the details and terms of the offer. (E.g. if costs and fees are independently specified in the offer)

- The Unadopted Amendments to FRCP 68 exclude costs, attorney's fees, and other items after the expiration of a refused offer.

    ? E.g. A defendant offered a lump sum of $50,000, and the plaintiff received a $45,000 judgment. The judgment would be "more favorable" to the plaintiff if the costs, attorney's fees, and other items awarded for the period before the offer expired total more than $5,000.

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[25] See Allen & Ellis, "What are Taxable Costs in Texas?" 36 Houston Lawyer 14, October 1998.

- **Colorado's** rule provides that any amount of the final judgment representing interest subsequent to the date of the settlement offer should not be considered when comparing the amount of the judgment and the amount of the settlement.

- **Oklahoma** subtracts attorney's fees and costs from the judgment when calculating the difference between the offer and judgment. **Wisconsin** also compares the offer and judgment exclusive of costs.[26]

c) Should a take-nothing judgment be considered a more favorable judgment for the defendant who has made an offer that was rejected by the Plaintiff? The U.S. Supreme Court held federal offer of judgment rule does not apply to a take-nothing judgment applying the literal language of the rule. (Delta Airlines v. August). "The virtue of this literal interpretation of the rule...is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." On the other hand, it is ironic that a Plaintiff may fare better by a take nothing judgment than a very small judgment in its favor. A majority of the subcommittee believes that a take nothing judgment is a more favorable judgment for the Defendant.

d) Remittiturs. Should the offer of judgment rule expressly include a provision that takes into account a remittitur in determining the ultimate judgment?

e) Should an offer of judgment rule apply to cases seeking injunctive or declaratory relief[27] and, if so, how should a court compare a Rule 166b offer to the final judgment when injunctive relief has been offered or awarded?

f) Non-Monetary Relief. What constitutes a favorable judgment? We should clarify how the rule would apply in cases seeking equitable relief. Proposal:

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[26] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment

[27] Rhodes v. Stewart, 488 U.S. 1, 2 (1988) (per curiam). (Obtaining a declaratory judgment does not automatically mean that a party has prevailed within the meaning of the Fees Act. Citing its "equivalency doctrine," the Court held that a plaintiff only achieves prevailing party status if the litigation affects the "behavior of the defendant towards the plaintiff.").

The terms of the offer must address all non-monetary relief. A judgment is not more favorable unless it includes substantially all non-monetary relief requested.

g) Non-Monetary and Monetary Relief. What constitutes a favorable judgment? Any offer of judgment rule should clarify how the rule would apply in cases where a party recovers one but not the other requested relief.

7) Exemptions:

a) Class Actions? Derivative suits? DTPA? Family law cases? Workers Comp?

b) Statutory Cap Damage Cases. Won't the defense (in a clear liability case) always make an offer 25% below the cap so as to shift the post-offer expense of fees and cost to the Plaintiff? Should statutory cap cases be exempted from the offer of judgment rule, or should the Defendant be required to offer the cap, before the fee shifting under an offer of judgment rule would apply?

c) Exempt action between a landlord and tenant affecting the tenant's residence. Perhaps exempt all actions brought before a justice court?

8) Withdrawal of Offers and Subsequent Offers

a) Withdrawal. Should withdrawal of an offer be forbidden within the time period during which the offer stated that it would remain open? Should the court have the discretion to permit withdrawal for good cause shown and to prevent manifest injustice?

b) Subsequent Offers. Should subsequent offers be allowed? It would seem so. Even if an offeror has locked in an offeree with an unaccepted offer, the offeror may want to improve its chances of recovery of its costs and attorneys' fees by improving the offer which thereby improves the chances of settlement, thereby fulfilling the objective of the rule.

9) Court Discretion to Deny Fee Shifting.

"The ABA proposal contains a broad discretionary grant to the court to reduce or eliminate cost shifting to avoid undue hardship, in the interest of justice, or for other compelling reason to seek judicial resolution."

Rule 166b(9)(c). Do we need a more precise standard for the court's discretion to decline to award litigation costs under the rule, other than "the amount as justice requires"?

Should parties be able to "opt out" of an offer of judgment rule? Should the court have discretion, on motion of a party, to determine that the offer of judgment rule will be inapplicable to the case at hand?

10) Collateral estoppel implications.

What are the collateral estoppel implications when a defendant offers a judgment, as to other cases involving the same incident or transaction? One option is to provide in the rule or by comment, that a judgment reached under the rule is not the basis for collateral estoppel in other proceedings.

VII. Alternative Proposals Discussed

Amend the Cost Rules.

Clarify that costs may be taxed against a prevailing party for the unreasonable rejection of an offer of judgment. Rule 131 provides that a prevailing party is entitled to costs "unless the court otherwise directs." The rule could be amended to make clear that the trial court may consider an unreasonable rejection of a settlement offer when determining whether to award costs to a prevailing party, to deny such costs, or even to award them to a losing party who made a good faith settlement offer that was unreasonably rejected. The addition of the following sentence to Texas Rule of Civil Procedure 131 is suggested:

> When a plaintiff receives less than the amount offered by a Defendant before trial, the trial court has the discretion to tax all or part of the costs against the Plaintiff.

Alternate suggestion: provide for shifting of costs under offer of judgment principles in cases in which "the judgment finally entered is not more favorable to the offeree than the rejected offer", and provide for taxation to up

to ten times taxable costs.[28]

Amend the Sanctions Rules.

Sanctions rules could be amended to provide that all offers of settlement and refusals of such offers must not be presented for any improper purpose, as well as be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and be supported by evidence obtained after a reasonable pre-offer (or pre-refusal) inquiry.[29] Alternatively, provide for shifting of attorneys' fees only when settlement offers were rejected "frivolously, in bad faith, or for an improper purpose." [30] Our subcommittee rejected this idea.

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[28] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

[29] See Professor Burbank, Proposals to Amend Rule 68--Time to Abandon Ship, 19 U. MICH. J.L. REF. 425 (1986); Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[30] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

Subcommittee Recommendation

Appendix A

Revised 2/01/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. **Election By Governmental Units; Waiver.**

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. **Service.** When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. **Offer To Settle.**

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. Acceptance of Offer.

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. Withdrawing an Offer

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. Rejection of Offer. For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. Award of Litigation Costs.

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in any action for personal injury or death.

10. Attorney's Fees.

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. Evidence Not Admissible.

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

Appendix B

Proposed 1984 Amendments to Rule 68 Offer of Judgment Rule Incorporating Unreasonable Rejection of Offer As Prerequisite to Recovery of Attorney's Fees.

"At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counteroffer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

"If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"In determining the amount of any sanction to be imposed under this

rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree. "This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1984), reprinted in 102 F.R.D. 407, 432-433 (1985).

Appendix C A.B.A. Report on Offer-of-Judgment Legislation

§1. Offer of Judgment

At any time in a suit in which the claims are for monetary damages, or where any non-monetary claims are ancillary and incidental to the monetary claims, but at least 60 days after the service of the complaint and not later than 60 days before the trial date, any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer.

When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

§ 2. Form of Offer of Judgment

An offer of judgment must be in writing and state that it is made under this rule; must be served upon the opposing party to whom the offer is made but not be filed with the court except under the conditions stated in § 11; must specify the total amount of money offered; and must state whether the total amount of money offered is inclusive or exclusive of costs, interest, attorney's fees and any other amount which the offeror may be awarded pursuant to statute or rule. Only items expressly referenced shall be deemed included in the offer.

§ 3. Determination of Applicability

At any time after the commencement of the action, any party may seek a ruling from the court that this rule shall not apply as between the moving party or parties and any opposing party or parties by reason of the fact that an exception to the rule exists or that one or more of the circumstances set forth in Section 11(e) for eliminating the application of the rule exists. The court, upon receiving and considering any such application, may grant the application, deny the application, or, in its discretion, defer a ruling on the application until a later time including a time after the entry of judgment. Any

moving party obtaining the relief sought under such a motion prior to judgment may not, itself, use the rule as to any opposing party to which the motion is applied.

§ 4. Time Period During Which Offer Remains Open.

An offer may state the time period during which it remains open, which in no event may be less than 60 days. An offer that states a time period of less than 60 days is an invalid offer. An offer that does not state the time period during which it remains open is deemed to remain open for 60 days, and thereafter indefinitely until 60 days before the date set for trial unless withdrawn pursuant to the provisions of § 8 in which case it shall have no further consequence under this rule.

§ 5. Extension of Time Period During Which Offer Remains Open

Upon the application of the offeree, the court may, for good cause shown, extend the time period during which an offer remains open. If the court extends the time period during which an offer may remain open, the offeror has the option of withdrawing the offer.

§ 6. Acceptance of Offer.

An offer is accepted when a party receiving an offer of judgment serves written notice on the offeror, within the time period during which the offer remains open, that the offer is accepted without qualification.

§ 7. Refusal of Offer.

An offer is deemed to be refused if it is not accepted within the time period during which the offer remains open.

§ 8. Withdrawal of Offer.

An offer may not be withdrawn, except with the consent of the court for good cause shown and to prevent manifest injustice, before the expiration of the time period during which the offer stated that it would remain open. An offer not made subject to an expressly stated time period may be withdrawn after 60 days by serving the offeree with written notice of the withdrawal and

shall have no further consequence under this rule.

§ 9. Inadmissibility of An Offer Not Accepted.

Evidence of an offer not accepted is not admissible for any purpose except in a proceeding to determine costs and attorney's fees under a statute or rule permitting recovery thereof or pursuant to an entry of judgment under § 11.

§ 10. Subsequent Offers.

The fact than an offer is made but not accepted does not preclude any party from making subsequent offers. If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee- shifting under § 11(a) or (b) as to any one of such offers.

§ 11. Effect of Rejection of an Offer.

If an offer made by a party is not accepted and is not withdrawn before final disposition of the claim that is the subject of the offer, the offeror may file with the clerk of the court, within 10 days after the final disposition is entered, the offer and proof of service thereof. A final disposition is a verdict, order on motion for summary judgment, or other final order on which a judgment can be entered, including a final judgment, but a judgment based on a settlement agreement will not result in cost-shifting unless the parties expressly agree to cost-shifting rights under this rule. The court, after due deliberation and after providing the parties to the offer an opportunity to submit proposed findings, will enter judgment as follows:

(a) If a final judgment obtained by a claimant who did not accept an offer from an adverse party is not greater than 75% of the amount of the offer, the claimant offeree shall pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorneys fees under court rule or contract, the

court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off. This subsection (a) shall not apply if the claimant offeree receives a take-nothing judgment.

(b) If a final judgment obtained by a claimant against an adverse party who did not accept an offer from such claimant is greater than 125% of the amount of the offer, the offeree shall pay the claimant offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the claimant offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorney fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off.

(c) In comparing the amount of a monetary offer with the final judgment, which shall take into account any additur or remittitur, the latter shall not include any amounts that are attributable to costs, interest, attorney's fees, and any other amount which the offeror may be awarded pursuant to statute to rule, unless the amount of the offer expressly included any such amount.

(d) If both the offeree and the offeror may be entitled to recovery of attorneys fees under rules or contract, the court shall determine the amount of the recovery of such attorneys' fees by either side by the application of this rule, of such other rule as may apply to the recovery of fees, the language of any contract providing for fees and general principles of law.

(e) The court may reduce or eliminate the amounts to be paid under subsections (a) and (b) to avoid undue hardship, or in the interest of justice, or for any other compelling reason that justifies the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of judgment.

(f) The amount of any attorney's fees to be paid under subsections (a) and (b) shall be a reasonable attorney's fee for services incurred in the case as to the claims for monetary damages after the date the offer was made, calculated on the basis of an hourly rate which may not exceed as to the claims for monetary damages that which the court considers acceptable in the jurisdiction of final disposition of the action, taking into account the attorney's qualifications and experience and the complexity of the case, except that any attorney's fees to be paid by an offeree shall not:

(1) exceed the actual amount of the attorney's fees incurred by the offeree as to the claims for monetary damages after the date of the offer; or

(2) if the offeree had a contingency fee agreement with its attorney, exceed the amount of the reasonable attorney's fees that would have been incurred by the offeree as to the claims for monetary damages on an hourly basis for the services in connection with the case.

§ 12. Nonapplicability.

This provision does not apply to an offer made in an action certified as a class or derivative action, involving family law or divorce, between a landlord and a tenant as to a residence, or in which there are claims based on state or federal constitutional rights.

This provision for fee shifting also does not apply to any case in which attorneys fees are statutorily available to a prevailing party to insure the ability of claimants to prosecute a claim in implementation of the public policy of the statute.

Committee Votes Against Offer-of-Judgment Proposal

By Mary Alice Robbins <mailto:mrobbins@amlaw.com>
Texas Lawyer

An advisory panel turned its thumbs down on a proposal that the Texas Supreme Court enact a rule to allow the shifting of litigation costs to a party who rejects a settlement offer and ends up with a less favorable judgment. But don't look for the issue to go away. After vigorously debating an "offer of judgment" proposal on March 8, the high court's Rules Advisory Committee voted 17-3 against the concept, only to be told by the chairman, Charles "Chip" Babcock, that the issue will be brought back before the panel in May.

Politics may be at play. Lt. Gov. Bill Ratliff, who has sponsored legislation to allow the fee-shifting when a litigant refuses to settle, says he asked the Supreme Court to look at the issue. S.B. 532, by Ratliff, passed the Senate in 1999, but its companion bill was left pending in a House committee, a spokeswoman for the lieutenant governor says.

A member of the advisory committee member objects to having the offer-of-judgment proposal brought back before the panel.

"Proceeding down a path you don't want to proceed down causes some confusion," says 4th Court of Appeals Chief Justice Phil Hardberger, a member of the committee. "Frankly, I had hoped the Supreme Court would simply take our vote. You wanted it, you got it."

Tommy Jacks, another member of the committee, says the 17-3 vote showed there is "a real serious level of misgivings" among lawyers on both sides of the docket and judges about introducing "something this radical" into the system.

Judge David Peeples, of the 224th District Court in Bexar County, says he voted against the proposal because of the complexity that he believes such a rule would add to the system. However, Peeples says he's not opposed to taking another look at the issue.

"I'm not convinced we can write a good rule that will do some good without paying a larger price in complexity," Peeples says. "But why not try?"

Babcock, a partner in the Houston office of Jackson Walker, says it's not unusual for the committee to advise the court on a rule, even though the members don't think the rulemaking is necessary.

"The court needs to know, if there is going to be a rule, what our thinking is about it - what would the best rule look like," Babcock says.

"We need to de-politicize the issue and start looking at the mechanics of what would make the system work better," says Supreme Court Justice Nathan Hecht, the court's liaison for rules.

The Supreme Court's Task Force on Civil Litigation Improvements, headed by Houston attorney Joe Jamail, also is considering the issue and drafted the proposed rule looked at by the advisory committee. Under the task force's initial proposal, post-offer litigation costs - including attorneys' fees - could be shifted if the difference between the damages awarded and the settlement offer equals at least 25 percent of the amount offered. It would be up to the judge whether to award those costs, says Elaine Carlson, a South Texas College of Law professor who headed the subcommittee that reviewed the proposal.

There is precedent for the rule in the federal courts and in other states. According to a report prepared by Carlson, 28 states and the District of Columbia have rules similar to Federal Rule of Civil Procedure 68, which provides that a plaintiff must pay a defendant's costs - attorneys' fees aren't included - if he refuses to accept an offer to settle and receives less in the judgment. Another 13 states have offer-of-judgment provisions that differ from the federal rule in "significant ways," the report said.

The report also noted that the U.S. District Court for the Eastern District of Texas adopted a rule which allowed the shifting of litigation costs and fees to a party who rejected an offer to settle and obtained a judgment less than 10 percent better than the amount offered.

In 1997, the 5th U.S. Circuit Court of Appeals held the rule to be invalid. The 5th Circuit held in Ashland Chemical Inc. v. Barco Inc. that the local rule was substantive rather than procedural and thus required congressional approval.

Authority Questioned

Several members of the advisory committee question whether this state's Supreme Court has the authority to enact an offer-of-judgment rule.

"This is a major state policy issue," state Rep. Jim Dunnam, D-Waco, an ex officio member of the committee, said at the meeting.

Dunnam, a partner in Dunnam & Dunnam, said the Legislature has been asked "session after session" to allow this type of relief but, despite being pressured by big-moneyed interests, has not passed a bill.

The reason it hasn't passed, he said, is because it's a bad change in the law.

Ratliff says he believes such a change is necessary to avoid needless litigation. "What this does is get people to settle early," Ratliff says.

"Here's what it comes down to - saving money for the clients and the system," Hecht says. Any rule adopted by the court would "nudge" plaintiffs and defendants to settle their disputes and spare the system the costs of having to try cases that should be settled, he says.

However, Hardberger said such a rule would have a "chilling effect" on litigants. "To put it in common terms, it would scare the hell out of most," he told fellow committee members.

Linda Eads, a former deputy state attorney general and professor at the Southern Methodist University Dedman School of Law, said changing the law would benefit the Office of the Attorney General, which handles huge amounts of litigation and often is opposed by lawyers unwilling to settle cases that should be settled. But Eads said the proposal involves a substantive change that the Legislature should consider, not a procedural change that the Supreme Court can enact through rulemaking.

Ratliff says he asked the Supreme Court to look at the issue to see if it is something that the court can do by rule. "My impression is the court thought it could," he says.

Hecht says the court "clearly" has the authority to enact a rule that would shift certain costs to a party who refuses an offer to settle but ultimately loses the case or receives less than the amount offered. The court also has authority to shift attorneys' fees if a party is "abusing the process" by unreasonably rejecting an offer to settle, he says.

But Jacks, a partner in the Austin office of Mithoff & Jacks, says the only way that he believes the issue falls within the court's rulemaking authority is if the sanctions are reserved for cases involving "egregious conduct."

Before fees and costs are shifted, Jacks says, a hearing should be held. He also says there is a serious question whether a jury trial would be required in such cases.

Jacks says parties in civil suits are not under any legal obligation to settle. "There's no law anywhere that imposes that requirement," he says.

Another consideration, Jacks says, is whether there is insurance coverage for this type of penalty. Jacks says insurance companies often decide whether to settle cases on behalf of those they insure. If a policy doesn't cover attorneys' fees for the opposing party, the insurer can opt not to settle and leave the insured to pay the fees if that proves to be the wrong decision.

Carlson, who voted for considering the concept, says she favors crafting a "limited" rule that allows only costs to be shifted. The rule would have to be crafted carefully to make sure it is within the court's authority to enact procedural rules, she says.

"I frankly think that if we don't include attorneys' fees, we're wasting our time," Babcock says. "In the federal system, where it's just the filing fee and relatively modest costs, it's not worth the time and effort to go ahead and use the rule."

Babcock says the Jamail task force, which met on March 11 in Houston, is going back to the drawing board and will redraft the rule to address some of the concerns raised. Jacks and Carlson also serve on the task force.

The rules advisory committee will revisit the issue when it meets May 17-18 in Austin.

FL ST RCP Rule 1.442
Fla.R.Civ.P. Rule 1.442

WEST'S FLORIDA STATUTES ANNOTATED
FLORIDA RULES OF CIVIL PROCEDURE

Current with Amendments received through 02/01/02.

Rule 1.442. Proposals for Settlement

(a) Applicability. This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

(b) Service of Proposal. A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

(c) Form and Content of Proposal for Settlement.

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

(e) Withdrawal. A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

(f) Acceptance and Rejection.

(1) A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of rule 1.090(e) do not apply to this subdivision. No oral

communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

(2) In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed.

(g) Sanctions. Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525.

(h) Costs and Fees.

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys' fees.

(2) When determining the reasonableness of the amount of an award of attorneys' fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

(A) The then-apparent merit or lack of merit in the claim.

(B) The number and nature of proposals made by the parties.

(C) The closeness of questions of fact and law at issue.

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

(i) Evidence of Proposal. Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

(j) Effect of Mediation. Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

CREDIT(S)

1985 Main Volume

Added July 26, 1972, effective Jan. 1, 1973 (265 So.2d 21). Amended Oct. 9, 1980, effective Jan. 1, 1981 (391 So.2d 165).

2002 Electronic Update

Added July 27, 1989, effective Jan. 1, 1990 (550 So.2d 442). Amended July 16, 1992, effective Jan. 1, 1993 (604 So.2d 1110); Oct, 31, 1996, effective Jan. 1, 1997 (682 So.2d 105); Oct. 5, 2000, effective Jan. 1, 2001 (773 So.2d 1098).

<General Materials (GM) - References, Annotations, or Tables>

COMMITTEE NOTES

2002 Electronic Update

1996 Amendment. This rule was amended to reconcile, where possible, sections 44.102(6) (formerly 44.102(5)(b)), 45.061, 73.032, and 768.79, Florida Statutes, and the decisions of the Florida Supreme Court in Knealing v. Puleo, 675 So. 2d 593 (Fla. 1996), TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995), and Timmons v. Combs, 608 So. 2d 1 (Fla. 1992). This rule replaces former rule 1.442, which was repealed by the Timmons decision, and supersedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions. The provision which requires that a joint proposal state the amount and terms attributable to each party is in order to conform with Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993).

2000 Amendment. Subdivision (f)(2) was added to establish the time for acceptance of proposals for settlement in class actions. "Filing" is defined in rule 1.080(e). Subdivision (g) is amended to conform with new rule 1.525.

HISTORICAL NOTES

2002 Electronic Update

Former Rule 1.442 was withdrawn and a new Rule 1.442 was adopted, effective Jan. 1, 1990, in the Florida Supreme Court per curiam opinion of July 27, 1989. Motions for rehearing were denied on Nov. 7, 1989.

The per curiam opinion of the Florida Supreme Court of July 27, 1989 (550 So.2d 442) which adopted this rule effective Jan. 1, 1990, provides in part:

"We hold that the confusion created by the enactment of sections 768.79 and 45.061 and their uncertain relationship to rule 1.442 require this Court to adopt a new rule. We withdraw present rule 1.442, effective at 12:01 a.m., January 1, 1990. The replacement rule set forth in the appendix is adopted by this Court, effective at 12:01 a.m., January 1, 1990. To the extent the procedural aspects of new rule 1.442 are inconsistent with sections 768.79 and 45.061, the rule shall supersede the statutes."

FORMS

1985 Main Volume

1 Fla Pl & Pr Forms, Civil Procedure §§6:3, 6:11, 6:12; 2 Fla Pl & Pr Forms, Real Property §§20:18, 20:74; 8 Fla Pl & Pr Forms, Contracts §§61:5, 61:8§f61:10, 61:41§f61:44.

CROSS REFERENCES

Offer of **judgment** and demand for judgment in certain actions, see F.S.A. § 768.79.

Offers of settlement, see F.S.A. § 45.061.

LAW REVIEW AND JOURNAL COMMENTARIES

Confusion in Florida **offer** of **judgment** practice: Resolving the conflict between judicial and legislative enactments. Clinton A. Wright, III, 43 Fla.L.Rev. 35 (1991).

Demands for judgment and offers of settlement: Who's on first? Louis B. (Buck) Vocelle, Jr., 62 Fla.B.J. 10 (March 1988).

Indemnification of corporate officers and directors. Robert L. Jennings and Kenneth A. Horky, 15 Nova L.Rev.

1357 (1991).

New **offer** of **judgment** rule in Florida: What does one do now? Bruce J. Berman and Jamie A. Cole, 64 Fla.B.J. 38 (Jan. 1990).

New **offer** of **judgment** statute. Judge James C. Hauser, 65 Fla.B.J. 19 (July/Aug. 1991).

The 1996 Amendments to Florida Rule of Civil Procedure 1.442-Reconciling a Decade of Confusion. David L. Kian, 71 Fla.B.J. 32 (July/Aug. 1997).

Offers of **judgment**--

Has the confusion ended? Scott Distasio, 66 Fla.B.J. 60 (Oct. 1992).
The confusion continues. Scott Distasio, 64 Fla.B.J. 20 (Dec. 1990).

Supreme Court of Florida increases the risks of refusing reasonable settlement offers--In re Rules of Civil Procedure, Rule 1.442 (**Offer** of **Judgment**). Note, 17 Fla.St.U.L.Rev. 843 (1990).

LIBRARY REFERENCES

1985 Main Volume

Judgment k74 et seq.
C.J.S. Judgment § 179 et seq.
Federal Rule 68, Text, Notes of Advisory Committee, Commentaries and Notes of Decisions, see 28 U.S.C.A.

Texts and Treatises
10 Fla Jur 2d, Condominiums and Co-Operative Apartments § 6; 12 Fla Jur 2d, Costs §§4, 5, 7, 13, 23, 31, 32; 17 Fla Jur 2d, Damages § 81; 18 Fla Jur 2d, Decedents' Property § 417; 28 Fla Jur 2d, Guardian and Ward § 73; 33 Fla Jur 2d, Judgments and Decrees § 253.

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1. In general

When one offeror makes a proposal for settlement to more than one offeree, each offeree is entitled to know the amount and terms of such offer that is attributable to that party in order to evaluate the offer as it pertains to him or her. Allstate Ins. Co. v. Materiale, App. 2 Dist., 787 So.2d 173 (2001).

When two offerors make a proposal for settlement to one offeree, the offeree is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer as it pertains to that party. Allstate Ins. Co. v. Materiale, App. 2 Dist., 787 So.2d 173 (2001).

Offers of **judgment** are punitive in nature and are in derogation of the common law, and must be strictly construed. RLS Business Ventures, Inc. v. Second Chance Wholesale, Inc., App. 2 Dist., 784 So.2d 1194 (2001).

Defendant's proposal for settlement under **offer** of **judgment** statute did not impose impermissible conditions by requiring that plaintiff execute full and complete release and stipulation for dismissal with prejudice; such conditions were inconsequential to offer and were merely formalities that would occur once offer was accepted. Gulf Coast Transp., Inc. v. Padron, App. 2 Dist., 782 So.2d 464 (2001), cause dismissed 791 So.2d 1100.

Social security disability payments plaintiff was entitled to recover, but which were not due or payable as of date of judgment she obtained against defendant, should not have been added to the verdict to determine "judgment obtained" under statute allowing defendant to recover attorney fees if judgment was at least 25 percent less than defendant's proposal for settlement. Gulf Coast Transp., Inc. v. Padron, App. 2 Dist., 782 So.2d 464 (2001), cause dismissed 791 So.2d 1100.

Taxable statutory costs were not damages and should not have been added to verdict to determine "judgment obtained" under statute allowing defendant to recover attorney fees if judgment was at least 25 percent less than defendant's proposal for settlement. Gulf Coast Transp., Inc. v. Padron, App. 2 Dist., 782 So.2d 464 (2001), cause dismissed 791 So.2d 1100.

Rule requiring that a joint proposal for **offer** of **judgment** shall state the amount and terms attributable to each party was designed to obviate future conflicts as to the effect of an offer upon defendants-offerees. Safelite Glass Corp. v. Samuel, App. 4 Dist., 771 So.2d 44 (2000), rehearing denied, review dismissed 786 So.2d 1188.

Statute providing for attorney fees upon rejection of settlement offer applies only to situation where verdict in jury action or judgment in nonjury action awards damages in favor of plaintiff/offeree and damages awarded are less than 75% of defendant's offer. Hostetter-Jones v. Morris Newspaper Corp., App. 5 Dist., 590 So.2d 533 (1991).

Entry of judgment in favor of plaintiff is prerequisite to defendant's seeking sanctions against plaintiff for refusing settlement offer. Westover v. Allstate Ins. Co., App. 2 Dist., 581 So.2d 988 (1991).

Trial court and District Court of Appeal lacked authority to declare unconstitutional or nullity this rule adopted by Supreme Court pertaining to **offer** of **judgment**. Reinhardt v. Bono, App. 5 Dist., 564 So.2d 1233 (1990).

This rule does not apply to case where judgment is entered against plaintiff offeree and in favor of

defendant offeror. B & H Const. & Supply Co., Inc. v. District Bd. of Trustees of Tallahassee Community College, Florida, App. 1 Dist., 542 So.2d 382 (1989), review denied 549 So.2d 1013.

On defendant's motion to vacate and clarify judgment entered against defendant by clerk of court following plaintiff's acceptance of defendant's **offer** of **judgment**, trial court properly refused to look at pleadings for purposes of interpreting **offer** of **judgment** which unambiguously stated that $20,500 was offered to allow plaintiffs to take judgment against defendant, despite defendant's contention that condition precedent should have been read into the offer because attorney who drafted the offer assumed that both parties contemplated return of car which defendant sold to plaintiff in exchange for the $20,500. BMW of North America, Inc. v. Krathen, App. 4 Dist., 471 So.2d 585 (1985), review denied 484 So.2d 7.

Trial court properly dismissed separate complaint brought by individual injured in collision involving leased vehicle against treating physician, where individual accepted automobile lessor's **offer** of **judgment** without qualification as full settlement of all claims pending against lessor, and where those claims included damage allegedly caused by physician. McCutcheon v. Hertz Corp., App. 4 Dist., 463 So.2d 1226 (1985), petition for review denied 476 So.2d 674.

Where proper **offer** of **judgment** was served and filed by defendant and accepted by plaintiff, fact that plaintiff may not have realized that its acceptance of the offer in that form would preclude recovery of contractual attorney's fees and prejudgment interest availed plaintiff nothing, in that plaintiff was presumed to know legal consequences of its own pleadings and its acceptance of **offer** of **judgment**. River Road Const. Co. v. Ring Power Corp., App. 1 Dist., 454 So.2d 38 (1984).

1.2. Construction with other laws

Time period prescribed in statute governing **offer** for **judgment**, which sets the time for filing motion for attorney fees to be "within 30 days after the entry of judgment" is procedural; therefore, it is subject to and governed by the Florida Rules of Civil Procedure and not by the statutory time requirements when the statute and pertinent rules of procedure are in conflict. Spencer v. Barrow, App. 2 Dist., 752 So.2d 135 (2000).

Timing of an **offer** of **judgment** in an eminent domain case is procedural in nature, and not substantive, and thus, 45-day requirement in rule of civil procedure governing **offers** of **judgment** in civil actions, and not 20-day requirement in statute governing **offers** of **judgment** in eminent domain cases, controls number days before trial within which condemnor must make offer. CSR Partnership v. State, Dept. of Transp., App. 2 Dist., 741 So.2d 623 (1999).

Provision of mediation statute providing that offer of settlement or demand for judgment may be made at any time after impasse has been declared by mediator is procedural statute which impermissibly infringes on Supreme Court's rule-making authority and is unconstitutional; therefore, **offer** of **judgment** made after unsuccessful mediation must still comply with statutory time requirements. Knealing v. Puleo, 675 So.2d 593 (1996).

While procedural aspects of statute governing award of costs and attorney fees to party whose rejected offer of settlement was more favorable to rejecting party than result at trial are preempted by Rules of Civil Procedure, substantive aspects of statute remain intact. Gilbert v. K-Mart Corp., App. 1 Dist., 664 So.2d 335 (1995).

Trial court erred in determining that it did not have authority to consider issue of excusable neglect and grant extension of time for filing of motion for costs and attorney fees following unreasonable rejection of settlement offer; 30-day provision of statute governing offers is procedural, and is superseded by Rules of Civil Procedure. Gilbert v. K-Mart Corp., App. 1 Dist., 664 So.2d 335 (1995).

To extent **offer** of **judgment** statute creates substantive rights, statute does not violate constitutional provision giving Supreme Court exclusive authority to adopt rules for practice and procedure in state courts; procedural portions of statute were superseded by rule governing **offer** of **judgment** procedure. TGI Friday's, Inc. v. Dvorak, 663 So.2d 606 (1995), rehearing denied.

Florida Civil Rule 1.442, which governs judgment offers, is not dispositive of award of fees under West's F.S.A. § 713.29, which provides for an award of attorney fees in an action brought to enforce a

mechanics' lien, as rule awards costs to a defendant incurred after making of **offer** of **judgment**, whereas statute provides for attorney fees through trial and appeal to either party. C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (1985).

1.3. Construction and application

Violation of rule prohibiting **offer** of **judgment** until 90 days after action was commenced did not affect rights of parties in third-party spoliation action against bailee, where offer was made by bailee, and spoliation action was brought after six years of litigation in underlying products liability action. Kuvin v. Keller Ladders, Inc., App. 3 Dist., 797 So.2d 611 (2001).

Statute governing **offers** of **judgment** and rule of civil procedure governing proposals for settlement must be strictly construed, as they are punitive in nature in that they impose sanctions upon the losing party and are in derogation of the common law. Schussel v. Ladd Hairdressers, Inc., App. 4 Dist., 736 So.2d 776 (1999).

Portions of pretrial settlement statute relating to timing of acceptance of **offer** of **judgment** are procedural in nature and, therefore, have force of law only because those portions have been adopted by Florida Supreme Court as civil procedure rule. Hanzelik v. Grottoli and Hudon Inv. of America, Inc., App. 4 Dist., 687 So.2d 1363 (1997), review denied 697 So.2d 510.

While offeror's right to attorney fees under **offer** of **judgment** statute is substantive legislative enactment, timing of both offer and acceptance is procedural and, therefore, within province of court. Hanzelik v. Grottoli and Hudon Inv. of America, Inc., App. 4 Dist., 687 So.2d 1363 (1997), review denied 697 So.2d 510.

Party may not accept **offer** of **judgment** after trial has commenced even if 30 days have not expired. Hanzelik v. Grottoli and Hudon Inv. of America, Inc., App. 4 Dist., 687 So.2d 1363 (1997), review denied 697 So.2d 510.

In suit involving multiple parties and multiple claims, only parties bound by **offer** of **judgment** were parties who made offer and parties who accepted offer, where there was no indication that liability of remaining parties was derivative of or subsumed within claims of parties to offer. Security Professionals, Inc. By and Through Paikin v. Segall, App. 4 Dist., 685 So.2d 1381 (1997), review denied 700 So.2d 687.

Defendant shareholder's **offer** of **judgment** to corporation, in connection with plaintiff shareholder's derivative action, did not encompass defendant shareholder's derivative action counterclaim against plaintiff shareholder. Security Professionals, Inc. By and Through Paikin v. Segall, App. 4 Dist., 685 So.2d 1381 (1997), review denied 700 So.2d 687.

Defendant's **offer** of **judgment** on "all pending claims" encompassed defendant's counterclaim against plaintiffs as well as plaintiffs' claims against defendant. Security Professionals, Inc. By and Through Paikin v. Segall, App. 4 Dist., 685 So.2d 1381 (1997), review denied 700 So.2d 687.

There was no period during which there was no applicable procedure governing **offers** of **judgment**, so as to support quashal of condemnor's **offer** of **judgment**, which was greater than judgment, as Supreme Court decision repealing rule formerly governing procedural aspects of **offers** of **judgment** adopted procedural rules already in place in statute, thus supplying applicable procedural rules. State, Dept. of Transp. v. Daystar, Inc., App. 4 Dist., 674 So.2d 754 (1996), rehearing denied.

Circuit court's award of costs and fees to defendant in personal injury action based on plaintiff's failure to accept **offer** of **judgment** and ultimate dismissal of suit had to be set aside, where order of dismissal was vacated. Carlow v. Blenman, App. 2 Dist., 652 So.2d 479 (1995).

Any motion for costs and fees based on rejection of **offer** of **judgment** in personal injury action had to be determined in accordance with statute in effect on date incident on which action was based allegedly occurred and case law interpreting that statute. Carlow v. Blenman, App. 2 Dist., 652 So.2d 479 (1995).

Pretrial offer of settlement in amount of $10,000 inclusive of attorneys fees was unreasonable and insufficient in consumers' deceptive and unfair trade practices action in which plaintiffs eventually recovered nearly $10,000, and thus did not preclude award of attorneys fees to prevailing parties, where

at point in time when offer was made plaintiff's counsel had already expended 80 hours of time on case, or approximately $20,000 worth of attorneys fees; offer was thus not bona fide good-faith offer. Stewart Select Cars, Inc. v. Moore, App. 4 Dist., 619 So.2d 1037 (1993), review denied 632 So.2d 1027.

Court should have considered whether plaintiff was entitled to sanctions against insurer that refused **offer** of **judgment** for $6,500 plus taxable costs "accrued as of date of acceptance," despite contention that inclusion of unspecified costs made offer indefinite, so that it did not state "total amount" as required under rule permitting sanctions, where plaintiff obtained judgment for $10,000; since specification of costs would not be considered as part of "damages awarded," reference to accrued costs could be considered surplusage. Stewart v. Progressive American Ins. Co., App. 1 Dist., 595 So.2d 272 (1992).

Plaintiff was not entitled to sanctions against insurer based on insurer's rejection of plaintiff's **offer** of **judgment** for $10,000, even though jury verdict was more than 125% of **offer**, where **judgment**, reflecting policy limit, was $10,000, and thus not more than 125% of offer. Stewart v. Progressive American Ins. Co., App. 1 Dist., 595 So.2d 272 (1992).

1.4. Conflict of law

The Supreme Court of Florida would not apply the Florida **offer** of **judgment** statute to a case where the substantive law of another state governs the underlying claim; court would hold that statute is substantive law for choice- of-law purposes. McMahan v. Toto, C.A.11 (Fla.)2001, 256 F.3d 1120, rehearing and rehearing en banc denied 275 F.3d 1085.

1.5. Judgment for offeror

This rule did not apply where judgment was entered against plaintiff and in favor of defendant offeror. Kline v. Publix Supermarkets, Inc., App. 2 Dist., 568 So.2d 929 (1990).

1.6. Judgment upon settlement

Offer of **judgment** statute and rule governing proposals for settlement did not require entry of final judgment against offeror upon offeree's acceptance of proposal of settlement, and unless terms of settlement proposal specifically provided for entry of judgment against offeror, trial court lacked authority to enter a final judgment where offeror was willing to proceed with payment and conclusion of settlement. Abbott & Purdy Group Inc. v. Bell, App. 4 Dist., 738 So.2d 1024 (1999).

2. Purpose

This rule requiring party obtaining a final judgment that is not more favorable than the settlement offer to pay costs incurred after offer is made and rejected is designed to induce or influence a party to settle litigation and obviate necessity of a trial. Hernandez v. Travelers Ins. Co., App., 331 So.2d 329 (1976); Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio, App., 343 So.2d 1357 (1977); Santiesteban v. McGrath, App., 320 So.2d 476 (1975).

Purpose of this rule governing an **offer** of **judgment** is to encourage defendants to acquiesce in claims discovered during litigation to be meritorious and to shift to claimant financial burden of carrying on litigation beyond point where an appropriate **offer** of **judgment** on merits is made. Wisconsin Life Ins. Co. v. Sills, App. 1 Dist., 368 So.2d 920 (1979), dismissed 373 So.2d 461.

2.1. Timeliness of offer

Defendants' settlement offer, which was made less than the required 45 days before date set for trial, was untimely, and thus defendants were not entitled to attorney fees based on rejected settlement offer, even though trial was ultimately held more than 45 days after settlement was offered, and even though defendants claimed to know that trial could not be held within 45 days of offer, where it was not clear that both parties knew case would not be heard as set. Largen v. Gonzalez, App. 5 Dist., 797 So.2d 635 (2001).

Medical provider's **Offer** of **Judgment** filed after start of original trial docket period, but only after provider and insurance company knew that their case would not be heard during trial period, was not directed to current trial period, but, rather, was intended for the next, as yet, unscheduled trial period, and thus offer was timely and enforceable, and trial court could award attorney fees and costs to provider, as prevailing party, under **offer** of **judgment** statute; provider mailed **Offer** of

Judgment one day before trial period ended, and in all likelihood, insurance company would not have received said offer during scheduled trial period. Progressive Cas. Ins. Co. v. Radiology and Imaging Center of South Florida, Inc., App. 3 Dist., 761 So.2d 399 (2000), rehearing denied.

Under rule of civil procedure governing proposals for settlement, any **Offer** of **Judgment** made so close to a trial period so as to render it untimely is, in effect, a nullity which cannot be subsequently resurrected by a continuance of the trial period that was in effect at the time the **Offer** of **Judgment** was made. Progressive Cas. Ins. Co. v. Radiology and Imaging Center of South Florida, Inc., App. 3 Dist., 761 So.2d 399 (2000), rehearing denied.

If an **Offer** of **Judgment**, which is served less than 45 days before the date set for trial, is made at a point in time in which it appears, from the facts of the individual case, that the **Offer** of **Judgment** is not directed to the current trial period, but, rather, is intended for the next, as yet, unscheduled trial period, then in that situation, and in that situation only, the **Offer** of **Judgment** is not a nullity and is considered timely; in order to rely upon this exception, there must be some evidence in the record that both parties know that the case will not be tried during the current trial period and that the **Offer** of **Judgment** is made in anticipation of the next, as yet, unscheduled trial period. Progressive Cas. Ins. Co. v. Radiology and Imaging Center of South Florida, Inc., App. 3 Dist., 761 So.2d 399 (2000), rehearing denied.

Notice of settlement proposal filed after start of original trial docket period was timely and enforceable, and thus supported award of costs and attorney fees under **offer** of **judgment** statute, where notice was served at time when parties had been excused from trial by court order so that case was no longer set for trial, and notice was served more than 45 days prior to next unscheduled trial docket. Liguori v. Daly, App. 4 Dist., 756 So.2d 268 (2000), rehearing denied, review denied 786 So.2d 1186.

Defendant's **offer** of **judgment** was untimely and thus unenforceable because it was made less than 45 days before the first day of the docket on which the case was set for trial, even though case actually went to trial almost six months after it was first set for trial, after defendant was granted a continuance over plaintiff's objection. Schussel v. Ladd Hairdressers, Inc., App. 4 Dist., 736 So.2d 776 (1999).

2.2. Service

Recipient of **offer** for **judgment** served by mail is entitled to five additional days to accept offer provided additional days would not result in acceptance being served after commencement of trial. City of Largo v. Barker, App. 2 Dist., 538 So.2d 556 (1989).

Amended **offer** of **judgment** does not relate back to date of service of original **offer** of **judgment** and will be considered as successive offer which must be served more than ten days prior to trial to be considered timely. Cheek v. McGowan Elec. Supply Co., 511 So.2d 977 (1987).

Agreement of parties by pretrial order that discovery cutoff date shall be tenth day before trial did not validate **offer** of **judgment** hand served on tenth day before trial. Cheek v. McGowan Elec. Supply Co., 511 So.2d 977 (1987).

To determine last day which service of **offer** of **judgment** may be timely made it is necessary to count backwards from day of trial which is event from which designated period of time begins to run. Cheek v. McGowan Elec. Supply Co., 511 So.2d 977 (1987).

RCP Rule 1.090(a) providing that if last day of period for timely service was Saturday, Sunday or legal holiday period shall run until end of next day which is neither Saturday, Sunday or legal holiday does not apply to express time requirements for service of **offer** of **judgment**. Cheek v. McGowan Elec. Supply Co., 511 So.2d 977 (1987).

When eleventh day before trial fell on Sunday, hand delivery of **offer** of **judgment** on following Monday was not timely. Cheek v. McGowan Elec. Supply Co., 511 So.2d 977 (1987).

2.4. Commencement of trial

Selection and swearing in of jurors was the "commencement of the trial," within meaning of this rule. Loy v. Leone, App. 5 Dist., 546 So.2d 1187 (1989).

Offer of **judgment** made more than ten days before trial was originally set was timely when originally

made; however, when offerors participated in commencement of trial on day, which was earlier than original trial date and which was prior to running of the "more than ten day" period specified by this rule, without any reservation of their rights under this rule, offerors in effect waived rights under this rule. Loy v. Leone, App. 5 Dist., 546 So.2d 1187 (1989).

2.5. Acceptance

Defendant's **offer** of **judgment** could not be accepted by plaintiff following trial, which resulted in verdict for defendants. Braham v. Carncross, App. 2 Dist., 514 So.2d 71 (1987).

Offeree of an **offer** of **judgment** delivered by mail is not entitled to five additional days to respond if those additional days would result in response being served after commencement of trial. Braham v. Carncross, App. 2 Dist., 514 So.2d 71 (1987).

Under no circumstances did this rule permit party to accept **offer** of **judgment** once trial had begun; therefore, plaintiff who received offer prior to trial but who waited until trial was essentially complete to attempt to accept offer, was prohibited from accepting offer. Kennard v. Forcht, App. 4 Dist., 495 So.2d 924 (1986).

2.6. Approval by court

Trial judge abused his discretion when he failed to disapprove **offer** of **judgment** and acceptance when confronted by clear and certain expression of parties' lack of understanding as to what was intended by the offer; offeree had filed notice of acceptance which purported to limit acceptance to count which alleged violation of statute that would have allowed recovery of attorney fees by successful claimant, and offeror then objected on grounds that no additional entitlement to attorney fees was contemplated by the parties. Commercial Carrier Corp. v. Guevara, App. 3 Dist., 541 So.2d 774 (1989).

2.7. Sufficiency of offer

Under Florida law, **offer** of **judgment** or settlement creating potential liability for attorney fees and costs, if rejected, ought to be more than carefully crafted, cleverly calculated, and disingenuous attempt to shift economic burden of litigation; offer ought to fairly account for risks of litigation, costs and fees at stake, and other components of uncertainty that sophisticated persons say when deciding whether to settle. Stouffer Hotel Co. v. Teachers Ins., M.D.Fla.1995, 944 F.Supp. 874, affirmed 101 F.3d 707.

Mother preserved issue of whether proposal for settlement of personal injury action was inadequate to support the fee and cost awards, although mother did not raise objection at the initial hearing on fees and costs; at second hearing mother filed numerous written objections to the award of attorney's fees and costs, including the objection that the proposal for settlement was inadequate because it failed to state to whom the offer was made, and trial court considered these objections before entering the final judgment awarding costs and fees. Dudley v. McCormick, App. 1 Dist., 799 So.2d 436 (2001).

Automobile driver's settlement proposal to mother, who brought personal injury action individually and on behalf of minor son, did not meet applicable procedural requirements to allow award of attorneys fees to driver, who was granted a directed verdict; rule required proposal to "state the amount and terms attributable to each party," but proposal did not differentiate between amount for mother and amount for son. Dudley v. McCormick, App. 1 Dist., 799 So.2d 436 (2001).

Condition of settlement offer that plaintiff relinquish all rights to sue about anything at any point in the future was incapable of being stated with particularity required under statute that requires that **offers** of **judgment** state with particularity the amount offered to settle a claim for punitive damages; defendant's offer did not give the plaintiff a determinable value with which to weigh his chances at trial. Zalis v. M.E.J. Rich Corp., App. 4 Dist., 797 So.2d 1289 (2001).

Offer of **judgment** failed to specify which of the pending claims were covered and failed to state with particularity any nonmonetary terms, as required by governing rule. RLS Business Ventures, Inc. v. Second Chance Wholesale, Inc., App. 2 Dist., 784 So.2d 1194 (2001).

Offer of **judgment** made by injured plaintiff and his wife in personal injury suit against corporation and its employee was not defective on ground that it failed to state amount and terms attributable to each party, although it was made jointly by both plaintiffs

to both defendants, as defendants did not have potentially different degrees of fault and competing interests, in that corporation was vicariously liable for employee's negligence, and if defendants accepted the offer they were entitled to be released by both plaintiffs. Safelite Glass Corp. v. Samuel, App. 4 Dist., 771 So.2d 44 (2000), rehearing denied, review dismissed 786 So.2d 1188.

In personal injury action in which pedestrian sued person loading juke box, his parents, and their company for injuries pedestrian sustained when juke box fell out of pickup truck while being loaded, pedestrian's failure to allocate amount for which he was willing to settle with respect to each of the co-defendant's in his **offer** of **judgment** did not impair his ability to recover fees under **offer** of **judgment** rule; complaint alleged only negligent act of person loading juke box, other defendants were included in complaint only under theories of vicarious liability, and each of the individual defendants was liable for entire amount of damages under joint and several liability. Strahan v. Gauldin, App. 5 Dist., 756 So.2d 158 (2000), rehearing denied, review granted 786 So.2d 1189, review dismissed as improvidently granted 800 So.2d 225.

In action brought by guardians of car passenger injured in accident against car driver's estate, truck driver, and truck driver's employer, guardians' **offer** of **judgment** did not comply with rule requiring a joint proposal to state the amount and terms attributable to each party, and thus guardians were not entitled to attorney fees and costs; offer was directed to employer, truck driver, and personal representative of car driver's estate, yet no separate amount attributable to car driver or any other defendant was made. McFarland & Son, Inc. v. Basel, App. 5 Dist., 727 So.2d 266 (1999), rehearing denied, review denied 743 So.2d 508.

This rule did not apply to limit recovery of attorney fees by board of trustees of community college from contractor; alleged **offer** of **judgment** by contractor was not made by a party defending against a claim, offer was made prior to contractor's demand for arbitration, and board's lawsuit and thus was not an **offer** of **judgment**, and offer did not specify definite amount nor did it specify that contractor was allowing board to take judgment against it. B & H Const. & Supply Co., Inc. v. District Bd. of Trustees of Tallahassee Community College, Florida, App. 1 Dist., 542 So.2d 382 (1989), review denied 549 So.2d 1013.

2.8. Confession of judgment

Even if insurer's payment of named plaintiff's individual claim, in class action challenging insurer's failure to pay medical bills pursuant to personal injury protection (PIP) coverage without obtaining reports based on independent medical examination (IME), could be deemed confession of judgment in favor of the entire class, that confession of judgment had to be limited to its terms, namely, the amount of insurer's liability to named plaintiff. Allstate Ins. Co. v. Chaple, App. 3 Dist., 774 So.2d 742 (2000), review dismissed 786 So.2d 1183, review denied 790 So.2d 1102.

3. Admissions

Conclusion of main action in favor of plaintiff against defendant less or pursuant to **offer** of **judgment** made by defendant and accepted by plaintiff did not amount to an admission and adjudication of defendant's liability for active negligence so as to bar its third-party indemnity claim against its lessee. Barnett Bank of Miami v. Mutual of Omaha Ins. Co., App. 3 Dist., 354 So.2d 114 (1978).

Where nonlitigated offer of compromise is accepted and judgment entered thereon pursuant to this rule, it does not operate as estoppel by judgment or admission of the facts contained in complaint in suit not between the parties to the judgment. Barnett Bank of Miami v. Mutual of Omaha Ins. Co., App. 3 Dist., 354 So.2d 114 (1978).

4. Costs--In general

Property owner was not entitled to attorney's fees and costs based on offer of settlement in slip and fall case, where owner made two offers of settlement, trial court found first offer was made in bad faith, and owner's motion to tax fees and costs did not request fees and costs pursuant to second offer. Jaffrey v. Baggy Bunny, Inc., App. 4 Dist., 733 So.2d 1140 (1999).

Fees and costs will not be awarded where the offer of settlement fails to include the elements prescribed by law. Jaffrey v. Baggy Bunny, Inc., App. 4 Dist., 733 So.2d 1140 (1999).

Section 57.041 neither infringes upon nor affects Rules of Civ. Proc., Rule 1.442. Reinhardt v. Bono, App. 5 Dist., 564 So.2d 1233 (1990).

Fact that defendant's insurer, rather than defendant, incurred costs and fees in defending action did not preclude defendant from award of costs under § 768.79 and Rules of Civ. Proc., Rule 1.442. Royster v. Van Der Meulen, App. 1 Dist., 564 So.2d 1204 (1990).

Party is not precluded from recovering costs under rule of civil procedure pertaining to **offer** of **judgment**, or after judgment in its favor, when someone other than named party pays or advances those costs. Aspen v. Bayless, 564 So.2d 1081 (1990).

Costs could properly be taxed against landowner who was not party at time adjoining landowner submitted **offer** of **judgment** in trespass action, where landowner was indispensable party, and her omission as original party was clerical error. Horn v. Corkland Corp., App. 2 Dist., 518 So.2d 418 (1988).

"Costs" within this rule providing for **offer** of **judgment** are statutory allowances recoverable by successful party as incident to main adjudication, and need not be specifically pled or claimed, and statutory allowance should be made regardless of whether offer itself expressly refers to costs and states that such costs are in addition to amount stated in **offer** of **judgment**, and thus trial court correctly allowed costs in addition to stated amount of offer. River Road Const. Co. v. Ring Power Corp., App. 1 Dist., 454 So.2d 38 (1984).

Where insured recovered judgment against his insurer on policy, insured was entitled to attorney fees under F.S.A. § 627.428, and such was not changed by fact that insured accepted insurer's **offer** for **judgment**, made immediately prior to trial, since if insurer wanted to make offer of settlement which included attorney fees, it should have done so. Parliament Ins. Co. v. That Girl in Miami, Inc., App. 3 Dist., 377 So.2d 1011 (1979).

Efficacy of life insurer's **offer** of **judgment**, which was effective to arrest costs, was not lessened by failure of jury to include in stated dollar sum an estimate for attorneys' fees incurred to that point or by failure of insurer to submit explicitly to a judgment for attorneys' fees as well as for costs. Wisconsin Life Ins. Co. v. Sills, App. 1 Dist., 368 So.2d 920 (1979), dismissed 373 So.2d 461.

Although daughter seeking recovery for bodily pain, suffering and disfigurement caused by automobile accident and father seeking recovery for medical expenses and denial of daughter's services had separate causes of action, defendant which had made **offer** of **judgment** was entitled to benefit of this rule requiring plaintiffs to pay costs even though offer did not direct the specific amount to be paid each party. Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio, App. 1 Dist., 343 So.2d 1357 (1977).

4.5. ---- Good faith, costs

Offer-of-judgment rule, which entitles defendant to award of costs and attorney fees if defendant's **offer** of **judgment** is not accepted and judgment ultimately obtained is of no liability or is at least 25% less than offer, places the burden on the offeree to prove the absence of good faith. Donohoe v. Starmed Staffing, Inc., App. 2 Dist., 743 So.2d 623 (1999).

Under **offer-of-judgment** rule, which entitles defendant to award of costs and attorney fees if defendant's **offer** of **judgment** is not accepted and judgment ultimately obtained is of no liability or is at least 25% less than offer, obligation of good faith insists that the offeror have some reasonable foundation on which to base an offer. Donohoe v. Starmed Staffing, Inc., App. 2 Dist., 743 So.2d 623 (1999).

For purposes of **offer-of-judgment** rule, which entitles defendant to award of costs and attorney fees if defendant's **offer** of **judgment** is not accepted and judgment ultimately obtained is of no liability or is at least 25% less than offer, defendants acted in good faith in making **offer** of **judgment**; defense counsel had deposed plaintiff's witnesses and had discerned no basis for lawsuit. Donohoe v. Starmed Staffing, Inc., App. 2 Dist., 743 So.2d 623 (1999).

Under **offer-of-judgment** rule, which entitles defendant to award of costs and attorney fees if defendant's **offer** of **judgment** is not accepted and judgment ultimately obtained is of no liability or is at least 25% less than offer, obligation of good faith merely requires that the offeror have a reasonable foundation on which to base the offer; it does not demand that the offeror possess, at the time he

makes the offer, the kind or quantum of evidence needed to support a judgment. Donohoe v. Starmed Staffing, Inc., App. 2 Dist., 743 So.2d 623 (1999).

5. ---- More favorable judgment, costs

Trial court has no discretion to refuse to award all reasonable and necessary costs to litigant whose offer to settle case exceeds amount ultimately awarded his opponent. Winn Dixie Stores, Inc. v. Cochran, App. 5 Dist., 540 So.2d 914 (1989).

Landowners were required to pay taxable costs incurred by adjoining landowner after adjoining landowner submitted **offer** of **judgment** in trespass action, where judgment finally obtained by landowners was less than offer made by adjoining landowner. Horn v. Corkland Corp., App. 2 Dist., 518 So.2d 418 (1988).

All costs incurred after attorney's settlement offer in malpractice action were to be borne by client where judgment after setoff was not more favorable than offer. Kay v. Bricker, App. 3 Dist., 485 So.2d 486 (1986).

Trial court could not consider separate **offers** of **judgment** collectively in determining that parents' recovery in personal injury action was not more favorable than **offers** of **judgment** so as to preclude parents from recovering costs where offers were not made simultaneously, neither offer indicated that it was to be joined with the other and each offer expired upon rejection. Thornburg v. Pursell, App. 2 Dist., 476 So.2d 323 (1985).

Whether a nonprevailing party in a mechanic's lien case has served an **offer** of **judgment**, pursuant to this rule, more favorable to the prevailing party than the judgment actually obtained is relevant in determining prevailing party's entitlement to attorney fees and costs. C.U. Associates, Inc. v. R.B. Grove, Inc., App. 3 Dist., 455 So.2d 1109 (1984), quashed 472 So.2d 1177.

Where judgment finally obtained by plaintiff was less favorable than **offer** for **judgment** which had been made by defendants' insurer, plaintiff was obligated to pay costs incurred after making of the offer, even though unreduced jury verdict exceeded the **offer** of **judgment**. United Services Auto. Ass'n v. Noell, App. 3 Dist., 372 So.2d 504 (1979).

When an **offer** of **judgment** is made, a party stops the running of further costs and attorney's fees under this rule requiring the party obtaining a final judgment that is not more favorable than settlement offered to pay costs incurred after offer is made and rejected. Hernandez v. Travelers Ins. Co., App. 3 Dist., 331 So.2d 329 (1976).

Postjudgment order assessing costs against insured in suit on automobile policy was subject to being reversed where **offer** of **judgment** made by insurer was less than amount recovered by insured. Hernandez v. Travelers Ins. Co., App. 3 Dist., 331 So.2d 329 (1976).

Express language of this rule pertaining to **offers** of **judgment** which states in pertinent part, "* * * if the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer," leaves no doubt that reasonable costs must be awarded to defendant where proper **offer** of **judgment** was made, plaintiff did not accept **offer**, and **judgment** finally obtained by plaintiff was not more favorable than offer. Santiesteban v. McGrath, App. 3 Dist., 320 So.2d 476 (1975).

Where defendant made unconditional total **offer** of **judgment**, and judgment finally obtained by plaintiff, who refused defendant's offer, was not more favorable than offer, plaintiff was not entitled to costs incurred after refusing offer. Insurance Co. of North America v. Twitty, App. 4 Dist., 319 So.2d 141 (1975), certiorari denied 330 So.2d 22.

Where judgment finally obtained by plaintiff was not more favorable than defendant's **offer** of **judgment**, which offer was refused by plaintiff, trial court could have allowed cost of defendant's depositions if they served useful purpose, as well as attorney fees for covering depositions in North Carolina, and cost of court reporter's expenses for attendance at trial. Insurance Co. of North America v. Twitty, App. 4 Dist., 319 So.2d 141 (1975), certiorari denied 330 So.2d 22.

5.5. ---- Finally obtained judgment, costs

For purpose of West's F.S.A. R.C.P. Rule 1.442, which provides that if judgment finally obtained by adverse party is not more favorable than **offer** of **judgment**, adverse party must pay costs incurred after making of the offer, "judgment finally

obtained" means judgment which has disposed of the case and become final after all rights to appellate review have been exhausted. Cheek v. McGowan Elec. Supply Co., App. 1 Dist., 483 So.2d 1373 (1985), approved and remanded 511 So.2d 977.

For purpose of West's F.S.A. R.C.P. Rule 1.442, which provides that if judgment finally obtained by adverse party is not more favorable than **offer** of **judgment**, adverse party must pay costs incurred after making of the offer, "judgment finally obtained" included judgment rendered on remand after reversal for new trial, even though offeror did not renew previous offer or serve new **offer** of **judgment** after remand; furthermore, the initial **offer** of **judgment** would remain viable through appeal and review of second trial. Cheek v. McGowan Elec. Supply Co., App. 1 Dist., 483 So.2d 1373 (1985), approved and remanded 511 So.2d 977.

6. ---- Necessity of **offer** of **judgment**, costs

Department store's joint **offer** of **judgment**, which failed to specify amount attributable to injured store customer and her spouse, was served prior to amendment to rule requiring that amount attributable to each person be specified, and thus, **offer** of **judgment** was not rendered ineffective to trigger sanctions of statute merely because it was joint offer. Herzog v. K-Mart Corp., App. 4 Dist., 760 So.2d 1006 (2000).

Service of invalid **offer** of **judgment** within ten days before trial did not supersede, alter, or otherwise terminate potential consequences of first offer served 15 days before trial. Cheek v. McGowan Elec. Supply Co., App. 1 Dist., 483 So.2d 1373 (1985), approved and remanded 511 So.2d 977.

Where record reflected that defendant's negligence and plaintiff's property damage were not issues of serious dispute, and defendant's primary defense was that the plaintiff had not suffered a permanent injury within reasonable medical probability so as to entitle plaintiff to recover for personal injuries, then, given jury's finding that automobile accident was caused solely by defendant's negligence, but awarding plaintiff no damages for claimed injuries to his person and property, defendant could have preserved his claim for costs had he made an **offer** of **judgment** in undisputed amount of property damage, and thus not having done so and not being a party recovering judgment, defendant's motion to tax costs was correctly denied. Upson v. Hazelrig, App. 3 Dist., 444 So.2d 1127 (1984).

6.5. ---- Defendant's entitlement, costs

Defendants were entitled to award of costs incurred subsequent to making **offer** of **judgment**, where offer was not accepted and plaintiffs recovered judgment which was lower than offer, even though costs of defense were allegedly incurred by defendants' insurer, rather than by defendants. Kanaar v. Goodwin, App. 3 Dist., 567 So.2d 1006 (1990).

7. ---- Terms of settlement, costs

Conditions contained in **offer** of **judgment** rendered it invalid and precluded award of attorney fees pursuant thereto, as offer was made before applicable rule was amended to permit inclusion of conditions. J.J.'s Mae, Inc. v. Milliken & Co., App. 4 Dist., 763 So.2d 1106 (1999).

Where judgment customer obtained was same as, and therefore not "less favorable" than, moving company's pretrial settlement offer, customer was improperly denied costs, pursuant to clause of settlement offer providing for customer to pay costs incurred by moving company after making of offer if customer did not accept **offer** and **judgment** was obtained less favorable, to which he was entitled under F.S.A. § 57.041 as verdict winner and therefore prevailing party in litigation. Frank v. Engel Van Lines, Inc., App. 3 Dist., 429 So.2d 333 (1983).

8. ---- Accrued costs

Appellants were entitled to reimbursement of costs they had been required to pay in connection with first proceeding, which was dismissed because they failed to substitute personal representative following death of original defendant, as costs of the initial lawsuit constituted "accrued costs" within meaning of this rule stating that at any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued. Collins v. Holland, App. 3 Dist., 409 So.2d 1097 (1982).

9. ---- Arrest of costs

Offer of **judgment** made by life insurer two weeks after litigation began and death benefit was paid was effective to arrest costs and to preclude insurer's liability for attorneys' fees from accruing beyond that date. Wisconsin Life Ins. Co. v. Sills, App. 1 Dist., 368 So.2d 920 (1979), dismissed 373 So.2d 461.

10. Attorney fees--In general

Not every beneficiary of judgment as matter of law in federal court is entitled to award of attorney fees in diversity case covered by Florida law. Stouffer Hotel Co. v. Teachers Ins., M.D.Fla.1995, 944 F.Supp. 874, affirmed 101 F.3d 707.

Proposal of judgment, which plaintiff served upon defendant three days prior to expiration of 90-day period following service of complaint, was premature and did not entitle plaintiff to award of attorney fees after plaintiff prevailed at trial. Grip Development, Inc. v. Coldwell Banker Residential Real Estate, Inc., App. 4 Dist., 788 So.2d 262 (2000), review denied 790 So.2d 1102.

Prejudice or lack thereof is not a topic for judicial inquiry in determining whether prevailing party who had served untimely proposal of judgment is entitled to award of attorney fees. Grip Development, Inc. v. Coldwell Banker Residential Real Estate, Inc., App. 4 Dist., 788 So.2d 262 (2000), review denied 790 So.2d 1102.

Motorist and husband, who made proposal for settlement to uninsured motorist (UM) insurer prior to trial on motorist's personal injury and husband's loss of consortium claims, were not entitled to attorney fees pursuant to **offer** of **judgment** statute, where proposal did not state amounts and terms attributable to each party. Allstate Ins. Co. v. Materiale, App. 2 Dist., 787 So.2d 173 (2001).

Offer of **judgment**, filed by doctor in his separate contribution suit against hospital after doctor settled with medical malpractice plaintiff, was timely filed and in proper form, and thus doctor was entitled to attorney's fees. Subramanian v. Health Foundation Support Services of South Florida, Inc., App. 3 Dist., 732 So.2d 442 (1999).

Defendant/counter-plaintiff was entitled to attorney's fees for both its defense claim and for prevailing on counterclaim where it made **offer** of **judgment** before trial for net judgment of specified amount on counterclaim inclusive of costs and attorney's fees for dismissal of all claims and counterclaims; defendant/counter-plaintiff recovered in bench trial judgment an award that, when combined with interest and costs, was 25% more than demand. Medical Billing Solutions, Inc. v. Diabetic Medserv, Inc., App. 4 Dist., 727 So.2d 1066 (1999).

Drastic reduction of plaintiff's attorney fee award from $6,502.50 to $750 constituted abuse of discretion, though plaintiff rejected informal settlement offer, for amount similar to final judgment, because defendant conditioned settlement on release of plaintiff's lien, where plaintiff had contractual right to attorney fees and was successful on its entire claim. American Sign Co. v. Falconer, App. 2 Dist., 696 So.2d 473 (1997).

Party's refusal of offer of settlement has no effect upon potential award of fees unless offer is within fee award rule. American Sign Co. v. Falconer, App. 2 Dist., 696 So.2d 473 (1997).

Federal statute allowing prevailing defendant in § 1983 action to recover attorney fees only in limited context where suit was vexatious, frivolous, or brought to harass or embarrass defendant preempts, in context of § 1983 actions, much broader state law generally allowing any defendant whose **offer** of **judgment** is rejected by plaintiff, and who obtains judgment of no liability, to recover reasonable costs and attorney fees from plaintiff. Moran v. City of Lakeland, App. 2 Dist., 694 So.2d 886 (1997), rehearing denied.

Coinsured was not entitled to collect attorney fees and costs in successful suit to recover on life policy, where coinsured's **offer** of **judgment** was for a specific amount plus attorney fees and costs which were to be determined at later date by trial court; governing statute requires **offer** of **judgment** state the total amount of the offer including specific amount for attorney fees and costs. State Farm Life Ins. Co. v. Bass, App. 3 Dist., 605 So.2d 908 (1992).

Evidence, presented by offeror in support of increase in attorney fees imposed as sanction for rejection of offer, that the offeror's cause of action was one not likely to attract an attorney on a contingency fee basis because of the difficulty of proof demonstrated

that rejection of the offer was not unreasonable so as to permit award of attorney fees as a sanction. State Farm Mut. Auto., Ins. Co. v. Lathrop, App. 2 Dist., 586 So.2d 1125 (1991).

Defendant was not entitled to award of attorney fees and costs as sanction for plaintiff's refusal of settlement offer, where plaintiff's claim was dismissed with prejudice. Sharp Community Ambulance Service, Inc. v. Sharp, App. 1 Dist., 582 So.2d 778 (1991).

Attorney fee award as sanction was not warranted under **offer** of **judgment** rule, where there was no evidence supporting any of the ten relevant factors court was permitted to consider in determining reasonableness of insurer's conduct in rejecting prior settlement offer. Government Employees Ins. Co. v. Robinson, App. 3 Dist., 581 So.2d 230 (1991), review denied 595 So.2d 557.

Offer of **judgment**, which required plaintiff to execute full and complete release and satisfaction, a hold harmless affidavit, and stipulation for dismissal with prejudice, was invalid on basis that it contained conditions not permitted by either § 768.79 or Rules of Court, Rule 1.442, and thus defendant was not entitled to award of costs and attorneys' fees when jury verdict was in amount that was at least 25% less than amount stated in **offer** of **judgment**. Martin v. Brousseau, App. 4 Dist., 564 So.2d 240 (1990).

Where rejected **offer** of **judgment** was silent on issue of attorney fees, for purposes of this rule it was immaterial whether final judgment did or did not provide for attorney fees; rather, attorney fees were to be determined by the court independently of the merits. Seminole Colony, Inc. v. Stanko, App. 4 Dist., 501 So.2d 195 (1987).

Language in **offer** of **judgment** by police officer who was defendant in civil rights action alleging false arrest and imprisonment providing for judgment in specified amount together with taxable costs and reasonable attorney fee accrued to date of offer was controlling, and trial court did not have discretion to deny award of attorney fees on ground that plaintiff arrestee's acceptance of minimal settlement offer did not provide him with benefit so as to allow him to be deemed a "prevailing party" entitled to award of attorney fees pursuant to 42 U.S.C.A. § 1988. McIntyre v. Lindsey, App. 1 Dist., 488 So.2d 888 (1986).

Right of award of attorney's fees pursuant to provision in contract was encompassed in **offer** of **judgment** made pursuant to West's F.S.A. RCP Rule 1.442 which failed to mention attorney fees specifically or reserve right to seek them later. George v. Northcraft, App. 5 Dist., 476 So.2d 758 (1985).

Plaintiff seeking foreclosure of mechanic's lien was not entitled to award of attorney fees after accepting **offer** of **judgment** which contained no reference to attorney fees, where plaintiff alternatively sought money damages for breach of contract and neither the offer nor acceptance recognized validity of lien theory and judgment subsequently entered was a standard money judgment. Encompass Inc. v. Alford, App. 1 Dist., 444 So.2d 1085 (1984), petition for review denied 453 So.2d 43.

Unless **offer** of **judgment** and acceptance thereof affirmatively indicate that amount specified in the offer is to include attorney fees, plaintiff, by accepting the offer, is not precluded from seeking attorney fees to which he may be entitled by statute. Encompass Inc. v. Alford, App. 1 Dist., 444 So.2d 1085 (1984), petition for review denied 453 So.2d 43.

Contractor, regardless of whether he would recover an award for his services, was entitled to reasonable attorney fees and costs for period terminating with defendant's **offer** of **judgment** as to award for materials. Banks v. Steinhardt, App. 4 Dist., 427 So.2d 1054 (1983).

Attorneys for condominium association were not entitled to attorney fees for additional hours expended by them subsequent to **offer** of **judgment** by unit owners since, when owners agreed to restore appearance of their unit in their **offer** of **judgment**, the dispute between the parties on the merits was ended, thus terminating the need for any additional costs and attorney fees, and the meaningful happenings upon which the association relied as establishing an award more favorable than the offer and thus the need for additional attorney fees would have been available to the association if the offer had been accepted. Wimbledon Townhouse Condominium I Ass'n, Inc. v. Kessler, App. 4 Dist., 425 So.2d 29 (1982).

An insurer defendant who correctly estimates and

offers to concede its liability for benefit in issue should not be required to acquiesce also in liability for attorneys' fees accrued to date of **offer** of **judgment** or else incur continuing liability for still more fees. Wisconsin Life Ins. Co. v. Sills, App. 1 Dist., 368 So.2d 920 (1979), dismissed 373 So.2d 461.

Attorney fees are not taxable costs under this rule governing **offers** of **judgment** and thus defendant was not entitled to recover attorney fees incurred after plaintiff's denial of defendant's **offer** of **judgment** from plaintiff even though judgment ultimately obtained by plaintiff was less than defendant's offer. Insurance Co. of North America v. Twitty, App. 4 Dist., 319 So.2d 141 (1975), certiorari denied 330 So.2d 22.

11. ---- Prevailing party, attorney fees

Liability for fees and costs in a mechanic's lien case incurred before an **offer** of **judgment** is made is unaffected by the offer, and the prevailing party is entitled to such fees and costs notwithstanding the later successful **offer** of **judgment**. C.U. Associates, Inc. v. R.B. Grove, Inc., App. 3 Dist., 455 So.2d 1109 (1984), quashed 472 So.2d 1177.

Existence of an **offer** of **judgment** in a mechanic's lien case is irrelevant to determine the prevailing party, since a successful **offer** of **judgment** under this rule serves to cut off liability for only those fees and costs incurred after the making of the offer. C.U. Associates, Inc. v. R.B. Grove, Inc., App. 3 Dist., 455 So.2d 1109 (1984), quashed 472 So.2d 1177.

Party who was granted judgment in mechanic's lien litigation was the "prevailing party," and thus entitled to attorney fees and costs as the prevailing party, despite fact that amount recovered in litigation was no greater than the amount offered before the litigation. C.U. Associates, Inc. v. R.B. Grove, Inc., App. 3 Dist., 455 So.2d 1109 (1984), quashed 472 So.2d 1177.

12. ---- Pleading, attorney fees

When applicable rule and statute governing **offers** of **judgment** are involved, motion for attorney's fee must be made within 30-day period. Bosch v. Hajjar, App. 4 Dist., 639 So.2d 1096 (1994).

Where complaint failed to state any basis for entitlement to attorney's fees, court erred in receiving in evidence, over defendant's objections, document purportedly embodying agreement between the parties to pay attorney's fees. River Road Const. Co. v. Ring Power Corp., App. 1 Dist., 454 So.2d 38 (1984).

If claim for attorney's fees had been based upon statute, omission of any reference to fees in offer or acceptance of judgment would not be fatal to plaintiff's subsequent claim therefor, but where fee claims were based upon contract, it was necessary that such claims be pled and proved as part of damages suffered by plaintiff beyond bare allegation of entitlement, the entitlement thereto and amount thereof being determined by trier of fact, absent stipulation otherwise by the parties, in same manner as other elements of damage. River Road Const. Co. v. Ring Power Corp., App. 1 Dist., 454 So.2d 38 (1984).

13. ---- Discovery expenses, attorney fees

Taxation of cost of opposing counsel's air fare to out-of-state deposition was not abuse of discretion where deposition was initiated by counsel for minor child and mother after child and mother had refused two **offers** of **judgment** which exceeded verdict eventually rendered by jury. White v. Cowles Florida Broadcasting, Inc., App. 1 Dist., 361 So.2d 821 (1978).

13.2. ---- **Offer** of **judgment**, attorney fees

Florida **Offer** of **Judgment** Statute creates a right to attorney fees so long as the statutory prerequisites have been met. In re Auffant, Bkrtcy.M.D.Fla.2001, 268 B.R. 689, subsequent determination 274 B.R. 554.

Under the Florida **Offer** of **Judgment** Statute, when a party serves a demand or **offer** for **judgment** and that party recovers at least 25% less than the demand or offer, the party is entitled to reasonable fees and costs; the statute similarly allows an award of fees in cases where a judgment of no liability is entered. In re Auffant, Bkrtcy.M.D.Fla.2001, 268 B.R. 689, subsequent determination 274 B.R. 554.

Offer of **judgment** for single sum of $350,000, at time when automobile manufacturer and dealer were both defendants in products liability suit, failed to

comply with rule requiring a joint proposal for settlement to state the amount and terms attributable to each party, and thus, injured child who was awarded $725,000 against automobile manufacturer was not entitled to attorney fees and costs under rule, even though manufacturer agreed to indemnify its dealer and, in fact, provided a defense for dealer. Ford Motor Co. v. Meyers ex rel. Meyers, App. 4 Dist., 771 So.2d 1202 (2000), rehearing denied, review denied 800 So.2d 615.

Automobile insurer's lump-sum offer to settle claims by accident victim and spouse for underinsured motorist (UIM) benefits did not satisfy requirement to specify the amounts offered to each party, and, thus, rejection of the offer and a judgment in favor of the insurer did not entitle the insurer to attorney fees under the **offer-of-judgment** statute and rule; although the claim for loss of consortium was derivative, it was distinct and belonged to the spouse. United Services Auto. Ass'n v. Behar, App. 2 Dist., 752 So.2d 663 (2000), rehearing denied, review granted 770 So.2d 163, review dismissed 782 So.2d 869.

Each party who receives an offer of settlement is entitled to evaluate the offer as it pertains to him or her; thus, rejection of a lump-sum offer to more than one party does not entitle the offering party to attorney fees if the judgment is at least 25% less than the offer. United Services Auto. Ass'n v. Behar, App. 2 Dist., 752 So.2d 663 (2000), rehearing denied, review granted 770 So.2d 163, review dismissed 782 So.2d 869.

13.3. ---- Reservation of judgment, attorney fees

Trial court's reservation of jurisdiction in regard to attorney fees, entered more than 30 days after the jury verdict, did not constitute an enlargement of time for prevailing plaintiffs to pursue their entitlement to fees, absent a showing of and finding by the trial court of excusable neglect. Spencer v. Barrow, App. 2 Dist., 752 So.2d 135 (2000).

13.4. ---- Sanctions, attorney fees

Motion for attorney fees under **offer** of **judgment** statute, which was filed just 22 days before first scheduled trial date, was not frivolous or filed in bad faith, and thus, attorney-fee sanctions were not warranted against movant on that basis, even though **offer** of **judgment** did not comply with statutory requirement that no offer be served later than 45 days before date set for trial, considering the continuing development of case law on time requirements for settlement offers and counsel's intent to argue that offer was timely because it was made more than 45 days before actual trial date, a position that was not addressed by case law until after counsel filed motion. In re Estate of Hathaway, App. 4 Dist., 768 So.2d 525 (2000).

13.5. ---- Excusable neglect, attorney fees

Confusion by prevailing plaintiffs over the time requirements for filing motion for attorney fees did not amount to "excusable neglect," such as would allow enlargement of time for filing such motion when final judgment was not entered on a jury verdict within 30 days of that verdict, considering that there was no confusion as to the law as it existed at all times applicable to the request for attorney fees. Spencer v. Barrow, App. 2 Dist., 752 So.2d 135 (2000).

13.7. ---- Time, attorney fees

Order of District Court of Appeal granting prevailing plaintiffs' motion for appellate attorney fees did not enlarge time for plaintiffs to pursue their entitlement to trial attorney fees. Spencer v. Barrow, App. 2 Dist., 752 So.2d 135 (2000).

14. Interest

Claims for prejudgment interest, as well as claims for attorney's fees based upon contract, should be treated as elements of damages which are integral part of plaintiff's cause of action, and when defendant submits **offer** of **judgment** in sum certain, plaintiff who accepts such offer will be precluded from recovering additional sums attributable to prejudgment interest or attorney's fees not awardable by statute. River Road Const. Co. v. Ring Power Corp., App. 1 Dist., 454 So.2d 38 (1984).

Offer of **judgment** which contained only a single figure included all elements of damages attributable to plaintiff's cause of action, including damage resulting from deprivation of use of the money, so that plaintiff was precluded from thereafter securing an award of prejudgment interest. Encompass Inc. v. Alford, App. 1 Dist., 444 So.2d 1085 (1984), petition for review denied 453 So.2d 43.

15. Voluntary dismissal

Award of attorney fees and costs under this rule providing for such award was improper where plaintiff voluntarily dismissed action with prejudice; rule requires either return of verdict in jury action or filing of judgment in nonjury action, and court did not set forth its findings as Rule requires. Curenton v. Chester, App. 5 Dist., 576 So.2d 969 (1991).

16. Withdrawal of offer

Amendment to statute governing **offers** of **judgment** made after impasse is reached in mediation, that provided that withdrawals of offers had to be in writing, as incorporated by rule, was in force at time of **offer** of **judgment** and alleged withdrawal of offer in dispute that arose from automobile accident, and so defendant's verbal withdrawal of its offer was ineffective, even though action accrued prior to enactment of amendment. Dynasty Exp. Corp. v. Weiss, App. 4 Dist., 675 So.2d 235 (1996).

Offer of **judgment** withdrawn prior to expiration of 30 days after its service was void and could not serve as basis for award of attorney fees to offering party. Kirby v. Adkins, App. 5 Dist., 582 So.2d 1209 (1991).

17. Unreasonable delay or increased costs

Sanction of costs for rejection of reasonable **offer** of **judgment** could not be imposed absent finding that rejection of offer resulted in unreasonable delay and needless increase in cost of litigation, and remand for hearing on issue was necessary. Liebling v. Florida Energy Management, Inc., App. 2 Dist., 619 So.2d 441 (1993).

In order to determine whether sanction of costs should be imposed for unreasonable rejection of **offer** of **judgment**, it must first be determined that offeree's rejection caused unreasonable delay and needless increase in cost of litigation, and then that offer was refused and that damage award in favor of offeree was less than 75% of offer or that damages awarded offeror were greater than 125% of refused offer. Liebling v. Florida Energy Management, Inc., App. 2 Dist., 619 So.2d 441 (1993).

Fact that offeree did not tender a counteroffer did not show its rejection of the offer caused unreasonable delay and needless increase in the cost of litigation warranting sanctions. State Farm Mut. Auto., Ins. Co. v. Lathrop, App. 2 Dist., 586 So.2d 1125 (1991).

Starting point for implementing rule allowing for award of sanctions following the rejection of an **offer** of **judgment** is a determination that the offeree's rejection caused an unreasonable delay and needless increase in the cost of litigation, and that determination must be conjoined with a finding either that the offer was refused and the damage award in favor of the offeree is less than 75% of the offer or that the damages awarded the offeror are greater than 125% of the refused offer. State Farm Mut. Auto., Ins. Co. v. Lathrop, App. 2 Dist., 586 So.2d 1125 (1991).

There was no showing that four months which elapsed between **offer** of **judgment** and rendition of jury's verdict increased the offeree's costs, so that it was not entitled to sanctions because of the rejection of its offer. State Farm Mut. Auto., Ins. Co. v. Lathrop, App. 2 Dist., 586 So.2d 1125 (1991).

18. Findings

Trial court erred in awarding attorney fees without setting forth findings as required by statute providing for attorney fees upon rejection of settlement offer. Hostetter-Jones v. Morris Newspaper Corp., App. 5 Dist., 590 So.2d 533 (1991).

19. Damages awarded

For purpose of rule permitting court to award sanctions against party that unreasonably rejects **offer** of **judgment**, "damages awarded" in relation to offer are properly measured by judgment; rule contemplates sanctions upon disproportionate judgment. Stewart v. Progressive American Ins. Co., App. 1 Dist., 595 So.2d 272 (1992).

In determining relationship between "damages awarded" and amount of rejected **offer** of **judgment**, offer is to be compared to total amount of judgment not including costs; costs are merely incident of actual damages, rather than damages in themselves. Stewart v. Progressive American Ins. Co., App. 1 Dist., 595 So.2d 272 (1992).

20. Unreasonable rejection of offer

Under Florida law, insincerity disguised as **offer** of **judgment** creating potential liability for attorney fees and costs, if rejected, fails to meet test of reasonableness contemplated by Florida statutes and rules on **offers** of **judgment** and recovery of attorney fees and costs. Stouffer Hotel Co. v. Teachers Ins., M.D.Fla.1995, 944 F.Supp. 874, affirmed 101 F.3d 707.

Plaintiff reasonably rejected defendants' **offer** of **judgment** and, therefore, was not liable for attorney fees, even though court had granted defendants' motion for judgment as matter of law at close of plaintiff's evidence in action for tortious interference with contract or prospective advantage; plaintiff's grievance was understandable in light of significant economic opportunity lost to plaintiff because of defendants' acts, and neither amount of money tendered by defendants nor ultimate result in the litigation gravitated materially toward award of fees. Stouffer Hotel Co. v. Teachers Ins., M.D.Fla.1995, 944 F.Supp. 874, affirmed 101 F.3d 707.

Finding that defendant did not reject **offer** of **judgment** in slip-and-fall case unreasonably, justifying denial of plaintiff's attorney fee request, was supported by evidence that plaintiff had difficult case of liability. Dvorak v. TGI Friday's, Inc., App. 4 Dist., 639 So.2d 58 (1994), review granted 654 So.2d 131, approved 663 So.2d 606, rehearing denied.

Party may rely on trial court's familiarity with case when deciding whether **offer** of **judgment** was unreasonably rejected, thereby justifying award of attorney fees; expert testimony is not necessary. Dvorak v. TGI Friday's, Inc., App. 4 Dist., 639 So.2d 58 (1994), review granted 654 So.2d 131, approved 663 So.2d 606, rehearing denied.

20.5. Rejection of invalid offer

General lump sum proposal of settlement to two offerees, which did not specify amount offered to each party, was defective, and thus inadequate to invoke rule awarding attorney fees and costs to prevailing party whose settlement offer had been rejected. Alanwood Holding Co. v. Thompson, App. 2 Dist., 789 So.2d 485 (2001).

Offer-of-judgment statute was not triggered by defendant's lump sum settlement offer that did not specify amount attributed to each plaintiff. Stern v. Zamudio, App. 2 Dist., 780 So.2d 155 (2001).

Defendant attorney's offer to settle claims by husband and wife plaintiffs in action for abuse of process, false imprisonment, and intentional infliction of emotional distress was invalid, as offer failed to specify the amount and terms attributable to each party, and, thus, rejection of **offer** and **judgment** in favor of attorney did not entitle attorney to attorneys fees under **offer-of-judgment** rule, as husband's and wife's claims were distinct, and each would have had different damages. Goldstein v. Harris, App. 4 Dist., 768 So.2d 1146 (2000), rehearing denied.

21. Time respond

For purposes of **offer-of-judgment** rule, which entitles defendant to award of costs and attorney fees if defendant's **offer** of **judgment** is not accepted and judgment ultimately obtained is of no liability or is at least 25% less than offer, plaintiff's motion for enlargement of time to respond to offer did not toll time in which to respond; plaintiff did not set its motion for a hearing. Donohoe v. Starmed Staffing, Inc., App. 2 Dist., 743 So.2d 623 (1999).

West's F.S.A. RCP Rule 1.442

FL ST RCP Rule 1.442

Rehearing denied

715 So.2d 1054
23 Fla. L. Weekly D1807
(Cite as: 715 So.2d 1054)
<KeyCite History>

District Court of Appeal of Florida,
Fifth District.

RESPIRATORY CARE SERVICES, INC., et al.,
Appellants,
v.
MURRAY D. SHEAR, P.A., et al., Appellees.

Nos. 96-3232, 97-1896.

July 31, 1998.
Rehearing Denied Aug. 27, 1998.

Client filed legal malpractice case against law firms and attorney based on representation of client in suit against hospital. The Circuit Court, Orange County, John H. Adams, J., entered judgment awarding trial and appellate attorney's fees to defendants. Client appealed. The District Court of Appeal, Thompson, J., held that statute allowing recovery of appellate attorney fees when offer of judgment is rejected still required motions for appellate fees to be filed in appellate court requesting fees.

Reversed and remanded with directions.

West Headnotes

[1] Costs k223
102k223

[1] Costs k264
102k264

Generally, the appellate court has exclusive jurisdiction to award appellate attorneys' fees, and to invoke the jurisdiction of the court to award fees, the party seeking attorney's fees must timely file a motion in the appellate court. West's F.S.A. R.App.P.Rule 9.400(b).

[2] Costs k264
102k264

Once the appellate court determines that an award of appellate attorney's fees is appropriate, a mandate is issued to the trial court to impose the fees after conducting a hearing, but absent a mandate, the trial court has no jurisdiction to award appellate attorney's fees. West's F.S.A. R.App.P.Rule 9.400(b).

[3] Costs k264
102k264

Statute that allowed defendants to recover appellate attorney's fees on ground that their offer of judgment was rejected still required that defendants file motions for appellate fees in appellate court requesting fees, and because defendants failed to do so, trial court was precluded from making award of appellate fees. West's F.S.A. § 768.79(b); West's F.S.A. R.App.P.Rule 9.400(b).

[4] Costs k264
102k264

Even where a fee award is mandatory, a motion for appellate fees must be filed in appellate court pursuant to rule. West's F.S.A. R.App.P.Rule 9.400(b).

[5] Costs k194.50
102k194.50

Award of attorney's fees is mandatory when offer of judgment is rejected if statutory requirements regarding amount of judgment obtained are satisfied and if offer of judgment was made in good faith. West's F.S.A. § 768.79.

***1055** Vincent G. Torpy, Jr., and Lisa L. Hogreve, of Frese, Nash & Torpy, P.A., Melbourne, for Appellants.

Alexander S. Douglas II, of Bush & Derr, P.A., Orlando, for Appellees William G. Osborne and Osborne & Aikin, P.A.

Douglas B. Brown and Suzanne M. Barto, of Rumberger, Kirk & Caldwell, P.A., for Appellees Broad & Cassel and Alice Blackwell White.

THOMPSON, Judge.

We consolidate these cases because the parties and the issues are identical. The appellants, Respiratory Care Services, Inc., and Ahmad Saidi ("Saidi") appeal a final judgment awarding trial and appellate attorney's fees of $52,089.50 to William G. Osborne and Osborne & Akin, P.A. ("Osborne") in case

96-3232, and $49,320.90 to Broad & Cassel, P.A. ("Broad & Cassel") in case 97-1896. The fees were awarded pursuant to section 768.79, Florida Statutes, which allows the award of attorney's fees if a rejection of offer of judgment is 25 percent greater than the final judgment. We reverse the awards.

Appellants filed a legal malpractice case against Broad & Cassel, P.A., Osborne & Aikin, P.A., and William G. Osborne, individually. [FN1] The malpractice suit arose from an earlier lawsuit wherein appellees represented appellants in their suit against a hospital. Ultimately, the trial court dismissed with prejudice one of the malpractice claims. The remaining claim against appellees, diminishment of settlement value, was dismissed without prejudice, amended, and then voluntarily dismissed with prejudice by appellants after the parties filed a stipulated motion for entry of a final judgment. In the stipulated final judgment, the parties agreed that "the Plaintiffs [appellants] shall take nothing by way of this action." The final judgment did preserve appellants' right to appeal the dismissal with prejudice and reserved the trial court's jurisdiction to tax costs and attorney's fees. The dismissal was affirmed without opinion. *Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 666 So.2d 157 (Fla. 5th DCA 1995).

> FN1. Appellants also sued partners and associates in the firms, but the legal malpractice action against them was dismissed.

After remand, a hearing was held on appellee Osborne's motion for attorney's fees and costs, pursuant to section 768.79, Florida Statutes. The trial court awarded $23,472.50 ***1056** for legal fees incurred from the date the offer of judgment was served through the final judgment, and $28,617 for fees incurred on appeal. During the hearing, the trial court determined that appellees served appellants with an offer of judgment for $10,000 which appellants failed to accept. To support the motion for fees in case 96-3232, Osborne filed two affidavits: one from Osborne's attorney Alexander Douglas, II reflecting fees and costs of $52,143.53, and the other from attorney Alton G. Pitts stating the fees were reasonable. Attorney Douglas also testified at the hearing to support his fee affidavit.

In case 97-1896, the trial court conducted a separate hearing and determined that appellee Broad & Cassel also served an offer of judgment for $10,000, which appellants also failed to accept. Broad & Cassel filed computer generated timesheets and affidavits from attorneys Pitts and Douglas B. Brown reflecting reasonable fees and costs of $49,320.90 of which $37,791.75 was for appellate attorney's fees. Attorney Brown also testified at the hearing.

APPELLATE ATTORNEY'S FEES

[1][2] Appellants argue that the trial court erred in awarding appellate attorneys' fees. Generally, the appellate court has exclusive jurisdiction to award appellate attorneys' fees, and in order to invoke the jurisdiction of the court to award fees, the party seeking attorney's fees must timely file a motion, pursuant to Florida Rule of Appellate Procedure 9.400(b), in the appellate court. Once the appellate court determines that an award of appellate attorney's fees is appropriate, a mandate is issued to the trial court to impose the fees after conducting a hearing. Absent a mandate, the trial court has no jurisdiction to award appellate attorney's fees. *See e.g., Le Grand v. Dean,* 598 So.2d 218 (Fla. 5th DCA 1992); *Real Estate Apartments, Ltd. v. Bayshore Garden Apartments, Ltd.,* 530 So.2d 977 (Fla. 2d DCA 1988). In this case, the appellees did not move this court for an award of fees, and no such mandate was issued.

[3] Nevertheless, appellees argue that Florida Rule of Civil Procedure 1.442 incorporates section 768.79, Florida Statutes, which allows recovery of appellate attorney's fees when an offer of judgment is rejected. Further, appellees assert that section 768.79 only requires that the motions for trial and appellate fees be filed in the trial court "within 30 days after the entry of judgment or after voluntary or involuntary dismissal." Hence, they argue there is no need to comply with Rule 9.140. We disagree with this reasoning.

Appellees are correct that provisions of section 768.79(b) allow the recovery of appellate attorney's fees. They cite several cases to support their argument. *Williams v. Brochu,* 578 So.2d 491 (Fla. 5th DCA 1991); *Mark C. Arnold Const. Co. v. National Lumber Brokers, Inc.,* 642 So.2d 576 (Fla. 1st DCA 1994); *Schmidt v. Fortner,* 629 So.2d 1036, 1043 n. 10 (Fla. 4th DCA 1993), *approved, TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606 (Fla.1995). In each of these cases, however, a motion was filed with the appellate court requesting appellate attorney's fees. The holding in *Williams,*

that appellate fees are recoverable under section 768,79, is correctly interpreted to mean only that upon proper motion to the appellate court, section 768.79 provides a basis for attorney's fees. It in no way states or implies that section 768.79 supersedes the procedural requirements of rule 9.400(b).

[4][5] Even where a fee award is mandatory, a motion for appellate fees must be filed pursuant to rule 9.400(b). *Salley v. City of St. Petersburg,* 511 So.2d 975 (Fla.1987); *School Bd. of Alachua County v. Rhea,* 661 So.2d 331 (Fla. 1st DCA 1995), *rev. denied,* 670 So.2d 939 (Fla.1996). Under section 768.79, an award of attorney's fees is mandatory if the statutory requirements in subsections (6)(a) or (b) are satisfied and if the offer of judgment was made in good faith. *TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606, 611 (Fla.1995). To obtain an award of appellate fees, appellees were required to file a motion in this court. Because they failed to do so, the trial court erred in making the award.

ATTORNEY'S FEES PRIOR TO APPEAL

Appellants argue that the awards for fees incurred prior to appeal are unreasonable. ***1057** However, neither order contains specific findings on the number of hours reasonably expended and the hourly rate as required by *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145, 1151 (Fla.1985). We therefore reverse the awards and remand for proper findings. *Rowe; Warner v. Warner,* 692 So.2d 266 (Fla. 5th DCA 1997).

REVERSED and REMANDED with directions.

GOSHORN and PETERSON, JJ., concur.

PROPOSED UNIFORM COURT RULES FOR COVERAGE OF JUDICIAL PROCEEDING IN TEXAS TRIAL AND APPELLATE COURTS

POLICY

These guidelines are intended to standardize the use of electronic media coverage in the courts of Texas to preserve the independence of the judiciary, maintain the dignity, decorum and impartiality of court proceedings and to protect the rights of litigants.

DEFINITIONS

"Audio-visual coverage" or "electronic media coverage" or "coverage" shall mean (1) electronic broadcasting or other transmission to the public of radio or television signals from the courtroom, (2) electronic recording of sound or visual images in the courtroom for later transmission or reproduction, and (3) still photography in the courtroom. In the use of each of these terms, such coverage may refer to that by news or educational media.

"Media" or "media agency" mean any news reporting or news-gathering entity and any associated agents or employees thereof, including television, radio, and television networks, news services, newspapers, magazines, trade papers, in-house publications, professional journals, or any educational media the function of which is to inform the public. Educational media coverage includes but is not limited to reproduction of court proceedings for public or private school classroom use or for legal training.

"Judicial proceeding" means the proceeding of a court or a judge wherever conducted.

"Court" means a presiding judge, associate judge, master or other justice designated to preside over the proceedings in question. If more than one justice presides, any decision required shall be made by a majority of the judges.

"Pool" means an arrangement among several media agencies for joint production of video, audio and still photographic coverage of a judicial proceeding.

PROCEDURE FOR APPLICATION AND APPROVAL

Application; Notification of Parties. Coverage of judicial proceedings may be granted only to members of the news or educational media and only by the court's approval of a written application for coverage by a news or educational media representative with the applicable clerk of the court without cost. The application shall be signed by an authorized media representative and acknowledge receipt of a copy of these rules and that these rules are binding upon it. The application shall be served on the parties to the proceeding no later than the day before the scheduled proceeding, unless the proceeding is set on less than a day's notice, in which case the notice should be served as soon as practicable.

The request should state as much identifying information as practical to inform the court, such as the case style and number and the date and time the proceeding is scheduled to begin. The request must state the name of the requesting person or organization; the type of coverage

requested (for example, televising or photographing); and the type and extent of equipment to be used. Upon the filing of such notice and before the commencement of the proceeding, any party may request a hearing on objections to such coverage. Objections to media coverage should state the specific and demonstrable injury alleged from media coverage. The hearing shall be at a time that will not substantially delay the proceedings.

Time for filing a request. A request to cover a court proceeding must be filed no later than three days before the proceeding to be covered. The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

Decision of Court. The granting of a coverage request shall be made at the court's discretion. The court shall, by written order, either allow, deny or limit coverage. The court has the discretion to allow, deny, limit or terminate electronic media coverage of a proceeding when the interests of justice demand protecting the rights of the parties, witnesses, or the dignity of the court, or assuring the orderly conduct of the proceedings, or for any other reason considered necessary or appropriate by the court. In granting a request, the court shall consider all relevant factors, including but not limited to:

(a) the type of case involved;
(b) whether the coverage would harm any participants;
(c) whether the coverage would interfere with the fair administration of justice, provision of a fair trial, or the rights of the parties;
(d) whether the coverage would interfere with any law enforcement activity;
(e) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;
(f) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;
(g) the extent to which the coverage would be barred by law in the judicial proceeding; and
(h) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.

The court may grant a request, subject to limitations suggested by these rules, unless coverage would clearly deprive a participant in the proceedings of a right protected by the constitutions or other laws of the United States or of Texas. Whenever coverage would impair the rights of a participant, coverage may be allowed subject to narrowly designed limitations that safeguard the protected interest. Technological techniques that safeguard the protected interest are to be preferred over prohibiting all coverage of the proceeding or any part thereof. For example, in instances where the identity of a witness should not be made public, requiring the media to electronically obscure the face and/or disguise the voice of the witness is preferable to prohibiting coverage of the witness' testimony. Likewise, precluding or restricting coverage of part of a witness' testimony is preferable to barring coverage of the witness' entire testimony.

COVERAGE LIMITATIONS

Equipment and Personnel. Coverage in general should be by a pool system established by the news organizations and administered by those organizations, subject to the following limitations:

(a) No more than one video camera and one camera operator shall be permitted in any proceeding at any time. Only video cameras, audio equipment and still camera equipment that does not produce disruptive sound or light may be employed to cover judicial proceedings. In the event the electronic media intends to cover any entire or lengthy proceeding, and informs the court, or in other appropriate circumstances, the court may allow an unmanned second camera into the courtroom.

(b) No more than one photographer to operate two still cameras shall be permitted in any proceeding at any time.

(c) No more than one audio system for broadcast purposes shall be permitted in any proceeding at any time. Audio pickup for all news media purposes shall be through existing audio systems in the court, if possible. If no technically suitable audio system is available, microphones and related wiring essential for media purposes shall be unobtrusive and placed in the courtroom at the court's direction, preferably only at the bench, witness stand and counsel tables.

(d) No moving lights, flash attachments or sudden lighting changes shall be permitted during the coverage of judicial proceedings. No light or signal visible to trial participants shall be used on any equipment during coverage to indicate whether it is operating. The court may, in its discretion, approve modifications and additions in light sources existing in the courtroom, provided such modifications or additions are installed and maintained at media expense and are not distracting or otherwise offensive.

(e) Video cameras, still cameras and camera personnel shall be positioned in such locations as shall be designated by the presiding judge. The areas designated shall provide the news media with reasonable access to cover the proceedings with the least possible interference with court proceedings. During the proceedings, operating personnel shall not move about, nor shall equipment be placed, moved or removed. All such activities shall take place each day before the proceeding. All equipment shall be in place in advance of the commencement of the proceeding.

(f) Identifying marks, call letters, words, logos and symbols shall be concealed on all equipment. Persons operating such equipment shall not display any identifying insignia on their clothing.

Specific restrictions on coverage. No coverage of the jury or of any juror or alternate juror in the jury deliberation room or during recess shall be permitted. Coverage of the jury, including alternate jurors, while in the jury box or elsewhere in the courtroom may be disallowed, but in any event shall not focus on, involve close-ups of, or otherwise emphasize any individual juror or alternate juror. Electronic media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Audio coverage of conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench is prohibited.

Because of the routine occurrence of sensitive matters occurring in the courts, juvenile and family courts may establish and publish additional policies regarding electronic media

coverage of certain types of proceedings in their courts.

Supervision of audio-visual coverage. Coverage of judicial proceedings shall be subject to the continuing supervision of the court. Violations of these rules, or of the specific order governing coverage entered by the court, shall be punishable by the court's contempt powers. Notwithstanding the approval of a request for permission to provide coverage of judicial proceedings, the court shall have discretion throughout such proceedings to revoke such approval or to limit the coverage authorized.

Ceremonial coverage. If electronic media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c(c) of the Texas Rules of Civil Procedure, permission for, and the manner of such coverage, are determined solely by the court, with or without guidance from these rules.

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

POOLING

If more than one media agency of one type applies for coverage of a judicial proceeding, they shall make pool arrangements. If they are unable to agree, the court may deny all electronic media coverage by that type of media agency, or may designate one agency or one representative as pool coordinator, specifying such other conditions of pool coverage as may be necessary. A pool will be declared when any TV news organization has camera and sound access to courtroom proceedings being covered by any other TV news organization. It will be the responsibility of the station inside the courtroom to provide either instant electronic distribution of all the audio and video of the court proceedings through use of a distribution amplifier ("DA,") or a "dub copy" of all the court proceedings recorded by the station allowed camera and microphone access to the courtroom.

Eligibility. The only stations eligible for access to the pool will be those stations that have a representative covering the proceeding during the time the pool camera and microphone are inside the courtroom. Each station present should notify the pool provider of its interest in receiving the audio and video feed or dub in a timely fashion, preferably at the time of the proceeding. In the case of instant electronic distribution the audio and video signals will be made available to all TV news organizations present. No dubs will be made. In the case of no signal distribution, only TV news organizations present during the pooled proceedings will be eligible for a dub of those proceedings.

Pool Responsibilities. The TV news organization that makes an initial agreement with the court where the proceedings are to take place becomes the pool camera, by virtue of the fact that until others express an interest, the coverage is "exclusive." If, however, more than one station expresses an interest in coverage of the proceeding 24 hours before the start of TV coverage of that proceeding, the stations will determine which of them will provide the pool coverage through an agreement, drawing or flip of a coin.

Notification. TV news organizations that gain access to court proceedings on their own have no

obligation to notify other stations of their intent to record those proceedings. If, however, other stations express an interest in similar coverage during the time the initial station is covering the inside courtroom proceedings, then a pool is declared but no requirement for other stations to be notified of the pool arrangement exists.

WASHINGTON, D.C.

Trial of alleged terrorist spotlights camera issue

BY ASHLEY GAUTHIER

While the man alleged to be the "20th terrorist" awaits trial for conspiracy in connection to the Sept. 11 attacks, his case raises the issue of whether cameras will ever be permitted in federal trial courtrooms.

Zacarias Moussaoui was arrested a short time before the attacks on immigration charges. But a flying school had told the FBI about Moussaoui earlier and how he wanted to learn how to fly a plane once it was in the air, but did not need to learn how to take off or land.

Moussaoui was eventually indicted and will be tried on six counts of conspiracy for his alleged involvement in planning the attacks. His trial is planned for October.

Court TV petitioned the court, seeking permission to provide gavel-to-gavel coverage of the trial and a waiver of federal court rules barring any audio-visual coverage of a trial. Supported by groups such as the Reporters Committee for Freedom of the Press in a friend-of-the-court brief, Court TV argued that such a ban on televised trials is unconstitutional.

U.S. District Judge Leonie Brinkema issued a ruling on Jan. 18, stating that the camera ban in Federal Rule of Criminal Procedure 53 is constitutional. She also expressed concerns that televising the trial would create security problems.

Brinkema said that "any societal benefits from photographing and broadcasting these proceedings are heavily outweighed by the significant dangers worldwide broadcasting of this trial would pose to the orderly and secure administration of justice."

Court TV, joined by intervener C-SPAN, argued that the camera ban was unconstitutional because it discriminates between print and broadcast media. The network argued that the traditional justification for the distinction — that camera equipment causes distractions — is no longer valid because modern equipment is not bulky and obtrusive.

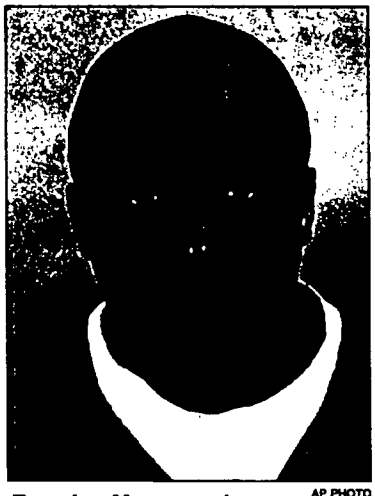
Groups joining the friend-of-the-court brief argued that televised proceedings would allow the public to observe the trial and feel a sense of resolution regarding the Sept. 11 attacks.

Brinkema ruled that the right of access was satisfied because "some" members of the media and public could attend the proceedings. Also, transcripts of proceedings would be made available electronically within three hours of the close of each court session.

"Contrary to what interveners and *amici* have argued, the inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion," Brinkema said. "Rather, this is a question of social and political policy best left to the United States Congress and the Judicial Conference of the United States."

The court also said that even if the rule were unconstitutional, it would still be acceptable to ban cameras in this case because of security concerns. Brinkema said she was concerned that witnesses might be intimidated by the prospect of televised coverage of their testimony. The judge admitted that cameras were now unobtrusive, but now a witness could be afraid that "his or her face or voice may be forever publicly known and available to anyone in the world."

Brinkema also said the safety of the court and its personnel might be compromised by broadcasting photographic images of the physical layout of the court and of court personnel. Finally, the judge determined that there was a risk of "showmanship," evidenced by Moussaoui himself, who behaved erratically at his arraignment.



Zacarias Moussaoui AP PHOTO

"We're disappointed because we thought the public should have the right to see this trial," said Kathleen Kirby, attorney for the Radio-Television News Directors Association.

Court TV said it will not appeal the ruling.

Brinkema's ruling raises the question of whether federal courts will ever permit cameras in their courtrooms. As of last summer, all 50 states had permitted television cameras in some of their courtrooms, recognizing that they do not adversely affect the efficient administration of justice but rather help the public to understand how the court system works.

Although cameras won't be at the Moussaoui trial, they will be in attendance at the retrial of Rabbi Fred Neulander in Philadelphia. Neulander faces charges of hiring a private investigator to kill his wife. Court TV will televise the trial.

Cameras also were allowed in a state district court in Las Vegas where Dennis Rodman was the subject of a civil trial in which a casino dealer accused the former basketball star of rubbing dice on the dealer's head, stomach and groin. Rodman's attorney attempted to have cameras banned from the trial, arguing that the presence of cameras might taint the jury and would only serve prurient interests.

The judge, however, ruled against Rodman, who didn't show up for the trial anyway.

With state courts on one side of the issue and federal courts on the other, Kirby said the issue may need to be addressed by Congress. Brinkema, in her decision, also stated that Congress should clarify the issue if it wishes to permit cameras in the courts.

Congress has, in fact, considered legislation that would permit federal judges to use discretion to allow cameras in the courtroom.

> "The inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion."
>
> — *U.S. District Judge Leonie Brinkema*

The legislation, called "Sunshine in the Courtroom," passed the Senate Judiciary Committee last November. The bill, if passed, would give all federal judges, even the U.S. Supreme Court, discretionary power to permit trials to be televised and photographed.

Bruce Collins, general counsel for C-SPAN, believes that cameras eventually will be permitted into federal courtrooms. But Collins said "something seminal is going to have to happen before cameras become a regular presence in federal courts."

For state courts, Collins noted, the U.S. Supreme Court decision in *Chandler v. Florida* was the precipitating factor.

In *Chandler*, the court ruled that the Constitution does not prohibit a state from experimenting with televised trials. The court recognized that, in some cases, camera coverage might impair the defendant's right to a fair trial, but a *per se* ban on television coverage was not necessary.

After the *Chandler* decision, states began to experiment.

Many found that cameras posed little or no interference with the defendant's rights in most cases, and eventually all states allowed cameras into the courtroom in some circumstances.

Collins said convincing the Supreme Court to televise oral arguments might be the type of seminal act needed to convince other federal courts that cameras would not harm the administration of justice. But, Collins said, the Supreme Court "made it very clear that they're not going to start."

Efforts to provoke action have not been successful.

The Federal Judicial Conference conducted a four-year experiment with televised trials involving six trial courts and two appellate courts. Although a report concluded that the harms the courts feared did not materialize, the conference never took action on allowing cameras into federal courts.

After the Oklahoma City bombing, the federal court trying Timothy McVeigh in 1997 recognized that the victims' families may have an interest in the proceedings and made arrangements for a special broadcast for family members who couldn't make it to the trial in Denver.

But the court would not permit a national broadcast.

Collins said he thought the Moussaoui case might provide a breakthrough because the case is of such interest. During the hearing, Brinkema recognized that technological advancements had changed society and its expectations, but she ultimately declined to permit televised coverage.

"Looking ahead," Collins said, "the only prospect in the short term seems to be legislation."

But he acknowledged that legislation would take a long time. Congress and the judiciary, both sensitive to separation of powers, may worry about perceptions of Congress interfering with the court system.

Plus, strong public sentiment would probably have to develop before Congress passed such a bill, Collins said.

Kristin Gunderson contributed to this report. ◆

WASHINGTON, D.C.

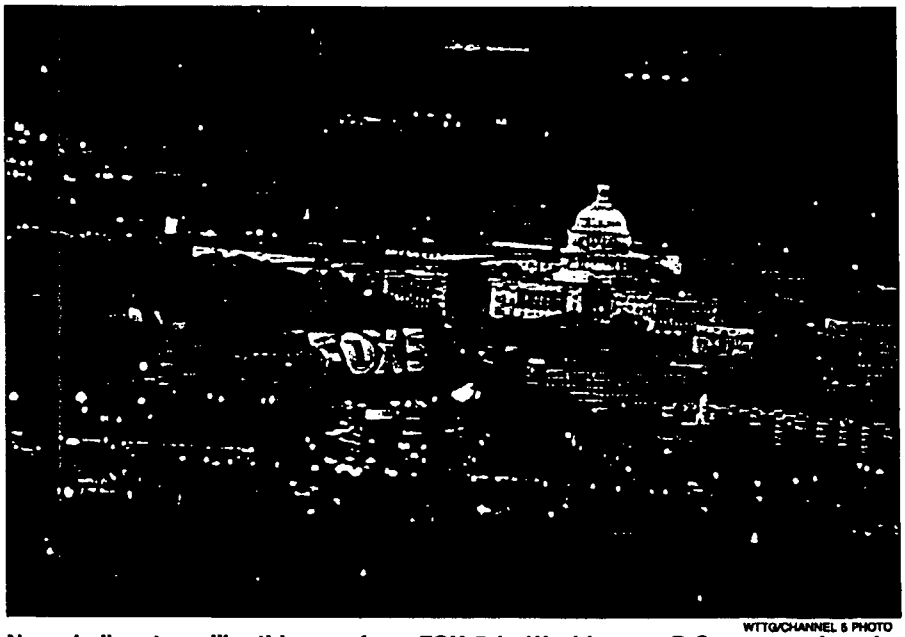
Helicopter news flights hit and clear turbulence

When postal workers in Denver found pudding mix spilling from an envelope last November, they thought it might be anthrax. A nearby hospital admitted four of them for decontamination.

It sounded like news to Byron Grandy, the news director for KMGH/Channel 7. And so, Grady contacted his helicopter pilot, Rich Westra, to investigate.

On a typical day, it would have been fine for Westra to fly over Denver's Swedish Hospital. But due to post-Sept. 11 restrictions on newsgathering helicopters, Westra soon found himself under investigation by the Federal Aviation Administration, accused of entering airspace deemed off-limits to reporters.

"The problem is, the FAA seems to think we can't take pictures," Westra said afterward. "It's the newsgathering process that is being contested."



WTTG/CHANNEL 5 PHOTO

News helicopters, like this one from FOX 5 in Washington, D.C., returned to the skies over the nation's largest cities after federal officials lifted a post-attack ban.

For months, pilots of newsgathering helicopters struggled with an ongoing ban limiting their flights over the nation's largest cities. After two months of halted flights for newsgathering and traffic watches, many helicopters returned to the air on a limited basis. On Dec. 19, the FAA restored general aviation access to airspace above the nation's 30 largest metropolitan areas.

"This reinforces our commitment to getting America back to business while maintaining the highest standards of safety and security," said Transportation Secretary Norman Mineta in announcing the lifting of the restrictions.

But it was a long time coming. Too long, say broadcast journalists.

Comparison of Comments From Interested Groups

Prepared by the 700 Series Sub-committee
(Based on Comments Received as of 5-15-02)
JP (Justice of the Peace and Constable Assn of Texas)
TAA (Texas Apartment Assn) **HAA** (Houston Apartment Assn)
SAA (San Antonio Apartment Assn) **FUCHS** (Travis County Legal Aid)

RULE	JP	TAA	HAA	SAA	Fuchs
4	Supports				
143a				Wants to add language in last sentence to indicate appeals are from JP court	
190	Supports				
216	Supports				
245	Supports				
738	Wants the provision for late charges deleted because there is no standard for reasonableness and because it would take too much trial time to calculate the late charges.	Supports the provision for late charges and wants to allow plaintiff's to sue for rental value even in the absence of a rental agreement. Wants to include that any judgment cannot be in excess of the jurisdictional limit.	Supports and also wants to add a provision for post judgment interest.	Supports and also wants to add a provision for post judgment interest. Wants to substitute the word owner for landlord, and tenant for renter in the 2nd sentence. Does not think judgments for money, i.e. rent, late fees, attorney's fees, should be limited by the JP or county courts jurisdictional limits.	Opposes late charges but agrees post judgment interest can be included
739	Supports, except for the provision which will require the clerk of the JP court to attach anything to the citation which is filed by the plaintiff under Rule 741	Wants the answer date to be an appearance date with the trial to be set later by the court. Wants to add possession bond citation with required trial date 5,6,or 7 days after service. Wants jury fee paid at least 1 day before trial day.	Supports		Wants the appearance date, at the option of the court, to be either the trial date or an appearance date with a trial to be set later by the court. Also wants some notices on the citation to be in Spanish

RULE	JP	TAA	HAA	SAA	Fuchs
740	Supports version #1	No jury trial. Writ can issue immediately if a default judgment, but if defendant appears writ issues only after 5 days, and chance to appeal. Defendant can appeal even if writ has issued. No counterbond	Does not feel either version allows a landlord to recover possession quickly from a tenant who is a security or safety risk.	Wants to add a requirement that there be 2 good sureties in a (1). In version #1, they feel the setting of a jury trial lacks definiteness. They feel version #2 may be unconstitutional because it denies a jury trial to a tenant	Wants the possession bond trial to be set 6 days after service, and wants to eliminate the counterbond. Also wants the possession bond to be 4 times the rent, and adds a possession bond form
741	Wants the word sworn inserted before complaint in the 1st sentence so it is consistent with rule 739. Opposes the provisions of this rule which will require the plaintiffs to file additional information with the petition, and require the court to rule on the sufficiency of that material, as well as deal with motions and continuances filed because of the rule.	Opposes all new requirements for expanded pleading and to attach certain documents to the pleadings.			No longer wants documents enclosed with petition or Enhanced pleading requirements
742	They want to limit the service of citation in evictions to the sheriff or constable only	If the citation is for a possession bond the citation must be served at least 5 days before trial date.			Supports
742a	In (a), (b), and (c) they want to limit the service of citation in evictions to the sheriff or constable only		Supports the attempt to clean up the problem of trying to serve tenants at multiple addresses		Wants to retain the requirement that attempts at service be made at all known work addresses, and wants all attempts to be made at least 4 hours apart, and that citations be placed on the top half of the door.
743	Opposes any form of discovery in evictions	Says rules should be silent as to discovery as the existing rules provide for discovery	Opposes any discovery in evictions		Does not see any need to provide for discovery because the current rules already allow discovery

RULE	JP	TAA	HAA	SAA	Fuchs
744	Supports	Plaintiff must request jury trial at time of filing petition, and defendant must request jury within 5 days after service. Jury must be summoned within 7 days after service.	They think earliest opportunity language in line 4 is too vague and will result in delays in setting jury trials		
745	Supports	Opposes the additional 7 day delay in the 2nd sentence	Opposes the additional 7 day delay in the 2nd sentence		
746	Supports the general position but feels anytime a title dispute is raised it should be determined by a district court, not the JP court				
747		Wants the jury trail to be held within 7 days after the request is filed.			
747a	Supports	Supports			

RULE	JP	TAA	HAA	SAA	Fuchs
748	Supports except wants late charges deleted. Also they want to add the following to the last sentence in the 1st paragraph "unless an immediate writ was issued under rule 740"	Wants post judgment interest in the judgment. Writ issues after 5 days except for possession bond defaults, which can issue immediately. Provision for writs on manufactured homes evictions. Says writ should issue without delay. Also says JP judgment can be enforced when appeal is perfected in some situations. Eliminates requirement for the JP to find and record in the judgment findings about the rent, due date, etc.			
749	Opposes any motion for new trial. They want an appeal bond for twice the amount of the judgment or 2 months rent plus court costs whichever is greater in order to appeal. They want any hearings on the sufficiency of the bond to be held by the JP court not the county court.	Opposes any motion for new trial, to set aside a default, or a dismissal. Allows a tenant to appeal a default possession bond judgment within 5 days after judgment signed, even if a writ has issued.	Opposes any motion for new trial. They feel the rule is too long and should be broken up into smaller rules.	In (c) they feel the appeal bond should be set at twice the amoun of the judgment.	Wants to tighten up the requirements to get a new trial Wants the defendant to still b able to appeal after a writ is signed on a possession bond case and have the JP withdraw the writ.

Rule	JP	TAA	HAA	SAA	Fuchs
749a	Supports	They feel the proposed rules still do not solve the problem of excessive delays in the appeal of the denial of an affidavit of indigence from JP court to county court. They say the process can take 3 to 4 weeks and we have not changed the timetable for handling these appeals.	They feel the rule should be clarified	In (f) they wonder how the county clerk will receive notice of the filing of an affidavit of indigence so they will know to file a contest. In (i)(2) they feel the language should be filed in county court instead of brought to county court.	Wants to allow 5 days for a contest to the affidavit
749b	They feel an appeal should not be perfected until a defendant who has had an affidavit of indigence approved posts one months rent into the registry of the JP court	The perfection of an appeal does not prevent the JP from issuing a writ unless the defendant complies with their new proposed rule 750	The would like the JP court to enforce the judgment i.e. issue a writ of possession if the tenant fails to post a supersedeas bond	In the last sentence of the 2nd paragraph, they want to change the word when to if. They also want post judgment interest added to the comment.	
749c	Supports	They want to add location for phone numbers of the sureties	They suggest adding the phone numbers of the sureties.		Wants to add a location for the JP to state why the appeal bond is disapproved so it can be corrected

RULE	JP	TAA	HAA	SAA	Fuchs
750		They want the initial one months rent paid into the registry of the JP court, not the county court. Defendant must pay amount equivalent to the judgment for rent and late fees into the JP registry within 5 days after appeal perfected in order to remain in possession. Defendant who has approved affidavit of indigence does not have to pay rent into court registry if eviction was for a non rent breach. If appeal is perfected and defendant does not pay money into registry of JP court within 5 days, JP can give notice of hearing and issue writ.	They want to know if the suspension of the enforcement of the judgement is based on agreement of the parties and the tenant breaches his part of the agreement of the parties and the tenant breaches his part of the agreement can the landlord still get a writ of possession without going through a full trial at county court? In (d) they want time limits on the debtos performance. They want (h) through (k) in a separate rule.	In (g) they want the tenant to pay rent into the registry of the county court within 5 days of the transcript being filed. In (k) and the comment they want it clear that rent must be paid into the registry of the registry of the court.	Wants to delete the supersedeas bond requirements because once an appeal is perfected the judgment is a nullity and there is nothing to supercede. A defendant would have to pay rent into the registry to remain in possession except an indegent defendant would be exempt from the initial payment if eviction based on rent breach. Wants to give a defendant the right to appeal even if a writ is issued.
751		Deletes it because there will not be a supersedeas bond	They want the phone numbers of the sureties on the bond.	They want the bond to reflect that the judgement includes post judgment interest.	Wants it deleted because there would not be a supersedeas bond
752			They want to add late fees and post judgment interest in paragraph 2.	They want to add late fees and post judgment interest in paragraph 2	
753		They want the time for the defendant to file a written answer to be 8 days not 10			

RULE	JP	TAA	HAA	SAA	Fuchs
753a		They want the time for the defendatnt to file a written answer to be 8 days not 10 days.			
754		They want time after which a trial may be held following the receipt of a transcript at county court to be 8 days not 10 days	They oppose any discovery in eviction appeals to county court. In (d) they want the time period for the case to be able to be set for trial to be 8 days not 10 days.		They want the defendant to have 10 days to request a jury trial after notice of transcript. They do not feel any reference to discovery is necessary since existing rules provide for discovery. Wants to give a defendant 10 days to request a jury trial. Does not believe any reference to discovery is necessary since existing rules provide for discovery.
755		Wants to add writs issued in manufactured housing cases provisions.			

Eviction Rules 738-755 Ver. 7.8 (5/07/02)

SECTION 3. FORCIBLE ENTRY AND DETAINER

RULE 738. JOINDER OF ADDITIONAL CLAIMS

~~A suit for rent, may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.~~

A suit for rent, contractual late charges, and attorney's fees may be joined with an action of forcible entry and detainer. The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, and attorney's fees, due the landlord by the renter. The justice may also award court costs against the unsuccessful party.

Notes and Comments

Source: Art. 3976, unchanged.

Notes and Comments

Comment: Whenever the term forcible entry and detainer is used in this section it is intended that it also include forcible detainer. Back rent, late charges authorized by lease or contract, and attorney's fees may be sought subject to the jurisdictional limit of the justice court.

[Comment for the committee. Late charges should be included in an eviction suit. Judicial economy dictates that a landlord not have to file for back rent in an eviction and then sue for late charges on that back rent in a separate action. Late charges, attorney's fees and rent may be requested if they are within the jurisdictional limit of the court, but costs may be awarded regardless of the amount in controversy because costs are not included within the jurisdictional limit.]

RULE 739. CITATION

When an aggrieved ~~the~~ party ~~aggrieved~~ or ~~his~~ the party's authorized agent shall file ~~his~~ a written sworn complaint, the justice shall immediately issue citation ~~directed to~~ directing the defendant or defendants ~~commanding him~~ to appear for trial before such justice at a time and place named in such citation, such time being not more than ten days nor less

than six days from the date of service of the citation. The justice shall attach to the citation copies of all documents, and records filed with the complaint by the complainant.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3977.

[Comment for the committee. Gender neutral changes]

Rule 740 Version #1 (Jury trial permitted, trials to be held within 6 days or as soon as possible)

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The ~~party aggrieved~~ plaintiff may, at the time of filing his complaint, or thereafter prior to ~~final judgment~~ trial in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant, in the same manner as service of citation in a forcible entry and detainer suit and shall inform the defendant of all of the following rules and procedures, except that the officer or other authorized person serving the notice of possession bond shall return such notice to the justice who issued same within one day after service:

(a) Defendant may remain in possession if;

(1) defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant; or

(2) ~~Defendant~~ defendant, ~~is entitled to~~ within two days of being served with notice of the possession bond, demands ~~and he shall be granted~~ a trial ~~to~~ which will be held, insofar as practicable, prior to the expiration of six days from the date defendant is served with notice of the filing of the plaintiff's possession bond. In order to obtain a jury trial, the defendant must demand the same within this two day period and pay the jury fee. If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to

possession of the property, the ~~constable of sheriff shall place the plaintiff in possession of the property promptly~~ justice court may issue a writ of possession after the expiration of five days after such determination by the justice of the peace. If the defendant requests a trial under this rule it will be the only trial held in this cause and will supercede the trial which would have been held under the original citation for forcible entry and detainer.

(b) If defendant does not file a counterbond ~~and if defendant does not~~ or demand a trial be held, the ~~constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly~~ plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

(c) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as after a traditional forcible entry and detainer trial.

Rule 740 Version #2 (No jury trials, bench trials to be held within 6 days)

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The ~~party aggrieved~~ plaintiff may, at the time of filing his complaint, or thereafter prior to ~~final judgment~~ trial in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant, in the same manner as service of citation in a forcible entry and detainer suit and shall inform the defendant of all of the following rules and procedures, except that the officer or other authorized person serving the notice of possession bond shall return such notice to the justice who issued same within one day after service:

(a) Defendant may remain in possession if;

(1) defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant; or

(2) ~~Defendant~~ defendant ~~is entitled to~~ within two days of being served with notice of the possession bond, demands ~~and he shall be granted~~ a trial ~~to~~ which must be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond. If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the ~~constable or sheriff shall place the plaintiff in possession of the property~~ justice court may issue a writ of possession after the expiration of five days after such determination by the justice of the peace. If the defendant requests a trial under this rule it will be the only trial held in this cause and will supercede the trial which would have been held under the original citation for forcible entry and detainer; Any trial held under this rule must be a trial by judge.

(b) If defendant does not file a counterbond ~~and if defendant does not~~ or demand ~~that~~ a trial be held prior to the expiration of said six-day period, the ~~constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly~~ plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and

(c) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as after a traditional forcible entry and detainer trial.

Notes and Comments

A defendant must be served with a possession bond in the same manner as citation in a forcible entry and detainer suit. The trial held under this rule must be a trial by judge because of the severe time limits imposed. If a trial is requested by the defendant under this rule then it will take the place of the trial referenced in the original citation.-

RULE 741. REQUISITES OF COMPLAINT

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same. The complaint shall be in writing, on paper measuring approximately 81/2 inches by 11 inches, and signed and sworn to by the party, the party's attorney, or the party's authorized agent.

(a) The complaint must state that the premises at issue is located within the precinct where the complaint is filed.

(b) The complaint must state that the justice court where the complaint is filed has jurisdiction over the suit.

(c) If the complaint seeks judgment for rent and contractual late charges then the complaint must state the frequency with which the rent is paid, the day on which it becomes due, and the amount of rent the tenant is obligated to pay on that day. The complaint must also state the total rent and contractual late charges which are owed when the petition is filed.

(d) The complaint must state facts which entitle the complainant to the possession authorized under Chapter 24 of the Texas Property Code..

(1) If the suit for possession is based on non-payment of rent and contractual late charges, then the complainant must attach to the complaint a copy of any relevant sections of a written lease, if any, including the parties to the lease, the term of the lease, the provisions relating to rent, the signatories to the lease, and any other sections relevant to the suit. In addition, the complainant must attach a copy of any relevant written payment records for the period in dispute.

(2) If the suit for possession is based on a breach of a lease other than non payment of rent, then the complainant must attach a copy of any relevant sections of a written lease, if any, including the parties to the lease, the term of the lease, any provisions of the lease alleged to have been breached, the signatories to the lease, and any other sections relevant to the suit.

(3) If the suit for possession is based on the termination of an executory contract, or a foreclosure then the complainant must attach to the complaint a copy of any relevant sections of documents which form the basis for the suit for possession.

(4) If the suit for possession is based on the tenant's holding over after the termination of the tenant's right to possession then the complainant must attach to the complaint copies of the relevant sections of any written documents which form the basis for the suit for possession.

(5) If the suit for possession is based on grounds other than 1-4 above then the complainant must attach copies of the relevant sections of any written documents which form the basis for the suit for possession.

(e) The complainant must also provide enough additional copies of documents required by this rule to enable the court to attach those copies to each citation. If the complaint fails to attach any information required by this rule then the trial may be postponed on motion of any party or on the court's own motion, in accordance with Rule 745. Failure by the complainant to attach any information required by this rule is not grounds for the dismissal of the suit.

(f) The grounds under which the complainant is entitled to possession and other damages authorized by Rule 738 is limited by the facts stated in the complaint. The complaint may be amended by the complainant at any time prior to trial. If the complaint is amended the defendant may request a continuance in accordance with Rule 745.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

This rule sets forth more formal pleading requirements and limits the complainants grounds for the recovery of a judgment to those facts stated in the complaint. While the complaint may be amended, it would allow the defendant to request a continuance to prepare an additional defense. The complainant is also required to attach copies of any documents relevant to the suit to the complaint, which the court would then be required to attach to the citation. The failure of the complainant to attach relevant documents would be grounds to request a continuance but would not be grounds for the dismissal of the suit. If the documents were relevant, and were not voluntarily provided by the complainant, then the defendant could make a request for discovery under Rule 743.

Source: Art. 3979, unchanged.
Change by amendment effective April 1, 1984; Corrective.

[Comment for the committee. This prevents having to amend the rules if the Property Code is renumbered.]

RULE 742. SERVICE OF CITATION

(a) Person Authorized to Serve Citation in Forcible Entry and Detainer Actions. Persons authorized to serve citation in Forcible Entry and Detainer actions include (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or written order of the court who is not less than 18 years of age. No person who is a party to, or interested in the outcome of a suit shall serve any process.

(b) Method of Service of Citation
The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at ~~his usual place of abode~~ the premises at issue, at least six days before the ~~return~~ trial day ~~thereof~~ ~~for~~ as shown on the citation. ~~and on or before the day assigned for trial~~ The person serving the citation ~~he~~ shall return ~~such~~ the citation, noting the action taken thereon, ~~with his action written thereon~~, to the justice who issued the ~~same~~ citation at least one day before the ~~appearance~~ trial day named in the citation.

(Amended Aug. 18, 1947, eff. Dec 31, 1947.)

Notes and Comments

Source: Art 3980, with minor textual change.

[Comment for the committee. This will conform service of citation in evictions to service for all other civil suits in Texas. The requirement that the citation be returned at least

one day prior to trial will prevent the citation being returned after the time set for trial although on the same day.]

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists ~~all home an work addresses~~ the address of the premises at issue as well as any other alternate addresses of the defendant or defendants as contained in a written lease agreement, ~~of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located~~, and if service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the premises ~~in question~~ at issue as follows:

If the officer or other person authorized to serve citation in forcible entry and detainer actions ~~receiving such citation~~ is unsuccessful in serving ~~such~~ citation under Rule 742, the officer or other authorized person shall no later than five days after receiving such citation execute a sworn statement based on personal knowledge, confirming that ~~the officer has made~~ diligent efforts have been made to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed ~~by the officer~~ with the justice ~~who shall promptly consider the sworn statement of the officer~~. After promptly considering the sworn statement ~~of the officer~~ the justice may then authorize service by written order ~~according to the following~~ as follows:

(a) The officer or other authorized person shall place the citation inside the premises ~~by placing it~~ through a door mail chute or by slipping it under the ~~front door~~ main entry door to the premises; and if neither method is possible or practical, ~~the officer shall~~ to securely affix the citation to the ~~front door or~~ main entry door to the premises; and

(b) The officer or other authorized person shall that same day ~~or the next day~~ deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail; and

(c) The officer or other authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above. The return of the citation by an authorized person shall be verified; and

(d) Such delivery and mailing to the premises shall occur at least six days before the ~~return~~ trial day as shown on ~~of~~ the citation; and ~~on or before~~ at least one day before the ~~appearance~~ trial day named in the citation ~~assigned for trial~~. the officer or other authorized person accomplishing service ~~he~~ shall return such citation noting ~~with his~~ the action taken ~~written~~ thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or ~~his~~ the party's authorized agent to make a request for or motion for alternative service pursuant to this rule.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform service of citation under 742a with service under Rule 742. It will also relieve the landlord of the requirement of putting down all possible addresses of the defendant for the process server to attempt service at before a request for service under Rule 742a can be made. The best address in which to serve a defendant for an eviction is generally at the premises in question. It will also require the process server to get the citation back to the court at least one day prior to trial. If the trial is set for 9am and the process server doesn't get the citation back until 3pm then it doesn't do much good as the trial will have been rescheduled even though the process server will have technically complied with the law. This change will also require that the server file a verified return of citation. Another change is that the server mails the citation on the same day it is attached to or slipped through the door. This solves the problem of how you calculate the earliest trial date under sub-section (d) [i.e. do you calculate from the date of delivery or the date of mailing?] and it gets the mailed citation to the defendant quicker by 1 day.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. If the plaintiff shall fail to appear when the case is called for trial, the case may be dismissed for want of prosecution. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

Generally, discovery is not appropriate in forcible entry and detainer actions, however, the justice has the discretion to allow reasonable discovery.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947.)

Notes and Comments

Source: Art. 3981, unchanged.

[Comment for the committee: Some provision must be made for discovery although applying the entire discovery rules for forcible entry and detainer cases is not reasonable. This language is similar to the language in Chapter 28 of the Government

Code providing for reasonable discovery in small claims court, therefore the justice courts will be familiar with this terminology.]

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying ~~a~~ the jury fee ~~of five dollars~~ required by law for requesting a jury trial in justice court. Upon such request, a jury shall be summoned at the earliest opportunity, as in other ~~cases in~~ justice court proceedings. This rule will not apply to trials conducted under Rule 740.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3982, unchanged.

[Comment for the committee. See comment at the end regarding Rule 4]

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding ~~six~~ seven days. Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the court's own motion, the trial may be postponed for an additional seven day period. The trial may be postponed for a longer period upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in open court.

Notes and Comments

Source: Art 3983, unchanged.

[Comment for the committee. Many JP courts hold evictions only one day a week and it is generally on the same day each week, therefore being able to continue a case for only 6 days is often inconvenient for the court. There are some cases where both parties would like a longer continuance in order to further prepare or for settlement discussions.

RULE 746. ONLY ISSUE

~~In a case of forcible entry or of forcible detainer under Sections 24.001-24008, Texas Property Code, the only issue shall be as to the right to actual possession and the merits of the title shall not be adjudicated.~~

Except as provided in rule 738, the only issue in a forcible entry and detainer action under Chapter 24 of the Texas Property Code is the right to actual possession and the merits of the title shall not be adjudicated.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

The issue to be determined in a forcible entry and detainer is the right to actual possession, and the merits of title are not to be adjudicated. Thus, whenever conflicting claims of title must be adjudicated in order to determine which party has the right of possession, the justice court will not have jurisdiction. Although the tenant may assert a question of title, if a genuine question of title is not raised, then the justice court would have jurisdiction. Merely questioning the merits of title without evidence of a genuine dispute will not cause the justice court to lose jurisdiction. The justice court may inquire into the merits of title in order to determine whether or not the court has jurisdiction, and may even accept into evidence proof of title, not for the purposes of determining title, but in order to establish the existence of a landlord-tenant relationship and to resolve the question of actual possession.

Source: Art. 3984, with minor textual change.

Change by amendment effective April 1, 1984: Corrective.

[Comment for the committee. This is a housekeeping change so we will not have to amend the rules if the property code is renumbered. Also by eliminating the word only perhaps we clear up some confusion about what can be tried in an eviction action. Rule 746 now seems to be in conflict with rules 738 and 748. Striking only makes it more consistent.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be impaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find.

(Amended June 16, 1943, eff. Dec. 31, 1943; June 10, 1980, eff. Jan 1, 1981.)

Notes and Comments

Source: Art. 3985.

Change by amendment effective January 1, 1981: The last sentence of the former rule is deleted because it is the same provision as the second sentence of Rule 743.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. ~~in justice court~~ In any forcible entry and detainer suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform Rule 747a to Section 24.011 Texas Property Code.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if sought and established by proof, and provided that such claims are within the jurisdiction of the court . ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice ~~shall~~ must issue a writ of possession except that no ~~No~~ writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount.
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:

(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

(d) If the judgment of the justice court is not appealed then it remains in force and a prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b, and the county courts jurisdiction is invoked then the justice court may not enforce the judgment. The judgment of the justice court will be vacated upon final judgment in the case by the county court.

(e) The county court may rely on the justice court judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the judgment of the justice court in determining whether or not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination, either on its own motion or on sworn motion of either party, as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Notes and Comments

The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled and although a defendant may not file a counterclaim, any available defenses may be raised at trial. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. ~~This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has~~

~~entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).~~ This is necessary where there is no obligation to pay rent, such as after a foreclosure or the termination of an executory contract.

Once an appeal is perfected to the county court in accordance with Rule 749b, the county court's jurisdiction is invoked. Should the county court dismiss the appeal for want of jurisdiction, that ruling is reviewable by the court of appeals. If no timely appeal is taken of a county court dismissal for want of jurisdiction, then the justice court judgment will be the prevailing judgment.

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.
Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Comment for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action, the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed. Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him. Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the~~

~~court to which the cause has been appealed without first showing substantial compliance with this rule.~~
~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A party may appeal from a final judgment in a forcible entry and detainer to the county court of the county in which the judgment is signed.

(c) A defendant may appeal by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice in an amount equal to the court costs incurred in justice court.

(d) A plaintiff may appeal by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(e) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The justice court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(f) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,
(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(g) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any

federally insured and federally or state chartered bank or savings and loan association.

(h) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(i) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond and may be used to suspend the enforcement of the judgment, including the writ of possession. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

~~RULE 749a. PAUPER'S AFFIDAVIT~~

~~If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice~~

thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.
A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.

(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)

This is a new rule. It substantially tracks Rule 572.

Notes and Comments

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal to the county court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government- entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party;

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the justice court judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the

date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and ,on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing. The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:
(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:
(2) any other costs sustained in the justice court; and
(3) a filing fee paid to appeal the case to the county court.

(Note to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary to make the rule fit these cases. It is important to note that the approval of an affidavit of indigence ~~only~~ allows the case to be appealed ~~but does not~~ and ~~suspend~~ suspends the enforcement of the judgment. ~~, except for the writ of possession~~. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~Notes and Comments~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the plaintiff shall be perfected. When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment. Enforcement of the judgment, may proceed in the county court unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond, when required, will allow the appellee to seek a writ of possession, and the issue of possession may not be further litigated in the forcible entry and detainer action in the county court.

No factual determination in a forcible entry and detainer action, including determination of the right to possession, will be given preclusive effect in other actions that may be brought between the parties.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed without appealing the issue of possession. However, if the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession. No factual determination in a forcible entry and detainer action, including a determination of the right to possession, will be given any preclusive effect in other actions that may be brought between the parties. Thus, a tenant dispossessed under a writ of possession is not precluded under res judicata or collateral estoppel principles from bringing a wrongful eviction action.

If a defendant perfects the appeal to the county court by the approval of an affidavit of indigence, it is not necessary for the defendant to post a supersedeas bond, deposit , or security to remain in possession, and to suspend the enforcement of the judgment.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)

Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~**RULE 749c. APPEAL PERFECTED**~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~RULE 750.~~ RULE 749c FORM OF APPEAL BOND

The appeal bond authorized in the preceding ~~article~~ rule may be substantially as follows:

_____ , Plaintiff

vs.

_____ , Defendant

"The State of Texas,

"County of _____

Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in favor of the said A.B. on the _____day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and_____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ ~~appellee~~ county clerk of _____ County, Texas, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____
Signature of Appellant

_____
Signature of Surety

_____
Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.
Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

Rule 750 SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) In a forcible entry and detainer case an appellant who has perfected an appeal under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ; or
(2) filing with the justice court a good and sufficient supersedeas bond; or
(3) making a deposit with the justice court in lieu of a supersedeas bond; or
(4) providing alternate security as ordered by the justice court.

(b) Supersedeas Bonds

(1) must be in an amount required by this rule;
(2) must be made payable to the ~~county clerk~~ judgment creditor of the county in which the case was heard;
(3) must be signed by the appellant or the appellant's agent;
(4) must be signed by a sufficient surety or sureties as approved by the justice court.
(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(c) Deposit in lieu of supersedeas bond.

Instead of filing a surety supersedeas bond, a party may deposit with the justice court;

(1) cash;
(2) a cashier's check payable to the ~~county clerk~~ judgment creditor, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(d) Conditions of Liability

The surety or sureties on a bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;

(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or

(2) the debtor does not perform an adverse judgment final on appeal.

(e) Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the county court will promptly issue a writ of supersedeas.

(f) Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;

(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;

(2) the amount of attorney's fees awarded for the appellee;

(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or

(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.

(5) Lesser amount The justice court may order a lesser amount than required by subsections 1-4 above if the justice court finds that;

(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and

(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(g) Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.

(1) During the pendency of the appeal ~~the~~ an appellant who is a tenant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. Upon sworn motion filed in county court, either party may contest the findings set forth in the justice court judgment as to rent or fair market rental value. The court may hold a hearing on the motion. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of

the county court as they become due, the court ~~may~~ must issue a writ of possession.

(2) During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:
(A) did not cause the agency to cease making the payments: and
(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(3) The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;
(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;
(B) dismissal of the appeal, or
(C) order of the court upon final hearing.

(4) All hearings and motions under this rule shall be entitled to precedence in the county court.

(h) When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.

(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to enforce or suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.

(j) If the appeal is perfected and the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time. The duty of the defendant to pay rent into the registry of the county court as it becomes due exists even if the appeal is perfected by the approval of an affidavit of indigence.

(k) If the appeal is perfected by the approval of an affidavit of indigence, the defendant need not post a supersedeas bond, deposit, or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment.

Notes and Comments

If the defendant who perfects an appeal from an adverse judgment does not pay rent into the registry of the county court as it becomes due, the appellee may request a writ of possession from the county court where the case is pending at any time. A defendant who perfects an appeal by the approval of an affidavit of indigence may remain in possession and suspend the enforcement of the judgment without posting a supersedeas bond, deposit or security. A defendant who perfects an appeal by approval of an affidavit of indigence must still pay rent into the registry of the county court as it becomes due in order to be allowed to remain in possession.

(Note to committee: This sets up the second part of an appeal, which is suspending the enforcement of the judgment by posting a supersedeas bond. There is no provision to avoid the posting of a supersedeas bond by filing an affidavit of indigence. This provision is very similar to the TRAP rules modified somewhat for these cases.)

~~**RULE 751. TRANSCRIPT**~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

Rule 751 Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

"The State of Texas"
"County of _____"
"Cause No. _____"

WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of _____ (plaintiff/defendant), hereinafter referred to as appellee against _____ (plaintiff/defendant), hereinafter referred to as appellant for;

____ Possession,
____ Court costs of $ _____,
____ Back rent and contractual late charges of $ _____,
____ Attorney's fees of $ _____,

together with interest thereon from the date of the judgment, at the rate of ____ percent per annum, from which judgment appellant has appealed to the county court of _____ County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE _____ (appellant), as principal, and _____ as surety at _____ (address of surety), and _____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ (appellee), the sum of $ _____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

"Given under our hands this ____ day of _____, _____."

Signature of Appellant

_____

Signature of Surety

_____

Signature of Surety

Notes and Comments

This is a new rule which provides a suggested form for the supersedeas bond provided by rule 750.

(Note to committee: This is a new supersedeas bond form. Most of the content of old rule 751 is now in rule 749c.)

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Chapter 24 ~~Section 24.006~~ of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. ~~That prevailing party shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.~~

Notes and Comments

Source: Art. 3990, unchanged; except that by amendment effective December 31, 1943, the rule is made to extend, in a proper case, to appellant as well as to appellee; and other relevant changes have been made.

Changes by amendment effective January 1, 1976: Costs and damages are stated by this rule rather than by various enumeration's in other rules.

~~RULE 753. JUDGMENT BY DEFAULT~~

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The county clerk shall immediately notify all parties to the justice court judgment of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

RULE 753a. JUDGMENT BY DEFAULT

~~Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court.~~ If the defendant has filed a written answer in the justice court, the same shall be taken to constitute ~~his~~ the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and ~~if he~~ fails to file a written answer within ten ~~eight~~ full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 754. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial

on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. The case shall be docketed in the county court in the name of the plaintiff in the justice court as plaintiff, and in the name of the defendant in the justice court as defendant. Regardless of which party appealed from the judgment in the justice court, only the plaintiff in the county court may take a non-suit. If the county court's jurisdiction is invoked, then it must dispose of all parties and issues before the court, including the issue of possession.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the supersedeas bond, the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant five days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond.

Notes and Comments

This rule provides guidance to the county court in procedures to use in the trial of the case. When the county court invokes jurisdiction of a case it must dispose of all issues and parties before the court. If the case is dismissed, once the county court has invoked jurisdiction, then the dismissal should address the issue of possession

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

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RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 740, 744, 748, 749, 749a, ~~749b~~, ~~and~~ ~~749c~~ 750 and 754.

(Note to committee: This needs to be changed because under the current rules 5 days may be longer than 6 days.
Example: A defendant is served with citation for an eviction on a Wednesday so under Rule 739 the trial can be held as early as the following Tuesday. However, under rule 744 the defendant can request a jury trial within 5 days of service, and under rule 4 you cannot count holidays, Saturdays or Sundays in that 5 day calculation. If the tenant was served on Wednesday you would count Thursday and Friday as day 1 and 2, exclude Saturday and Sunday and then count Monday as day 3, Tuesday as day 4 and Wednesday as day 5. Therefore a defendant could come in on Wednesday to timely request a jury trial under rule 744 one day after the trial could have been set under rule 739. If service occurred the Wednesday before thanksgiving then day five would be Friday of the following week or 3 days after the trial. Adding rule 744 to rule 4 would seem to solve this problem. Other changes to the rules necessitate deleting rules 749b and 749c, and adding rules 750 and 754.)

Rule 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost on appeal from a judgment of a justice of the peace or small claims court, within twenty (20) days after being notified to do so by the county clerk, the appeal shall be deemed not perfected and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted. Payment of costs on appeal from a forcible entry and detainer action are governed by Rules 749, 749b, and 749c.

(Added July 22, 1975, eff. Jan. 1, 1976.)

RULE 190 DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Except in forcible entry and detainer cases, every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

RULE 216 REQUEST & FEE FOR JURY TRIAL

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

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

c. This Rule does not apply in forcible entry and detainer cases.

Notes and Comments

Comment to 2001 change: Rule 744 governs request & fee for jury trials in forcible entry and detainer cases in justice court, and Rule 754 governs request & fee for jury trials in forcible entry and detainer appeals in county court.

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including forcible entry and detainer cases, nor will it apply to the de novo trial of appeals of forcible entry and detainer cases in county court.

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

(Amended July 22, 1975, eff. Jan. 1, 1975; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

April 24, 2002

Texas Apartment Association
Concerns with the Proposed Eviction Rules

This is a list of the Texas Apartment Association's main concerns regarding the February draft of the proposed changes by the Supreme Court Advisory Committee Subcommittee to the eviction rules:

1. DELAY CAUSED BY AN AFFIDAVIT OF INDIGENCE. The proposed rules do not solve a serious problem facing property owners when tenants delay eviction for three or four weeks by merely appealing non-indigent finding of a Justice of the Peace, forcing property owners to hire an attorney to represent the property owner in county court in appeals based on bad faith affidavits of indigence. Under current rules, when an affidavit of indigence is filed, the owner's best course of action in most cases is to not object and to let the case be appealed to the county court based on the affidavit of indigence. (This process takes two-to-four weeks if all works well.) Contesting the affidavit of indigence ruling will usually cause further delay. The Committee proposal still leaves the door wide open for this kind of abuse by residents in cases where the owner seeks judgment for eviction and for back rent. (See second-to-last paragraph in proposed Rule 749c.)

2. SETTING TRIAL DATES. In proposed Rule 739 regarding citation, the Justice of the Peace does not have the choice to either: (1) set a trial date on the sixth to tenth day or (2) set an answer date on the sixth day, with an obligation to set for trial as soon as possible after the sixth day if the tenant answers. (The rules need to allow Justices of the Peace to set an answer date to save property owners the unnecessary expense of hiring an attorney when one may not be required. Setting an answer date rather than a trial date allows owners to obtain a default judgment in nearly all cases without having to extensively prepare for a potential trial or hire an attorney.)

3. MOTION FOR NEW TRIAL. In proposed Rule 749, motions for a new trial should not be allowed at all; or if they are to be allowed, more stringent restrictions should be imposed.

4. UNNECESSARY DELAYS. In proposed Rule 745, an additional seven day delay for "exceptional circumstances" (in addition to the seven day delay available by affidavit of one of the parties), should not be allowed.

5. DISCOVERY. In proposed Rule 743, discovery should not be allowed at all unless: (1) the request is filed before the trial date, (2) no hearing is necessary on the discovery motion; (3) the discovery motion is automatically overruled at beginning of the trial, if the judge has not granted discovery; and (4) the judge has total discretion to grant and limit discovery. In any case, if discovery is allowed, it must be reasonable.

6. DELAY IN WAITING PERIOD. In proposed Rule 753 the mandatory trial waiting period (or tenant answer date) in county court should not be expanded from eight days to ten days.

7. DEFAULT JUDGMENTS. Proposed Rule 747a should be clarified to indicate that non-lawyers can get a default judgment, regardless of the kind of eviction case.

8. TENDERING RENTS. Proposed Rule 750, should require one month's rent to be tendered to the Justice of the Peace court and not county court.

9. STANDARD TERMINOLOGY. All the rules need to follow statutory terminology and use the term "eviction" rather than the archaic term "forcible entry and detainer."

10. SIMPLE LANGUAGE. All the rules need to be much more simply worded. The proposed rules are too complicated for ordinary lay persons to understand.

TEXAS APARTMENT ASSOCIATION
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April 26, 2002

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

Dear Justice Hecht:

On behalf of the Texas Apartment Association, I am writing to express our concerns regarding the proposed revisions to the eviction rules that are currently being considered by the Supreme Court Rules Advisory Committee. It is our belief that if the proposed revisions we have seen are adopted, the eviction process in Texas would be more expensive, drawn-out and result in more cases being appealed to County Courts at Law. The most recent draft we have reviewed was written in February.

With more than 110,000 eviction cases in Texas each year, it appears that the current rules generally work well and there is not a pressing need for a radical overhaul of the system. With a few exceptions, both property owners and residents have the opportunity to have their case heard in the courts, and the process works swiftly without impinging on due process.

The overwhelming majority of eviction cases are clear-cut instances in which a resident has failed to pay rent in a timely manner. To regain possession of the rental unit, it is often necessary for the property owner to seek eviction, which in most cases is not disputed by the resident and, in 95 percent of the cases, results in a default judgment. From the property owner's perspective, every day that it takes to finally resolve an eviction suit is a day of lost rent that cannot be recovered. It is imperative to regain possession as quickly as possible to minimize lost rental income and the likelihood of damage to the premises. In addition, it is important that property owners and residents be able to represent themselves if they choose to, particularly in non-payment of rent cases.

If the Rules Advisory Task Force identifies a need to change any of the eviction rules, we would hope that all interested parties would have the opportunity to fully participate in the discussions and drafting involved in the revision process. While this is not the process regularly employed by the Rules Advisory Committee, it is my understanding that there is currently only one Justice of the Peace on the Committee, and there are no other members who regularly work on eviction cases or who have an intimate knowledge of these rules. Judge Tom Lawrence is highly respected and we hold him in high regard. However, while he has had conversations with our legal counsel and others who have a concern about these rules, that is not the same as participating in a meeting and openly discussing the merits of proposed changes and the potential real world impact of these changes on the court system as well as rental housing owners, operators and residents.

We trust that any effort to rewrite these rules would keep in mind that, whenever possible, they should be written in layperson terminology and easy-to-understand language that recognizes the fact that many

Justices of the Peace in our state are not attorneys, and that the vast majority of participants in eviction cases represent themselves without legal counsel.

Enclosed is a list of the main concerns we have with the February draft of the rules. In summary, we believe many of the proposals would significantly lengthen and add to the cost of the eviction process. Proposals changing the way trials are set, allowing motions for new trials and discovery, and granting additional delays for "exceptional circumstances" or in the mandatory trial waiting period, are among our key concerns. More detailed information is provided on the attached summary.

We have had discussions with representatives of the Justices of the Peace & Constables Association and tenant advocacy groups. They share some of the concerns that we have and also appear to have other concerns. In a reasonable period of time, I feel like the three groups could agree upon a proposed set of rules that would balance the interests of all of these stakeholders.

We would welcome the opportunity to discuss our concerns with the Rules Advisory Committee or selected members of the Committee. We respectfully request that no action be taken on the proposed rules until the impacted parties have an opportunity to meet and attempt to develop a unified position on the eviction rules.

Thank you for your consideration and your work for the citizens of Texas.

Sincerely,

George A. Allen, CAE
Executive Vice President

CC: Charles 'Chip' Babcock, Chairman, Supreme Court Rules Advisory Committee
The Honorable Tom Lawrence
Chris Griesel

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May 14, 2002

Judge Tom Lawrence
121 West Main
Humble, Texas 77338

via regular mail and
email: tom_lawrence@jp.co.harris.tx.us

Re: Proposed eviction rules

Dear Judge Lawrence:

As attorney for the Texas Apartment Association, I am enclosing a May 13th draft of what TAA supports as changes to the rules in the Texas Rules of Civil Procedure that affect evictions. It contains the same numbering system and most of the substantive changes in the most current draft by the subcommittee of the Supreme Court Advisory Committee. In the indented commentary in the TAA draft, it notes after each rule (1) how the TAA proposal differs from the existing rules and (2) how it differs from the May 7th SCAC subcommittee draft. Wherever the TAA draft substantively differs from the SCAC draft, I have explained our reasons why.

Also enclosed is a computer-generated comparison of the TAA May13th draft to the SCAC subcommittee's May 7th draft of the rules.

TAA believes that it is possible to preserve speedy resolution of eviction cases while still retaining fairness and practicality for all concerned. We believe the enclosed rules are much improved over the existing rules, thanks to the ideas from the subcommittee of the Supreme Court Advisory Committee, as well ideas we have incorporated after having discussed the rules extensively in recent months and years with Judge Sandy Prindle (president of the JP and Constables Association) and Fred Fuchs (attorney for the Travis County Legal Aid Society).

I will be in attendance at the May 17th, 9:00 a.m. meeting of the Supreme Court Advisory Committee at the State Bar Building in Austin in order to answer any questions you may have about the TAA draft or any of the other suggestions or objections submitted to the Committee by other groups affected by the eviction rules. Thank you for all the time and effort your Committee has and will be putting into an improved version of the eviction rules.

Sincerely yours,

NIEMANN & NIEMANN, LLP

By /s/ Larry Niemann
Larry Niemann

Enc: (1) May 13th TAA draft of eviction rules and
(2) comparison TAA May 13th draft and SCAC Subcommittee May 7th draft

xc: via mail and email

Mr. Chris Griesel, Rules Attorney
Texas Supreme Court
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FileServer:CLIENTS:TAA:Eviction:lawrenceltrmay13.doc

TAA

May 13, 2002 DRAFT by Texas Apartment Association

NOTE: This draft incorporates most of the suggested changes in the preliminary draft of the subcommittee of the Supreme Court Advisory Committee (SCAC). It also contains other changes needed from the standpoint of landlords, tenants, and justices of the peace in the opinion of the Texas Apartment Association (TAA). The bulleted comments discuss the difference between this TAA proposed draft and (1) the current rules and (2) the May 7th draft by the SCAC subcommittee.

The rule numbering follows the numbering system suggested in the Supreme Court Advisory Committee subcommittee May 7th draft. Except where substantive changes have been made, the substance of the text generally follows the proposed May 7th draft by the subcommittee of the Supreme Court Advisory Committee.

Since laypersons have to read and understand these rules, the wording and writing style of the existing rules areas hopefully more user friendly. We have tried to use the Brian Garner (Law Prose) style of simplified legal drafting as much as possible (although it could be better).

A shamrock symbol at the beginning of a commentary on the SCAC May 7th draft pinpoints the difference between the May 13th TAA draft and the May 7th SCAC subcommittee draft.

(PROPOSED) RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays should not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 739, 742, 742a, 744, 748, 749, 749a, 750 and 754.

- **Adds**: *TAA draft adds clarification that Saturdays, Sundays and legal holidays are counted in the following rules to avoid the current problem of 5 days actually being longer than 6 days: Rule 739 (service of citation in bond for possession cases); Rule 742 (service of citation in bond for possession cases); and Rule 742a (alternative service).*

  - *SCAC draft does not include Rules 739 and therefore Saturdays, Sundays etc would be included in calculating a 5-day setting in a bond for possession case.*
  - *SCAC draft could result in a delay in the trial setting in alternative service cases since Rule 742a is not included in the SCAC list.*

♣ *SCAC draft also references Rule 740 (possession bond) as an exception to the "Saturday and Sunday don't count rule." TAA draft does not because TAA draft does not include include a counterbond provision.*

(PROPOSED) SECTION 3. EVICTION

How TAA draft differs from current rules:

- ***Changes*** *"forcible detainer" and "forcible entry and detainer" to "eviction" terminology throughout the rules in order to parallel statute terminology. The change to "eviction" terminology should also apply to SCAC draft of revisions to Rule 4 (computation of time); Rule 143 (cost on appeal to county court); Rule 190.1 (discovery limitations); Rule 216 (request and fee for jury trial); and Rule 245 (assignment of cases for trial). It is more important to not confuse the laypersons is than to follow old terminology for case law precendent purposes. TAA believes that the lawyers and courts are capable of correctly handling the old terminology in the old case law. The more recent case law will probably be using "eviction" terminology. The lawyers and judges had no problems with the case law when the rules and the statutes changed from the old "writ of restitution" to "writ of possession".*

♣ *SCAC draft does not use "eviction" terminology. It uses "forcible entry and detainer" instead. Ironically, 98% of eviction cases are "forcible detainer" cases and not "forcible entry and detainer" cases.*

(PROPOSED) RULE 738. JOINDER OF ADDITIONAL CLAIMS

A claim for rent, contractual late charges and attorney's fees may be joined with an eviction suit. If there is no oral or written rental agreement, a claim for rental value may be joined. The court may render judgment in favor of plaintiff for eviction and for rent or rental value and any attorney's fees owed by the defendant to the plaintiff. The total judgment awarded for rent or rental value shall not exceed the jurisdiction of the justice court. The justice may also award court costs against the unsuccessful party.

How TAA draft differs from current rules:

- ***Adds*** *attorneys fees (which are currently statutorily authorized under TCPRC Section 38.001) (Current rule is silent.)*

  SCAC draft includes attorney's fees.
- ***Adds*** *recovery of "rental value" when evicting (1) occupants after tenants are gone or (2) trespassers. (Current rule is silent on whether the term "rent" is broad enough to include rental value if there is no lease.)*

  SCAC draft allows "rental value" in Rule 748.

- ***Adds*** *contractual late charges. (Current rule does not allow.)*

  SCAC draft allows inclusion of contractual late charges.
- ***Adds*** *recovery of court costs against unsuccessful party. (Current rule is silent.)*

  SCAC draft allows recovery of court costs against unsuccessful party.
- ***Clarifies*** *that the total judgment of rent (but not attorneys fees or other amounts) must be within court's jurisdictional dollar amount. (Current rule is unclear.)*

  SCAC addresses this in Rule 748 and states that rent plus late charges plus attorneys fees must be within the jurisdictional amounts.
- ***Clarifies*** *that court costs are not to be included for purposes of jurisdictional amount. (Current rule is silent.)*

  ♣ *SCAC draft doesn't expressly address.*

(PROPOSED) RULE 739. CITATION

(a) When a plaintiff or the plaintiff's authorized agent files a written sworn complaint for eviction, the justice shall immediately issue citation directing the defendant to appear for trial before the justice at a time, date and place named in the citation, on a date not less than six nor more than ten days from the date of service of the citation.

If a bond for possession under Rule 740 is filed with the sworn complaint, the citation must designate a trial date on the fifth, sixth, or seventh day after both citation and notice of possession bond are served on the defendant. The citation and the notice of possession bond must be served concurrently.

(b) The citation shall inform the defendant that the case shall be heard by a jury only if a request for jury and payment of a jury fee is made one day before the trial date as designated in the citation.

How TAA draft differs from current rules:

- ***Adds:*** *If a bond for possession is filed, the JP must designate the date of the trial in the citation, which must be on the fifth, sixth, or seventh day after service. (Under current rule, JP can set trial before, on, or after 6th day if early trial is requested by the defendant.)*

  ♣ *SCAC draft doesn't expressly address required date of early trial. The current rule and SCAC proposal do not require the JP to set an early trial when tenant requests early trial.*
- ***Adds:*** *Notice of possession bond must be served concurrently with the citation. (Current rules are silent.)*

  ♣ *SCAC draft doesn't require concurrent service of citation and bond notice.*

- ***Deletes:*** *Any mention of return of the citation since that subject is more appropriately addressed in and has been relocated to proposed Rule 742 regarding "Service of Citation."*

  ♣ *SCAC draft addresses return date in Rule 739. but TAA draft does so in Rule 742.*

(PROPOSED) RULE 740. POSSESSION BOND

(a) The plaintiff may, at the time of filing an eviction suit, file a possession bond to be approved by the justice in such amount as the justice may fix as the probable costs of suit and damages which defendant may incur if the suit has been improperly instituted. The bond shall be conditioned that the plaintiff will pay the defendant all costs and damages as shall be adjudged against plaintiff.

(b) The justice court shall notify the defendant that the plaintiff has filed a possession bond. The notice shall be served on the defendant concurrently with and in the same manner as service of citation in an eviction suit and shall inform the defendant of the procedures in (c) and (d) below. The officer or other authorized person serving notice of the possession bond shall return the notice to the justice who issued the notice at least one day before the trial date designated in the citation.

(c) A trial held under this rule must be a trial by the justice. If the defendant does not appear for trial as directed in the citation, the justice may, on request of the plaintiff, promptly enter a default judgment and issue a writ of possession immediately. If the defendant appears for trial as directed in the citation, the case shall be tried in the same manner as other eviction suits; and any writ of possession may be issued and executed only according to Rule 748.

(d) Whenever a justice court issues a writ of possession under this rule, the defendant may appeal in the same manner as a defendant may appeal an eviction judgment when a possession bond has not been filed.

How TAA draft differs from current rules:

- ***Adds:*** *In bond for possession cases, trial must be designated in the citation to be held on 5th, 6th, or 7th day after citation is served. (See Rule 739.) This window requirement is needed to prevent and stop the abuse by some JPs who purposely drag their feet in setting trial date in bond cases. (Current rule doesn't set a required time window for the "early trial.")*

  ♣ *SCAC draft doesn't set a required time window for the "early trial".*

- ***Supports*** *SCAC Alternative No. 2 of a judge-trial only in bond for possession cases. The reason is that a request for a jury can delay a trial for one to four weeks because of the unavailability of jury panels. In bond for possession cases, the sworn complaint is nearly always based on allegations of serious criminal activity (death threats, rape, molestation, murder, arson attempts, assaults, etc.) drug dealing, ongoing property damage, intolerable noise bothering other tenants, etc. Having a trial delayed because of a jury demand defeats the purpose of an extra speedy*

eviction in those kinds of cases, especially if the jury request is made only for purpose of delay and extracting more free rent. If the tenant is the loser in a bench trial, the tenant can still suspend the writ of possession by the appeal process and have a jury trial in county court.

♣ *SCAC first alternative draft allows jury trial in bond for possession cases, but SCAC second alternative allows trial by judge only in bond cases.*

- ***Removes** counterbond option for defendant. (Under current rule, defendant has option of counterbond or asking for early trial. Counterbond option is meaningless because a tenant can avoid immediate issuance of the writ by simply asking for early trial under current rules.)*

  ♣ *SCAC draft retains option of counterbond (which is seldom, if ever, used since a mere request for early jury trial will defeat immediate issuance of a writ of possession.*

- ***Removes** ability of defendant to avoid immediate writ by simply asking for early trial. (Under current rule, merely asking for early trial avoids early writ issuance.) The current rule states: "If, in lieu of a counterbond, **defendant demands trial within said six-day period**, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace." [A default judgment hearing would be considered a "trial" under the current rule.]*

  ♣ *SCAC draft retains option for early trial request (which defeats early issuance of writ).*

- ***Adds**: Under proposed rule, immediate issuance of a writ is defeated only if defendant **actually attends early trial**. Under current rule, defendant can defeat immediate writ by **merely asking** for early trial since it doesn't require tenant to attend the requested early trial. Current rule says: "If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace."*

  ♣ *SCAC draft retains tenant option to avoid early writ by posting counterbond or simply asking for early trial but does not require tenant to attend trial in order to avoid early writ.*

(PROPOSED) RULE 741. REQUISITES OF COMPLAINT

The sworn complaint shall describe the premises, the possession of which is claimed, with sufficient certainty. It shall also state the facts that entitle the plaintiff to possession and authorize the suit under Chapter 24 of the Texas Property Code.

How TAA draft differs from current rules:

- *No substantive change from current rules.*

  ♣ *SCAC imposes numerous technical requirements for the sworn complaint, such as specific paper size, requirement to attach "relevant" back up documentation. TAA strongly opposes this increase in complexity. This will create real pitfalls for lay persons trying to represent themselves or their owners since they could lose the case by failing to attach one single, required piece of paper to the petition. Court clerks would be inundated with volumes more paper than they currently deal with.*

(PROPOSED) RULE 742. SERVICE OF CITATION

(a) Persons Authorized to Serve Citation in Eviction Suits.
Persons authorized to serve citation in eviction suits include (1) any sheriff or constable [or other person authorized by law, or (2) any person authorized by law or written order of the court who is not less than 18 years of age]. No person who is a party to or interested in the outcome of a suit may serve any process.

(b) Method of Service of Citation.
Except as provided in Rule 742a, the officer [or other person] authorized to serve citation shall serve it by delivering a copy of it to the defendant, or by leaving a copy with a person over the age of sixteen years at the premises in question at least six days before the trial date specified in the citation. If a bond for possession has been filed, the citation shall be served at least five days before the trial date specified in the citation. The person serving the citation shall state on the citation when it was served, the manner of service, and the citation shall be signed by the officer or authorized person.

(c) Return of Citation.
The person serving the citation shall return the citation, noting the action taken thereon, to the justice who issued the citation at least one day before the trial date designated in the citation.

How TAA draft differs from current rules:

- *TAA neither supports nor objects to Subsection (a) modifications (in brackets) of the existing rules on who can lawfully serve citation. [Currently only an "officer" can serve citation.]*

  ♣ *SCAC draft in Subsection (a) expands who can serve citation by allowing private process servers to do so.*

- ***Changes:*** *Service date in bond for possession cases is changed to 5 days before trial since under TAA's proposed Rule 740, the JPs are given the flexibility of holding the trial on the 5th, 6th or 7th day after service.*

  ♣ *SCAC draft in Subsection (b) says service must be at least 6 days before trial date. TAA draft is*

same except service must be only 5 days before trial date in bond for possession cases.

- ***Changes:*** *Return date one day before the trial date designated in citation. (Under current rule, there is no deadline for return and therefore citation can be returned on the day of trial.)*

  SCAC draft is same as TAA draft except the TAA draft moves return date from Subsection (b) to a new Subsection (c).

(PROPOSED) RULE 742a. SERVICE BY DELIVERY TO PREMISES AND MAIL

(a) If the sworn complaint lists the address of the premises at issue as well as any other alternate addresses of the defendant or defendants in a written lease agreement, and if service of citation cannot be readily accomplished under Rule 742, service of citation may be by delivery and mail under subparagraph (b) of this rule.

(b) If the officer or other person authorized to serve citation in eviction suits is unsuccessful in serving citation under Rule 742, the officer or other authorized person shall no later than five days after receiving the citation sign an affidavit based on personal knowledge, confirming that diligent efforts have been made to serve the citation on at least two occasions at all addresses of the defendant in the county, as stated in the sworn complaint. The affidavit shall state the times and places of attempted service. The affidavit shall be filed with the justice. After promptly considering the affidavit, the justice may authorize service by written order according to the following:

(1) The officer or other authorized person shall place the citation inside the premises through a door mail chute or by slipping it under the main entry door to the premises; and if neither method is possible or practical, the citation shall be securely affixed to the main entry door to the premises;

(2) The officer or other authorized person shall that same day deposit in the United States mail a copy of the citation with a copy of the sworn complaint attached to it, addressed to the defendant at the premises in question and sent by first class mail;

(3) The officer or other authorized person shall note on the return of the citation the date of delivery and the date of mailing under this rule. The return of the citation by an authorized person shall be verified; and

(4) The delivery and mailing to the premises under this rule shall occur at least five days before the trial date designated in the citation. The officer or other authorized person accomplishing service shall return the citation to the justice who issued it in accordance with Rule 742.

It is not necessary for the plaintiff or the plaintiff's authorized agent to make a request or motion for alternative service under this rule.

How TAA draft differs from current rules:

- *Removes requirement of petition stating that all known home and work addresses of defendant be stated in the sworn complaint and substitute leased premises address and any other address in the lease. (Current rules provides for this.)*

  SCAC draft is same as TAA draft.

(PROPOSED) RULE 743. DOCKETED

The suit shall be docketed and tried as other cases. If the defendant fails to appear when the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. If the plaintiff fails to appear when the case is called for trial, the case may be dismissed for want of prosecution. The justice has authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

How TAA draft differs from current rules:

- *TAA proposes that eviction rules be silent as to discovery. Defendants already have discovery rights via Rule 523; and attorneys have not had a problem in getting discovery when it is legitimately needed. But mentioning discovery in the eviction rules is going to be an open invitation for tenants to abuse the system by inundating the court with discovery requests, which will result in unnecessary delays and paperwork.*

  SCAC draft says "reasonable discovery at JP discretion".

(PROPOSED) RULE 744. REQUEST FOR JURY

Except for trials when a possession bond has been filed, a party has the right of trial by jury, by making a request to the court and paying the jury fee. In order to have a jury trial, a plaintiff must request a jury and pay the jury fee at the time of filing the sworn complaint; and a defendant must request a jury and pay the jury fee within five days after service of citation, as designated in the citation. Upon such request, a jury shall be summoned at the earliest opportunity, in the same manner as in other justice court proceedings, but in no event later than seven days from the date of service. This rule will not apply in trials conducted under Rule 740.

How TAA draft differs from current rules:

- ***Adds:*** *Any jury request must be made* ***early by each party:*** *by plaintiff at time of filing, and by defendant prior to the trial date designated in citation. (Current rule says jury demand and jury fee payment must be no later than five days after the defendant is served with citation.)*

  SCAC draft continues current rule of jury demand and payment 5 days after service.

- ***Adds:*** *JP must summon jury "at earliest opportunity" but puts an outside limit of 7 days from the date of request for jury. (Current rule is silent on when jury is to be summoned.)*

  ♣ *SCAC draft places no outside limit on when jury must be summoned; it just says "at earliest opportunity". Without the 7-day limit, local jury-panel availability can drag out evictions when a jury trial is requested— sometimes as much as a month."*

- ***Removes:*** *Reference to $5 jury fee is deleted. (Under current rule, it is in conflict with statute that sets jury fees.)*

  SCAC draft is substantively same as TAA draft.

- ***Adds:*** *Jury trial is not required in bond for possession cases. The time required for getting a jury panel can significantly delay the actual trial and undermine the purpose of a bond for possession. The lack of a waiting period between trial judgment and issuance of the writ in bond for possession cases can be avoided by the defendant by merely showing up for trial in justice court. If the case is appealed, a jury trial will always be available in county court.*

  ♣ *SCAC alternative number 2 to Rule 740 provides for bench trials (not jury trials) in bond for possession cases.*

(PROPOSED) RULE 745. TRIAL POSTPONED

On the court's own motion or upon good cause shown by affidavit of either party, the trial may be postponed by the justice for a period not exceeding seven days. The trial may be postponed for a longer period by agreement of all parties if the agreement is in writing and filed with the court, or the agreement is made in open court.

How TAA draft differs from current rules:

- ***Adds:*** *Allows JP to unilaterally postpone trial for up to 7 days on his or her own motion because of conflicts, death in family, sickness, etc., for up to seven days. (Current rule is silent on this.)*

  ♣ *SCAC draft allows postponement of additional 7 days* ***on top of*** *7-day postponement by affidavit from the parties. That is too much delay, especially when the defendant is not paying rent or is engaging in harmful or dangerous conduct.*

- ***Modifies:*** *Allows JP to postpone trial for up to 7 days for good cause asserted by affidavit of a party since justified discovery would constitute good cause. (Under current rule, JP can postpone trial for only 6 days for good cause established by affidavit of a party.)*

  SCAC draft is substantively same as TAA draft.

- ***Adds:*** *Allows longer postponement by agreement of the parties. (Under current rule, there is no provision for continuance by agreement.)*

  SCAC draft is substantively same as TAA draft.

(PROPOSED) RULE 746. ONLY ISSUE

Except as provided in Rule 738, the only issue in an eviction suit under Chapter 24 of the Texas Property Code is the right to actual possession. The merits of the title shall not be adjudicated.

How TAA draft differs from current rules:

- *No substantive change.*

  SCAC draft is substantively same as TAA draft.

(PROPOSED) RULE 747. TRIAL

If a jury trial is not timely requested by either party, the justice shall try the case. If a jury trial is timely requested by either party and is authorized under Rule 744, a jury shall be impaneled and sworn as in other cases, as soon as reasonably possible, but not more than 7 days after the request is filed. After hearing the evidence, the jury shall return its verdict in favor of the plaintiff or the defendant. No motions for new trial may be made.

How TAA draft differs from current rules:

- ***Clarifies*** *that jury trials must be held "as soon as reasonably possible" after jury request is made but no later than 7 days after a jury is requested. (Current rules are unclear.)*

  ♣ *SCAC draft is silent on outer limit of when a jury trial must be held (it simply says "at earliest opportunity").*
- ***Continues*** *prohibition under existing rules against motions for new trial.*

  ♣ *SCAC draft allows MNTs and motions to set aside in SCAC Rule 749a*

(PROPOSED) RULE 747a. REPRESENTATION BY AGENTS

In eviction cases for nonpayment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction suit in justice court, an authorized agent may file a sworn complaint in any kind of eviction case and may request and obtain a default judgment without having to be an attorney.

How TAA draft differs from current rules:

- ***Clarifies*** *that authorized, nonlawyer agents of the plaintiff can file* ***any type of eviction case.*** *(Current Rule 739 simply allows plaintiff or the plaintiff's authorized agent to file "a sworn complaint".)*

  SCAC draft in Rule 739 allows authorized agents to file "sworn complaint". It is not explicitly clear that agents can file sworn complaints that can cover ***all types*** *of evictions. Both SCAC and TAA drafts allow authorized agents to request and obtain default judgments.*

(PROPOSED) RULE 748. JUDGMENT AND WRIT

(a) If the judgment or verdict is in favor of the plaintiff, the justice shall grant judgment for plaintiff for possession of the premises, rent or rental value owed, late fees, and court costs, and shall state the post-judgment interest rate, as appropriate. The justice may also grant judgment for the plaintiff for attorney's fees, if pleaded, established by proof, and authorized by the rental agreement or statute.

(b) If the judgment or verdict is in favor of the defendant, the justice shall grant judgment for the defendant against the plaintiff for possession of the premises, and court costs and shall state the post-judgment interest, as appropriate. The justice may also grant judgment for the defendant for attorney's fees, if pleaded, established by proof, and authorized by the rental agreement or statute.

(c) The judgment shall be in writing and contain the full names of the parties, as stated in the sworn complaint, and shall state for and against whom the judgment is rendered. The judgment shall recite who is awarded:

(1) possession of the premises;

(2) rent, or rental value, owed, if any, and the amount;

(3) attorney's fees, if any, and the amount;

(4) late fees, if any, authorized by the rental agreement; and

(5) court costs, and the amount.

The judgment shall state the post-judgment interest rate, as appropriate. The judgment shall also state the amount or rent, or rental value if there is no rental agreement that must be initially placed in the justice court registry under Rule 750 to avoid issuance of a writ of possession during any appeal. Any judgment for rent or rental value and attorneys fees shall be within the jurisdiction of the court.

(d) A writ of possession may not be issued until the expiration of five days from the date the judgment is signed, except that (1) the writ may be issued immediately under Rule 740 if a default judgment is granted, and (2) the writ may be issued only in accordance with Section 94.203 of the

Texas Property Code, as amended if the defendant is leasing a manufactured home lot. Subject to the provisions of this subparagraph, if a plaintiff is entitled to issuance of a writ of possession, it must be issued without delay.

(e) If the judgment of the justice court is not appealed, it shall remain in force and a prevailing party may enforce its rights under the judgment in the justice court. If an appeal from the justice court is perfected in accordance with Rule 749b, the county court's jurisdiction is invoked and the justice court may not enforce the judgment except under Rule 750.

(f) This rule does not prohibit the county court from making an independent determination, either on its own motion or on sworn motion of either party, as to the amounts and due dates of rent, or rental value, to be paid into the registry of the county court during the pendency of the appeal.

How TAA draft differs from current rules:

- ***Adds*** *attorney's fees for either party, if appropriate. (Current rule is silent on attorney's fees.)*

  SCAC draft is substantively same as TAA draft.
- ***Adds*** *recovery of rental value if no lease. (Current rule allows recovery only for rent; rules are silent on recovery of rental value if no lease.)*

  SCAC draft is substantively same as TAA draft.
- ***Adds*** *exception for manufactured housing in Property Code, Section 94.203. (Under current rule, five-day writ issuance conflicts with 30-day writ in statute.)*

  ♣ *SCAC draft does not reflect requirements of the manufactured housing statute.*
- ***Adds*** *post-judgment interest, as appropriate. (Current rule is silent on interest. Post-judgment interest is statutorily authorized or all judgments for money by Finance Code, Section 304.001.)*

  ♣ *SCAC draft is silent.*
- ***Adds:*** *JP is allowed to determine rent or rental value to be placed in JP court registry if the case is appealed. (Under current rule, no mention of "rental value"; requirement is that "rent" be deposited under Rule 749.)*

  SCAC draft is substantively same as TAA draft.
- ***Adds:*** *Writ must be issued without delay once judgment for possession and any required waiting period has expired. There is a problem in some parts of the state where the justices simply drag their feet in issuing the writ for 2 or 3 weeks after the judgment has been entered despite repeated requests by the plaintiff.*

  ♣ *SCAC draft contains no such language.*
- ***Removes*** *statement that JP judgment is nullity if appeal is perfected since judgment can still be enforced unless one month's rent (or a lesser amount under some circumstances) is posted with justice court. (Current rules says "nullity" upon perfection of appeal.)*

  ♣ *SCAC draft says if appeal is perfected and the county court jurisdiction is invoked, the JP court cannot enforce the judgment.*
- ***Contains no requirements*** *for JP to make multiple findings of fact. None are needed. If JPs are compelled to make findings of fact in each case, it will cause a delay and unnecessary paperwork for them. There are over 100,000 eviction cases per year.*

(Current rules contain no fact finding requirement other than setting the amount of any appeal bond.)

♣ *SCAC draft requires multiple findings of fact by the JP.*

(PROPOSED) RULE 749. MAY APPEAL

(a) Either party may appeal from a judgment in an eviction case to the county court of the county in which the judgment is rendered by doing the following within five days after the judgment is signed:

(1) filing an appeal bond, with one or more sureties, to be approved by the justice; or depositing with the justice court cash or cash equivalent acceptable to the court, in the amount of the appeal bond; and

(2) depositing with the justice court the amount of the required county court filing fee in accordance with subparagraph (e) of this rule. The filing fee must be made payable to the county clerk of the county in which the case was heard in justice court.

In lieu of (1) and (2), the defendant may file an affidavit of indigence showing an inability to post the appeal bond or appeal bond deposit and the county court filing fee.

(b) The justice shall set the amount of the appeal bond at an amount equal to the court costs incurred in justice court. If there are multiple appellants, an affidavit of indigence filed by one appellant does not dispense with the requirement of an appeal bond for the remaining appellants who do not file affidavits of indigence or whose affidavits of indigence are not approved by the court.

(c) The justice court shall immediately forward all papers in the case file to the county clerk, along with (1) the appeal bond, or deposit in lieu of an appeal bond, and the filing fee, or (2) the affidavit of indigence.

(d) Except as stated in subparagraph (e), an appeal bond must meet the following criteria:

(1) It must be in an amount equal to the court costs incurred in justice court;

(2) It must be made payable to the adverse party;

(3) It must be signed by the judgment debtor or the debtor's authorized agent; and

(4) It must be co-signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(e) Instead of filing an appeal bond, a party may deposit the amount of the appeal bond in cash, money order, or other mode of payment acceptable to the court.

(f) Any motions challenging the sufficiency of the appeal bond may be filed with the county court.

(g) Within five days following the filing of an appeal bond, the party appealing shall give notice of the filing of the bond, deposit, or affidavit, to the adverse party. No default judgment may be taken by a party in county court without the party showing substantial compliance with this rule.

(h) If a default judgment has been entered in a case in which a possession bond has been filed, the defendant may still appeal after the writ of possession has been issued and executed, so long as the appeal is filed within five days after the date the judgment is signed.

How TAA draft differs from current rules:

- ***Reduces:*** *Appeal bond only needs to be for the amount of the court costs. (Under current rule, appeal bond must be for "damages", generally set at two times monthly rent by JPs. The smaller appeal bond for court costs only is not a problem since proposed Rule 750(c) and (d) require payment of rent (or rental value) into court registry during appeal regardless of the kind of eviction case.)*

  SCAC draft is substantively same as TAA draft.
- ***Adds:*** *JP is given express authority to approve or disapprove sureties. (Current rule is silent.)*

  SCAC draft is substantively same as TAA draft.
- ***Adds:*** *Allows payment of appeal bond in cash, cashier's check, or other mode approved by court. (Current rule is silent.)*

  SCAC draft is substantively same as TAA draft.
- ***Clarifies:*** *Challenge of bond sufficiency must be in county court. (Current rule is silent.)*

  ♣ *SCAC draft is substantively same as TAA draft, but the TAA list is shorter because of the all-inclusive "other mode of payment acceptable to the court."*
- ***Adds*** *right of tenant to appeal adverse pauper ruling. (Current rule is silent, but constitutionality requires ability to appeal.)*

  SCAC draft is substantively same as TAA draft. (Rule 749a)
- ***Adds*** *right of tenant to appeal judgment in possession bond case, even if writ is already issued because of default judgment. (Current rule is silent, but constitutionality requires ability to appeal.)*

  ♣ *SCAC draft is silent.*
- ***Identifies*** *parties as "plaintiff" and "defendant" in county court—not appellant or appellee. (Under current rule, "appellant" and "appellee" terminology is used.)*

  ♣ *SCAC draft is silent.*

(PROPOSED) RULE 749a. AFFIDAVIT OF INDIGENCE

(a) Establishing Indigence.
A party who cannot pay the court costs to appeal to the county court, including the county court filing fee, may proceed without filing an appeal bond and paying the county court filing fee or making a deposit under Rule 749(f) if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of Affidavit.
The affidavit of indigence must identify the party filing the affidavit and state the amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns other than household furnishings, children's toys and wearing apparel;

(4) cash or cash equivalent the party owns and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free or contingent legal services to the party; and

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed.
An appellant must file the affidavit of indigence in the justice court within five days after the justice court judgment is signed.

(d) Duty of Clerk or Justice of the Peace.

Upon the filing of an affidavit of indigence, the justice of the peace or clerk of the court shall give notice to the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) Contest to Affidavit.
The appellee may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice court clerk or justice of the peace to the opposing party. The contest need not be sworn.

(f) No Contest Filed.
If a contest is not timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed under subparagraph (a) of this rule.

(g) Burden of Proof.
If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the party who filed the affidavit is incarcerated at the time the hearing on a contest is held, the affidavit shall be executed by the incarcerated defendant. The affidavit shall be considered as evidence and shall be sufficient to meet the party's burden to present evidence without the party's attendance at the hearing.

(h) Hearing and Decision in Justice Court.

(1) Notice required.
If the affidavit of indigence is filed in justice court and a contest is filed, the justice court shall set a hearing and notify the parties of the setting.

(2) Time for hearing.
The justice court shall either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.
The time for conducting a hearing shall not be extended for more than five days from the date the extension order is signed.

(4) Time for written decision; effect.
If the justice court does not timely sign an order sustaining the contest, the affidavit of indigence shall be deemed approved, and the party shall be allowed to proceed under subparagraph (a) of this rule.

(i) Appeal from the Justice Court Order Disapproving the Affidavit of Indigence.

(1) If the justice of the peace disapproves the affidavit of indigence, the appellant may appeal the order disapproving the affidavit by filing within five days thereafter a motion in county court seeking de novo review of the justice court order. On request, the justice shall send to the county court the affidavit of indigence, any

written contest, and the justice court's order on the contest. The county court shall hold a de novo hearing and rule on the matter within five days from the date the motion is filed with the county court. If the affidavit of indigence is approved by the county court, it shall direct the justice to send to the clerk of the county court, the complete transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal of the justice court judgment by filing an appeal bond, or, in lieu depositing the amount of the appeal bond in accordance with Rule 749(f), and paying the county court filing fee to the justice court within five days of the date the county court signs the order. If no appeal bond is filed in the justice court within five days, the justice court may issue a writ of possession.

(2) A writ of possession may not issue pending a hearing by the county court on the appellant's right to appeal on an affidavit of indigence.

How TAA draft differs from current rules:

- ***Adds:*** *Creates comprehensive list for what affidavit of indigence must cover. (Current rule is silent on list; no guidance for parties or court.)*

  ♣ *SCAC draft list is substantively same as TAA draft except that the TAA draft in Subsection (b)(3) does not require listing of household furnishings, children's toys, and wearing apparel.*

- ***Adds:*** *Requires clerk to notify plaintiff of filing affidavit of indigence within one day after filing. (Current rule is silent; no prohibition against late notice.)*

  SCAC draft is substantively same as TAA draft.

- ***Adds:*** *Requires opportunity for hearing on contest of indigence affidavit. (Under current rule, same.)*

  SCAC draft is substantively same as TAA draft.

- ***Adds:*** *Requires expeditious county court review of appeal of JP court ruling on non-indigence. (Current rule is silent.)*

  SCAC draft is substantively same as TAA draft.

(PROPOSED) RULE 749b. APPEAL PERFECTED AND TRANSCRIPT

(a) An appeal of the justice court judgment shall be perfected when appellant timely files:

(1) an appeal bond, or deposit in lieu of an appeal bond in conformity with Rule 749, and pays the filing fee required for the appeal of cases to the county court; or

(2) an affidavit of indigence approved in conformity with Rule 749a.

(b) When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on its docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond or deposit, in lieu in conformity with Rule 749, and the county court filing fee, or the

affidavit of indigence approved in conformity with Rule 749a, with the county clerk of the county in which the case was heard.

(c) The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both plaintiff and defendant of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

(d) The perfection of an appeal in an eviction case does not suspend the issuance and execution of a writ of possession if a judgment for possession is granted for the plaintiff in justice court unless the defendant has complied with Rule 750.

(e) No factual determination in an eviction case in justice court, including determination of the right to possession, will be given preclusive effect in other suits that may be brought between the parties.

How TAA draft differs from current rules:

- ***Adds:*** *Appeal perfection by appeal bond or affidavit of indigence does not necessarily suspend enforcement of judgment by JP court. (Under current rule, appeal perfection prohibits JP court from enforcing judgment under any circumstances.)*

SCAC draft is substantively same as TAA draft.

(PROPOSED) RULE 749c. FORM OF APPEAL BOND

The appeal bond authorized in the preceding article shall be substantially as follows:

CAUSE NO. ____

_____	§	IN THE JUSTICE COURT
Plaintiff	§	
	§	
v.	§	PRECINCT NUMBER _____
	§	
_____	§	
Defendant	§	_____ COUNTY, TEXAS

Appeal Bond

WHEREAS, in the above entitled and numbered case in the Justice Court of precinct _____ of _____ County, Texas, judgment for eviction was signed on the _____ day of _____, _____ in favor of _____ appellee, and against _____ appellant. Appellant wishes to appeal the judgment to the county court. Appellant, and sureties, covenant that appellant will prosecute the appeal with effect and pay all costs that may be adjudged against

the appellant, except that the sureties shall not be liable in an amount greater than $_____, such amount being the amount of the bond herein.

NOW, THEREFORE, Appellant(s) _____ as principal(s) and _____, as surety and _____ as surety, acknowledge ourselves as bound to pay to _____ appellee, the sum of $_____, conditioned that appellant(s) shall prosecute the appeal with effect and will pay of court in the event of an adverse final judgment on appeal.

Given under our hands this _____ day of _____, 20____.

_____	_____	_____
Appellant's signature	Surety's signature	Surety's signature
_____	_____	_____
Appellant's telephone number	Surety's printed name	Surety's printed name
	_____	_____
	Surety's printed address	Surety's printed address
	_____	_____
	Surety's telephone number	Surety's telephone number

The appeal bond is:

☐ Approved

☐ Disapproved for the following reason: _____

_____

Signed this _____ day of _____, 20____.

_____

Justice Presiding

How TAA draft differs from current rules:

- ***Changes:*** *Makes appeal bond for court costs only. (Under current rule, appeal bond is for "damages", usually set at twice one month's rent.)*

  SCAC draft is substantively same as TAA draft.

- ***Adds:*** *Includes lines for printed name and addresses of sureties for better legibility and identity, and the surety's telephone number. Adds telephone number for defendant since the telephone number can sometimes change by this point in the proceeding. (Under current rule, bond only provides for address of surety.)*

  ♣ *SCAC draft is substantively same as TAA draft except SCAC does not provide for printed (legible) name and address and does not provide for surety's phone number.*

- ***Adds:*** *Check boxes are added for approval or disapproval and a blank line is added as a reminder to the JP that the law requires him or her to state reasons for bond denial so the person being denied the bond can possibly cure. (Weeks vs. Hobson,*

877 SW2d 478 requires this since parties must be given an opportunity to cure reasons for bond denial.)

♣ *SCAC draft does not provide a blank line for the JP to state grounds for denial of bond.*

(PROPOSED) RULE 750. POSSESSION PENDING APPEAL BY TENANT TO COUNTY COURT

(a) Right of Continued Possession.
A defendant who has perfected an appeal of an eviction case under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal by complying with the following procedure:

(1) filing with the justice court a written agreement with the plaintiff stating the terms under which the defendant may stay in possession; or

(2) depositing rent or rental value into the justice and county court registry as required by this rule.

(b) Rent Payments.
A defendant shall deposit rent, or rental value if there is no oral or written rental agreement, in the justice or county court registry in the form of cash, money order, or other mode of payment acceptable to the justice;

(c) Initial Deposit of Rent with Justice Court.

(1) A defendant who has perfected appeal by filing an appeal bond or making the required deposit in lieu of the bond and paying the county court filing fee is entitled to stay in possession of the premises by depositing any amount awarded by the justice court for unpaid rent and late fees under the rental agreement, or the amount awarded by the justice court for rental value as determined by the justice court if there is no oral or written rental agreement, within five days of the approval of the appeal bond or the deposit in lieu of the appeal bond.

(2) A defendant who has perfected appeal by filing an affidavit of indigence is entitled to stay in possession of the premises without depositing rent or other amounts into justice court, unless the eviction is for nonpayment of rent. If the defendant perfected appeal by filing an affidavit of indigence and the eviction is for nonpayment of rent, the defendant must deposit any alleged unpaid rent and late fees under the rental agreement, or the alleged unpaid rental value as determined by the justice court if no oral or written agreement, within five days of the filing of the affidavit or the overruling of any contest to the affidavit, whichever is later.

(3) The justice court may order a deposit less than that required under subparagraph (1) or (2) of this rule if the justice court finds that (i) the rent or a portion of the rent has been contracted to be paid to the landlord by third parties, (ii) the plaintiff has

received no notice that the third party payments have ceased or will cease, (iii) the plaintiff has received all rent due from the third party under the third party's agreement with plaintiff or defendant, (iv) the plaintiff did not request the third party to cease making such third party's payments, and (v) justice requires a lesser deposit.

(4) If a defendant does not timely file an agreement between the defendant and the plaintiff, or deposit rent or rental value as required by this rule, the justice court shall, after notice to the parties and a hearing, issue a writ of possession pending appeal by the defendant. Except under Rule 740, a writ of possession may not be issued until the expiration of five days after the date of the judgment in justice court.

(d) Rent Deposits with County Court.

(1) During the pendency of the appeal the defendant must pay rent, or if the defendant does not have a rental agreement that requires rent payment, the defendant must pay the value of the fair market rent of the premises as set by the justice court for each month, into the registry of the county court within five days of its due date under a rental agreement, or if there is no rental agreement, the first day of each month thereafter. Upon sworn motion filed in county court, either party may contest the justice court determination of the amount of rent or fair market rental value that must be deposited.

Upon motion by the tenant, the county court may order rent payments to be tendered in an amount less than that required under this rule if the court finds that (i) the rent or a portion of the rent has been contracted to be paid to the landlord by third parties, (ii) the plaintiff has received no notice that the third party payments have ceased or will cease, (iii) the plaintiff has received all rent due, from the third parties under the third party's agreement with plaintiff or defendant or such rent has been tendered to the county court, (iv) the plaintiff did not request the third party to cease making such third party's payments, and (v) justice requires a lesser deposit.

(2) If the defendant fails to make timely payments into the registry of the county court or breaches the terms of an agreement with the plaintiff allowing the defendant to stay in possession, during the appeal, the plaintiff may file a notice of default in the county court where the cause is pending. Upon sworn motion by the plaintiff, and a showing of defendant's default in making payments into the registry of the county court as they become due, the court may issue a writ of possession to plaintiff after notice to the defendant, and a hearing. No writ of possession may be issued by the county court until the expiration of five days from the date an order is signed, awarding possession to the plaintiff under this rule.

(3) The county court may allow a party to withdraw deposited amounts from the county court registry upon:

(i) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;

(ii) dismissal of the appeal, or

(iii) order of the court upon final judgment.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

How TAA draft differs from current rules:

- ***Adds:*** *Tenant can stay in possession pending appeal by agreement of the parties. (Current rule is silent.)*

  SCAC draft is substantially the same.

- ***Adds:*** *During appeal, the tenant can stay in possession only by depositing rent or rental value as follows: after appeal is perfected by affidavit of indigence (for nonpayment of rent cases) or appeal bond (for all cases), the tenant must deposit rent in initial amount of the alleged unpaid rent and late fees; and continue to deposit rent into county court as it becomes due. (Current rule 749b requires deposit of one month's rent in JP court (no matter how much rent is alleged to be due) and requires continued tender of rent into county court of future rent as it becomes due.)*

  - *SCAC draft uses technical "supersedeas bond" language, which is difficult for laypersons to understand. SCAC draft does not require one month's rent to be initially deposited, it only requires tender of rent to the court as it comes due. The SCAC supercedeas bond must be at least enough to cover the amount of the judgment (rent plus late fees) plus attorneys fees.*

    This supercedeas bond approach is problematic because it is infeasible and extremely time consuming for a JP to certify that sureties legitimately are qualified. The supercedeas bond approach opens the door for contested hearings on the financial worth of the surety. It is currently rare that landlords who are successful on appeal are able to collect from sureties.

    SCAC rule requires landlord to file a motion with the county court to require defendant to pay full rent if the third party doesn't pay. This is problematic and unfair to landlords because it typically takes two or more weeks to get a hearing in front of the court. In effect, the landlord will be "eating" this loss and unable to collect the county court's judgment for rent, especially the portion that the third party didn't pay for the tenant.

- ***Adds:*** *Justice may reduce the initial rent deposit and future rent deposits to the portion of rent that the tenant would have paid if there had been no eviction case. (Current rule requires deposit of one month's rent; and it is unclear whether that*

means rent owed by tenant or rent owed by tenant plus rent owed by third-party government agency.)

♣ *SCAC draft is substantively same as TAA draft except SCAC draft uses a supercedeas bond instead of requiring rent awarded the landlord by the JP court to be put up.*

- ***Adds:*** *If government has not paid the landlord the government's share of rent due at time of appeal, the tenant must post entire month's rent to stop issuance of writ. If government does not pay government share as rent becomes due on appeal, landlord is entitled to issuance of writ upon motion and order of the county court. (Under current rule, there is no such provision.)*

♣ *SCAC draft is similar in principle to the TAA draft; but SCAC does not protect landlord in situations where government has not paid or will not be paying the rent.*

- ***Adds:*** *Plaintiff can withdraw a rent deposit from court prior to final resolution of case. (Under current rule, there is no provision.)*

SCAC draft is substantively same as TAA draft.

(PROPOSED) RULE 751. (NONE)

Old Rule 751 entitled "Transcript" has been incorporated, in part into Proposed Rule 749(b).

How TAA draft differs from current rules:

- No current rule.

♣ *SCAC draft provides for form of supersedeas bond. TAA draft does not require supersedeas bond; instead TAA draft requires payment of rent into JP court and thereafter in county court. Same result is accomplished as in SCAC draft but without complexity for laypersons who have to read and understand these rules.*

(PROPOSED) RULE 752. DAMAGES

On the trial de novo of the case in the county court, the plaintiff or defendant shall be permitted to plead, prove and recover damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal. Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney's fees in the justice and county court provided, as to attorney's fees, that the requirements of Chapter 24 of the Texas Property

Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party.

How TAA draft differs from current rules:

- No substantive change.

SCAC draft is substantively same as TAA draft.

(PROPOSED) RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The county clerk shall immediately notify all parties to the justice court judgment of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court and shall advise the defendant that default judgment may be entered unless a timely answer is filed. The style of the case in county court must be the same as in justice court.

How TAA draft differs from current rules:

- ***Adds:*** *The style of the case in county court must be the same as in justice court. Confusion has resulted whenever a county clerk sets the style as appellant and appellee.*

♣ *Also, SCAC expands 8 days in current rules to 10 days, delaying eviction by two days. TAA draft retains the current 8 days.*

(PROPOSED) RULE 753a. JUDGMENT BY DEFAULT
IN COUNTY COURT

If the defendant has filed a written answer in the justice court, the same shall be taken to constitute the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and fails to file a written answer within eight days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

How TAA draft differs from current rules:

- *No substantive change.*

♣ *SCAC draft is the same as TAA draft except TAA draft keeps current 8 days for defendant to answer whereas SCAC expands answer date to 10 days.*

(PROPOSED) RULE 754. TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of an eviction appeal and all related hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of an eviction case unless, a request for jury trial is filed and payment of jury fee is made to the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than five days in advance. The clerk shall promptly enter a notation of any jury fee payment on the court's docket sheet.

(c) The trial of an eviction case on appeal to county court shall be de novo and may be held any time after the expiration of eight days after the date the justice court transcript is filed in the county court. The county court may set an eviction trial on written request of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. Regardless of which party appealed from the justice court, only the plaintiff in the county court may take a nonsuit. If the county court's jurisdiction is invoked, the court must dispose of all parties and issues before the court, including the issue of possession unless the writ of possession has already been issued.

(d) On written motion by a party contesting the sufficiency of the appeal bond, the county court shall hold a hearing on the motion. If the judge finds the bond deficient, the judge may disapprove the bond and allow the appealing party five days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected within the five-day period, the bond may be approved. If the deficiencies on the appeal bond are not corrected within the five-day period, the appeal may be dismissed and the writ of possession shall issue.

(e) If the appealing party fails to prosecute the appeal with diligence or the county court renders judgment against the party, the county court shall also render judgment against the surety or sureties on the appeal bond, for the costs of court up to the amount of the bond.

How TAA draft differs from current rules:

- ***Adds:*** *Sets jury request deadline of 5 days before the trial in county court case. (Under current rule, there is no deadline; can be filed on morning of trial.)*

  SCAC draft is the same as the TAA draft.

- ***Adds:*** *Provides procedures for contesting appeal bond. (Under current rule, there are no procedures.)*

  ♣ *SCAC draft is substantively same as TAA draft. SCAC draft requires a 10-day waiting period rather than 8 days before the county court case may be heard; therefore, SCAC draft can add two days to the eviction process.*

(PROPOSED) RULE 755. WRIT OF POSSESSION IN COUNTY COURT

The writ of possession shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable. However, if the defendant is leasing a manufactured home lot, the writ of possession shall be issued as provided in Section 94.203 of the Texas Property Code, as amended. A writ of possession issued from a judgment of a county court may not under any circumstances be issued until the expiration of ten days after the signing of the judgment and only if the appellant has not filed a supersedeas bond in an amount set by the county court. The writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used for residential purposes only. The county court shall give precedence to the hearing to set the amount of the supersedeas bond necessary to suspend the judgment or the portion of the judgment the appellant elects to supersede.

How TAA draft differs from current rules:

- ***Adds:*** *Writs in manufactured housing cases must conform to Section 94.203 of Texas Property Code which requires a delay of 30 days before the writ of possession can issue in such cases. (Current rule is silent.)*

  ♣ *SCAC draft does not contain the statutory exception for evictions in manufactured housing.*

- ***Adds:*** *Writ can be issued no sooner than 10 days after county court judgment—which is the deadline for supersedeas bond for appeal to Court of Appeals in Section 24.007 of Texas Property Code. (Under current rule, writ is issued according to "judgment"; and the rule is silent as to tenant's statutory right to supersede judgment by filing supersedeas bond within 10 days after judgment in county court. Current rule is silent on how soon the writ can issue after county court judgment.)*

  SCAC draft is substantively same as TAA draft.

Comparison of TAA May 13th draft
to SCAC Subcommittee May 7th draft of eviction-related rules

Underlined language = new in TAA draft
Struck-through language = deleted in TAA draft

(PROPOSED) RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays should not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 739, ~~740,~~ 742, 742a, 744, 748, 749, 749a, ~~749b, 749c~~ 750 and 754.

(PROPOSED) RULE 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost on appeal from a judgment of a justice of the peace or small claims court, within twenty (20) days after being notified to do so by the county clerk, the appeal shall be deemed not perfected and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted. Payment of costs on appeal from ~~a forcible entry and detainer action~~ an eviction case are governed by Rules 749, 749b and ~~749c~~ 750.

(PROPOSED) RULE 190. DISCOVERY LIMITATIONS

~~Except in forcible entry and detainer cases~~ Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

(PROPOSED) RULE 216. REQUEST & FEE FOR JURY TRIAL

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

b. Jury Fee. Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk

promptly enter a notation of the payment of such fee upon the court's docket sheet.

c. This rule does not apply in ~~forcible entry and detainer~~ eviction cases.

(PROPOSED) RULE 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request for any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including ~~forcible entry and detainer~~ eviction cases, nor will it apply to the de novo trial of appeals of ~~forcible entry and detainer~~ eviction cases in county court.

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

(PROPOSED) SECTION 3 EVICTION
~~FORCIBLE ENTRY AND DETAINER~~

(PROPOSED) RULE 738. JOINDER OF ADDITIONAL CLAIMS

A ~~suit~~ claim for rent, contractual late charges~~,~~ and attorney's fees may be joined with an ~~action of forcible entry and detainer~~ eviction suit. If there is no oral or written rental agreement, a claim for rental value may be joined. The court may render judgment in favor of plaintiff for eviction and for rent or rental value and any attorney's fees owed by the defendant to the plaintiff. ~~The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, and attorney's fees,~~ due the landlord by the renter. The total judgment awarded for rent or rental value shall not exceed the jurisdiction of the justice court. The justice may also award court costs against the unsuccessful party.

Comparison of TAA May 13th draft
to SCAC Subcommittee May 7th draft of eviction-related rules

Underlined language = new in TAA draft
Struck-through language = deleted in TAA draft

~~RULE 739. CITATION~~
(PROPOSED) RULE 739. CITATION

(a) ~~When an aggrieved party or the party's~~ When a plaintiff or the plaintiff's authorized agent ~~shall file~~ files a written sworn complaint for eviction, the justice shall immediately issue citation directing the defendant ~~or defendants~~ to appear for trial before ~~such~~ the justice at a time, date and place named in ~~such~~ the citation, ~~such time being not~~ on a date not less than six nor more than ten ~~days nor less than six~~ days from the date of service of the citation. ~~The justice shall attach to the citation copies of all documents, and records filed with the complaint by the complainant.~~

If a bond for possession under Rule 740 is filed with the sworn complaint, the citation must designate a trial date on the fifth, sixth, or seventh day after both citation and notice of possession bond are served on the defendant. The citation and the notice of possession bond must be served concurrently.

(b) The citation shall inform the ~~parties that, upon timely request~~ defendant that the case shall be heard by a jury only if a request for jury and payment of a jury fee is made one day before the trial date as designated in the citation ~~no later than five days after the defendant is served with citation, the case shall be heard by a jury.~~

~~RULE 740. COMPLAINANT MAY HAVE POSSESSION~~
(PROPOSED) RULE 740. POSSESSION BOND

(a) The plaintiff may, at the time of filing ~~his complaint, or thereafter prior to trial in the justice court, execute and~~ an eviction suit, file a possession bond to be approved by the justice in such amount as the justice may fix as the probable ~~amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly~~ costs of suit and damages which may result to ~~instituted, and~~ defendant if the suit has been improperly instituted. The bond shall be conditioned that the plaintiff will pay the defendant all~~such~~ costs and damages as shall be adjudged against plaintiff.

(b) The justice court shall notify the defendant that the plaintiff has filed a possession bond. ~~Such notice must be served on a defendant,~~ The notice shall be served on the defendant concurrently with and in the same manner as service of citation in ~~a forcible entry and detainer~~ an eviction suit and shall inform the defendant of ~~all of the following rules and procedures, except that the~~the procedures in (c) and (d) below. The officer or other authorized person serving ~~the~~ notice of the possession bond shall return ~~such~~ the notice to the justice who issued ~~same~~ within one day after service the notice at least one day before the trial date designated in the citation.

(c) A trial held under this rule must be a trial by the justice. If the defendant does not appear for trial as directed in the citation, the justice may, on request of the plaintiff, promptly enter a default judgment and issue a writ of possession immediately. If the defendant appears for trial as directed in the citation, the case shall be tried in the same manner as other eviction suits; and any writ of possession may be issued and executed only according to Rule 748.

~~(a) Defendant may remain in possession if;~~

~~(1) defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant; or~~

~~(2) defendant within two days of being served with notice of the possession bond, demands a trial which will be held, insofar as practicable, prior to the expiration of six days from the date defendant is served with notice of the filing of the plaintiff's possession bond. In order to obtain a jury trial, the defendant must demand the same within this two day period and pay the jury fee. If, in lieu of a counterbond, defendant demands trial within said six day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the justice court may issue a writ of possession after the expiration of five days after such determination by the justice of the peace. If the defendant requests a trial under this rule it will be the only trial held in this cause and will supercede the trial which would have been held under the original citation for forcible entry and detainer.~~

~~(b) If defendant does not file a counterbond or demand a trial be held, the plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;~~

~~(c)~~ (d) ~~–~~Whenever a justice court issues a writ of possession under this ~~rule a~~ rule, the defendant may appeal in the same manner as ~~after a traditional for~~cible entry and detainer trial a defendant may appeal an eviction judgment when a possession bond has not been filed.

(PROPOSED) RULE 741. REQUISITES OF COMPLAINT

The sworn complaint shall describe the ~~lands, tenements or~~ premises, the possession of which is claimed, with sufficient certainty ~~to identify the same~~. It shall also state the facts that entitle the plaintiff to possession and authorize the suit under Chapter 24 of the Texas Property Code. ~~The complaint shall be in writing, on paper measuring approximately 81/2 inches by 11 inches, and signed and sworn to by the party, the party's attorney, or the party's authorizedagent.~~

~~(a)The complaint must state that the premises at issue is located within the precinct where the complaint is filed.~~

~~(b)The complaint must state that the justice court where the complaint is filed has jurisdiction over the suit.~~

~~(c)If the complaint seeks judgment for rent and contractual late charges then the complaint must state the frequency with which the rent is paid, the day on which it becomes due, and the amount of rent the tenant is obligated to pay on that day. The complaint must also state the total rent and contractual late charges which are owed when the petition is filed.~~

~~(d) The complaint must state facts which entitle the complainant to the possession authorized~~

~~(1)If the suit for possession is based on non-payment of rent and contractual late charges, then the complainant must attach to the complaint a copy of any relevant sections of a written lease, if any, including the parties to the lease, the term of the lease, the provisions relating to rent, the signatories to the lease, and any other sections relevant to the suit. In addition, the complainant must attach a copy of any relevant written payment records for the period in dispute.~~

~~(2)If the suit for possession is based on a breach of a lease other than non payment of rent, then the complainant must attach a copy of any relevant sections of a written lease, if any, including the parties to the lease, the term of the lease, any provisions of the lease alleged to have been breached, the signatories to the lease, and any other sections relevant to the suit.~~

~~(3)If the suit for possession is based on the termination of an executory contract, or a foreclosure then the complainant must attach to the complaint a copy of any relevant sections of documents which form the basis for the suit for possession.~~

~~(4)If the suit for possession is based on the tenant's holding over after the termination of the tenant's right to possession then the complainant must attach to the complaint copies of the relevant sections of any written documents which form the basis for the suit for possession.~~

~~(5)If the suit for possession is based on grounds other than 1-4 above then the complainant must attach copies of the relevant sections of any written documents which form the basis for the suit for possession.~~

~~(e)The complainant must also provide enough additional copies of documents required by this rule to enable the court to attach those copies to each citation. If the complaint fails to attach any information required by this rule then the trial may be postponed on motion of any party or on the court's own motion, in accordance with Rule 745. Failure by the complainant to attach any information required by this rule is not grounds for the dismissal of the suit.~~

~~(f)The grounds under which the complainant is entitled to possession and other damages authorized by Rule 738 is limited by the facts stated in the complaint. The complaint may be amended by the complainant at any time prior to trial. If the complaint is amended the defendant may request a continuance in accordance with Rule 745.~~

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(PROPOSED) RULE 742. SERVICE OF CITATION

(a) Persons Authorized to Serve Citation in ~~Fore~~ible Entry and Detainer Actions Eviction Suits. Persons authorized to serve citation in ~~Forcible Entry and Detainer actions~~ eviction suits include (1) any sheriff or constable [or other person authorized by ~~law or,~~law, or (2) any person authorized by law or written order of the court who is not less than 18 years of age]. No person who is a party to~~,~~ or interested in the outcome of a suit ~~shall~~ may serve any process.

(b) Method of Service of Citation.
~~The officer or other person~~ Except as provided in Rule 742a, the officer [or other person] authorized to serve citation shall ~~execute the citation~~ serve it by delivering a copy of it to the defendant, or by leaving a copy ~~thereof~~ with ~~some~~ a person over the age of sixteen years~~,~~ at the premises ~~at issue,~~ in question at least six days before the trial date specified in the citation. If a bond for possession has ~~day as shown on~~ been filed, the citation shall be served at least five days before the trial date specified in the citation. The person serving the citation shall state on the citation when it was served, the manner of service, and the citation shall be signed by the officer or authorized person.

(c) Return of Citation.
The person serving the citation shall return the citation, noting the action taken thereon, to the justice who issued the citation at least one day before the trial ~~day named~~ date designated in the citation.

(PROPOSED) RULE 742a. SERVICE BY DELIVERY TO PREMISES AND MAIL

(a) If the sworn complaint lists the address of the premises at issue as well as any other alternate addresses of the defendant or defendants ~~as contained~~ in a written lease agreement, and if service of citation cannot be ~~effected~~ readily accomplished under Rule 742, ~~then~~ service of citation may be by delivery ~~to the premises at issue as follows~~ and mail under subparagraph (b) of this rule.

(b) If the officer or other person authorized to serve citation in ~~forcible entry and detainer actions~~ eviction suits is unsuccessful in serving citation under Rule 742, the officer or other authorized person shall no later than five days after receiving ~~such~~ the citation ~~execute a sworn statement~~ sign an affidavit based on personal knowledge, confirming that diligent efforts have been made to serve ~~such~~the citation on at least two occasions at all addresses of the defendant in the ~~county where the premises are located as may be shown on the sworn complaint, stating~~ county, as stated in the sworn complaint. The affidavit shall state the times and places of attempted service. ~~Such sworn statement~~ The affidavit shall be filed with the justice. After promptly considering the ~~sworn statement~~affidavit, the justice may ~~then~~ authorize service by written order ~~as follows:~~ according to the following:

~~(a) The~~(1) The officer or other authorized person shall place the citation inside the premises through a door mail chute or by slipping it under the main entry door to the premises; and if neither method is possible or practical, ~~to securely affix~~ the citation shall be securely affixed to the main entry door to the premises; ~~and~~

~~(b) The~~(2) The officer or other authorized person shall that same day deposit in the ~~mail a true copy of such~~ United States mail a copy of the citation with a copy of the sworn complaint attached ~~thereto,~~ to it, addressed to the defendant at the premises in question and sent by first class mail; ~~and~~

~~(c) The~~(3) The officer or other authorized person shall note on the return of ~~such~~ the citation the date of delivery~~under (a) above~~ and the date of mailing under (b) above this rule. The return of the citation by an authorized person shall be verified; and

~~(d) Such~~(4) The delivery and mailing to the premises under this rule shall occur at least ~~six~~ five days before the trial ~~day as shown on the citation; and at least one day before the trial day named~~ date designated in the citation. The officer or other authorized person accomplishing service shall return ~~such~~ the citation ~~noting the action taken thereon,~~ to the justice who issued ~~the same~~ it in accordance with Rule 742.

~~It shall not be~~ It is not necessary for the ~~aggrieved party or the party's~~ plaintiff or the plaintiff's authorized agent to make a request ~~for~~ or motion for alternative service ~~pursuant to~~ under this rule.

(PROPOSED) RULE 743. DOCKETED

The ~~cause~~ suit shall be docketed and tried as other cases. If the defendant ~~shall fail to enter an appearance upon the docket in the justice court or file answer before~~ fails to appear when the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. If the plaintiff ~~shall fail~~ fails to appear when the case is called for trial, the case may be dismissed for want of prosecution. The justice ~~shall have~~ has authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

~~Generally, discovery is not appropriate in forcible entry and detainer actions, however, the justice has the discretion to allow reasonable discovery.~~

~~RULE744. DEMANDING JURY~~
(PROPOSED) RULE 744. REQUEST FOR JURY

~~Any party shall have~~ Except for trials when a possession bond has been filed, a party has the right of trial by jury, by making a request to the court and paying the jury fee. In order to have a jury trial, a plaintiff must request a jury and pay the jury fee at the time of filing the sworn complaint; and a defendant must request a jury and pay the jury fee ~~on or before five days from the date the defendant is served with citation, and by paying the jury fee required by law for requesting a jury trial in justice court.~~within five days after service of citation, as designated in the citation. Upon such request, a jury shall be summoned at the earliest opportunity, in the same manner as in other justice court proceedings, but in no event later than seven days from the date of service. This rule will not apply ~~to~~ in trials conducted under Rule 740.

(PROPOSED) RULE 745. TRIAL POSTPONED

~~For~~ On the court's own motion or upon good cause shown~~, supported~~ by affidavit of either party, the trial may be postponed by the justice for a period not exceeding seven days. ~~Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the court's own motion, the trial may be postponed for an additional seven day period.~~ The trial may be postponed for a longer period ~~upon the~~ by agreement of all parties ~~provided such~~ if the agreement is ~~made~~ in writing and filed with the court, or~~if~~ the agreement is made in open court.

(PROPOSED) RULE 746. ONLY ISSUE

Except as provided in ~~rule~~ Rule 738, the only issue in ~~a forcible entry and detainer action~~ an eviction suit under Chapter 24 of the Texas Property Code is the right to actual ~~possession and the~~ possession. The merits of the title shall not be adjudicated.

(PROPOSED) RULE 747. TRIAL

If ~~no jury is demanded~~ a jury trial is not timely requested by either party, the justice shall try the case. If a jury ~~is demanded~~ trial is timely requested by either ~~party, the~~ party and is authorized under Rule 744, a jury shall be impaneled and sworn as in other cases, as soon as reasonably possible, but not more than 7 days after the request is filed. After hearing the evidence, the jury shall return its verdict in favor of the plaintiff or the defendant as it shall find. No motions for new trial may be made.

(PROPOSED) RULE 747a. REPRESENTATION BY AGENTS

In ~~forcible entry and detainer~~ eviction cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any ~~forcible entry and detainer~~ eviction suit in justice court, an authorized agent may file a sworn complaint in any kind of eviction case and may request and ~~requesting or obtaining~~ obtain a default judgment without having to be an attorney ~~need not be an attorney.~~

(PROPOSED) RULE 748. JUDGMENT AND WRIT

(a) If the judgment or verdict is in favor of the plaintiff, the justice shall ~~give~~ grant judgment for plaintiff for possession of the premises, and ~~costs~~ rent or rental value owed, late fees, and court costs, and shall state the post-judgment interest rate, as appropriate. The justice may also ~~give~~ grant judgment for the plaintiff for ~~back rent, contractual late charges and~~ attorney's fees, if ~~sought and~~ pleaded, established by proof, and ~~provided that such claims are within the jurisdiction of the court~~ authorized by the rental agreement or statute.

(b) If the judgment or verdict is in favor of the defendant, the justice shall ~~give~~ grant judgment for the defendant against the plaintiff for ~~costs and for~~ possession of the premises, and court costs and shall state the post-judgment interest, as appropriate. The justice may also ~~award a defendant who prevails against the plaintiff in the issue of possession, a~~ grant judgment for the defendant for attorney's~~fees if authorized and~~fees, if pleaded, established by proof, and ~~provided that such claim is within the jurisdiction of the court. If the judgment is for the plaintiff for possession, the justice must issue a writ of possession except that no writ of possession shall issue until the expiration of five days from the day the judgment is signed.~~authorized by the rental agreement or statute.

~~(a)~~(c) ~~A forcible entry and detainer~~ The judgment shall be in writing ~~in a separate document~~ and contain the full names of the parties, as stated in the ~~pleadings, and~~ sworn complaint, and shall state for and against whom the judgment is rendered. The judgment shall recite who is awarded:

~~(1) possession of the premises;~~
~~(2) back rent, if any, and contractual late charges, if any, and in what amount.~~
~~(3) attorney's fees, if any, and in what amount;~~
~~(4) court costs and in what amount.~~

~~(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:~~

~~(1) whether there is an obligation to pay rent on the part of the defendant;~~

~~(2) a determination of the rent paying period;~~

~~(3) a determination of the day rent is due;~~

~~(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;~~

~~(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.~~

~~(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.~~

(1) possession of the premises;

(2) rent, or rental value, owed, if any, and the amount;

(3) attorney's fees, if any, and the amount;

(4) late fees, if any, authorized by the rental agreement; and

(5) court costs, and the amount.

The judgment shall state the post-judgment interest rate, as appropriate. The judgment shall also state the amount or rent, or rental value if there is no rental agreement that must be initially placed in the justice court registry under Rule 750 to avoid issuance of a writ of possession during any appeal. Any judgment for rent or rental value and attorneys fees shall be within the jurisdiction of the court.

(d) A writ of possession may not be issued until the expiration of five days from the date the judgment is signed, except that (1) the writ may be issued immediately under Rule 740 if a default judgment is granted, and (2) the writ may be issued only in accordance with Section 94.203 of the Texas Property Code, as amended if the defendant is leasing a manufactured home lot. Subject to the provisions of this subparagraph, if a plaintiff is entitled to issuance of a writ of possession, it must be issued without delay.

(e) If the judgment of the justice court is not appealed ~~then it remains~~ it shall remain in force and a prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b, and the county courts jurisdiction is invoked then the justice court may not enforce the judgment. The

judgment of the justice court will be vacated upon final judgment in the case by the county court. (e) If the judgment of the justice court is not appealed, it shall remain in force and a prevailing party may enforce its rights under the judgment in the justice court. If an appeal from the justice court is perfected in accordance with Rule 749b, the county court's jurisdiction is invoked and the justice court may not enforce the ~~judgment. The judgment of the justice court will be vacated upon final judgment in the case by the county court.~~

~~(e) The county court may rely on the justice court judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the judgment of the justice court in determining whether of not to issue a writ of~~ judgment except under Rule 750.

~~possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits~~(f) This rule does not prohibit the county court from making an independent determination, either on its own motion or on sworn motion of either party, as to the amounts and due dates of ~~rents~~rent, or rental value, to be paid into the registry of the county court during the pendency of the appeal.

(PROPOSED) RULE 749. MAY APPEAL

~~(a)All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.~~

~~(b)~~(a) Either party may appeal from a~~final~~ judgment in ~~a forcible entry and detainer~~an eviction case to the county court of the county in which the judgment is~~signed.~~

~~(c)~~ ~~A defendant may appeal by filing with the justice, not more than~~rendered by doing the following within five days after the judgment is signed:

~~(c)signed,~~(1) filing an appeal bond, ~~deposit, or security~~with one or more sureties, to be approved by ~~said~~the justice; or depositing with the justice court cash or cash equivalent acceptable to the court, in the amount of the appeal bond; and

~~in an amount equal to the court costs incurred in justice~~(2) depositing with the justice court the amount of the required county court filing fee in accordance with subparagraph (e) of this rule. The filing fee must be made payable to the county clerk of the county in which the case was heard in justice court.

~~(c)~~In lieu of (1) and (2), the defendant may file an affidavit of indigence showing an inability to post the appeal bond or appeal bond deposit and the county court filing fee.

(b) The justice shall set the amount of the appeal bond at an amount equal to the court costs incurred in justice court.
If there are multiple appellants, an affidavit of indigence filed by one appellant does not dispense with the requirement of an appeal bond for the remaining appellants who do not file affidavits of indigence or

~~(d) A plaintiff may appeal by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.(e) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The justice court will forward the filing fee to the county clerk along with all other papers in the case. heard.~~ whose affidavits of indigence are not approved by the court.

(c) The justice court shall immediately forward all papers in the case file to the county clerk, along with (1) the appeal bond, or deposit in lieu of an appeal bond, and the filing fee, or (2) the affidavit of indigence.

(d) Except as stated in subparagraph (e), an appeal bond must meet the following criteria:

(1) It must be in an amount equal to the court costs incurred in justice court;

(2) It must be made payable to the adverse party;

(3) It must be signed by the judgment debtor or the debtor's authorized agent; and

(4) It must be co-signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(e) Instead of filing an appeal bond, a party may deposit the amount of the appeal bond in cash, money order, or other mode of payment acceptable to the court.

(f) Any motions challenging the sufficiency of the appeal bond may be filed with the county court.

(g) Within five days following the filing of an appeal bond, the party appealing shall give notice of the filing of the bond, deposit, or affidavit, to the adverse party. No default judgment may be taken by a party in county court without the party showing substantial compliance with this rule.

(h) If a default judgment has been entered in a case in which a possession bond has been filed, the defendant may still appeal after the writ of possession has been issued and executed, so long as the appeal is filed within five days after the date the judgment is signed.

~~Rule 749a. Affidavit of Indigence~~
(PROPOSED) RULE 749a. AFFIDAVIT OF INDIGENCE

(a) Establishing indigence.
A party who cannot pay the court costs to appeal to the county court, including the county court filing fee, may proceed without ~~advance payment of costs~~ filing an appeal bond and paying the county court filing fee or making a deposit under Rule 749(f) if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of Affidavit.
The affidavit of indigence must identify the party filing the affidavit and ~~must~~ state ~~what~~ the amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns other than household furnishings, children's toys and wearing apparel;

(4) cash or cash equivalent the party ~~holds~~ owns and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free or contingent legal services to the party; and

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed.
An appellant must file the affidavit of indigence in the justice court within five days after the justice court judgment is signed.

(d) Duty of Clerk or Justice of the Peace.
Upon the filing of an affidavit of indigence, the justice of the peace or clerk of the court shall give notice to the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) Contest to Affidavit.
~~Unless a contest istimely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.~~
The appellee may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice court clerk or justice of the peace to the opposing party. The contest need not be sworn.

~~(e) No contest filed~~
~~Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.~~

(f) No Contest Filed.
If a contest is not timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed under subparagraph (a) of this rule.

~~(f) Contest of Affidavit~~
~~The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice court clerk or justice of the peace to the opposing party. The contest need not be sworn.~~

(g) Burden of Proof.
If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the party who filed the affidavit is incarcerated at the time the hearing on a contest is held, the affidavit shall be executed by the incarcerated defendant. The affidavit ~~must~~ shall be

considered as evidence and shall be sufficient to meet the ~~indigent~~ party's burden to present evidence without the party's ~~attending~~ attendance at the hearing.

~~(h) Hearing and decision in the trial court~~

~~(1) Notice required~~

~~If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.~~

~~(2) Time for hearing.~~

~~The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.~~

~~(3) Extension of time for hearing.~~

~~The time for conducting a hearing must not be extended for more than five days from the date the order is signed.~~

~~(4) Time for written decision; effect.~~

~~Unless within the period set for the hearing the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.~~

~~(i) Appeal from the justice court order disapproving the affidavit of indigence~~

~~(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.~~

~~(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and ,on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing. The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.~~

~~(j) Costs defined~~

~~As used in this rule, costs means:~~

~~(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:~~

~~(2) any other costs sustained in the justice court; and~~

~~(3) a filing fee paid to appeal the case to the county court.~~

(h) Hearing and Decision in Justice Court.

(1) Notice required.
If the affidavit of indigence is filed in justice court and a contest is filed, the justice court shall set a hearing and notify the parties of the setting.

(2) Time for hearing.
The justice court shall either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.
The time for conducting a hearing shall not be extended for more than five days from the date the extension order is signed.

(4) Time for written decision; effect.
If the justice court does not timely sign an order sustaining the contest, the affidavit of indigence shall be deemed approved, and the party shall be allowed to proceed under subparagraph (a) of this rule.

(i) Appeal from the Justice Court Order Disapproving the Affidavit of Indigence.

(1) If the justice of the peace disapproves the affidavit of indigence, the appellant may appeal the order disapproving the affidavit by filing within five days thereafter a motion in county court seeking de novo review of the justice court order. On request, the justice shall send to the county court the affidavit of indigence, any written contest, and the justice court's order on the contest. The county court shall hold a de novo hearing and rule on the matter within five days from the date the motion is filed with the county court. If the affidavit of indigence is approved by the county court, it shall direct the justice to send to the clerk of the county court, the complete transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal of the justice court judgment by filing an appeal bond, or, in lieu depositing the amount of the appeal bond in accordance with Rule 749(f), and paying the county court filing fee to the justice court within five days of the date the county court signs the order. If no appeal bond is filed in the justice court within five days, the justice court may issue a writ of possession.

(2) A writ of possession may not issue pending a hearing by the county court on the appellant's right to appeal on an affidavit of indigence.

~~RULE 749B. APPEAL PERFECTED~~
(PROPOSED) RULE 749b. APPEAL PERFECTED AND TRANSCRIPT

(a) An appeal of the justice court judgment shall be perfected when appellant timely files:

(1) an appeal bond or deposit in lieu of an appeal bond in conformity with Rule 749, and pays the filing fee required for the appeal of cases to the county court; or

(2) an affidavit of indigence approved in conformity with Rule 749a.

~~When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the plaintiff shall be perfected.~~

(b) When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it~~'~~s docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal ~~bond,~~ bond or deposit, ~~or security filed~~ in lieu in conformity with Rule 749, and the county court filing fee, or the affidavit of indigence approved in conformity with Rule 749a, with the county clerk of the county in which the case was heard.

(c) The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both ~~appellant and appellee~~ plaintiff and defendant of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

(d) The perfection of an appeal in ~~a forcible entry and detainer~~ an eviction case does not suspend ~~enforcement of the judgment. Enforcement of the judgment, may proceed in the county court unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on~~ the issuance and execution of a writ of possession if a judgment for possession ~~and court~~ is granted for the plaintiff in justice court unless the defendant has complied with Rule 750 ~~costs only, then the tenant's failure to post a supersedeas bond, when required, will allow the appellee to seek a writ of possession, and the issue of possession may not be further litigated in the forcible entry and detainer action in the county court~~.

(e) No factual determination in ~~a forcible entry and detainer action,~~ an eviction case in justice court, including determination of the right to possession, will be given preclusive effect in other ~~actions~~ suits that may be brought between the parties.

(PROPOSED) RULE 749c. FORM OF APPEAL BOND

The appeal bond authorized in the preceding ~~rule may~~ article shall be substantially as follows:

~~_____, Plaintiff~~ ~~"The State of Texas,~~

~~vs.~~ ~~"County of _____~~

~~_____, Defendant~~ ~~Cause Number _____~~

~~CAUSE NO.~~

Plaintiff	§	IN THE JUSTICE COURT
	§	
v.	§	PRECINCT NUMBER _____
	§	
	§	
Defendant	§	_____ COUNTY, TEXAS

Appeal Bond

"WHEREAS, in the above entitled and numbered ~~forcible entry and detainer~~ case in the Justice Court of precinct ~~_____ of~~ _____ of _____ County, Texas, judgment ~~was signed on the _____ day of _____, _____ in favor of _____ appellee., and against _____ appellant. From which judgment the~~ for eviction was signed on the _____ day of _____, _____ in favor of _____ appellee, and against _____ appellant. Appellant wishes to appeal the judgment to ~~said appellant, wishes to appeal to the county court; now, therefore, the said appellant,~~ the county court. Appellant, and sureties, covenant that appellant will prosecute ~~said~~ the appeal with effect and pay all ~~cost and damages which~~ costs that may be adjudged against the appellant, ~~provided~~ except that the sureties shall not be liable in an amount greater than ~~$_____, said~~ $ _____, such amount being the amount of the bond herein.

NOW, THEREFORE, Appellant(s) _____ as principal(s) and _____, as surety and _____

~~NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and _____ as surety at _____ (address of surety),~~ as surety, acknowledge ourselves as bound to pay to _____ ~~county clerk of _____ County, Texas, the sum of $ _____~~, _____ appellee, the sum of $ _____, conditioned that appellant(s) shall prosecute the appeal with effect and will ~~perform an adverse judgment final on appeal~~ pay all costs of court in the event of an adverse final judgment on appeal.

~~"Given under our hands this _____ day of _____, A.D. _____."~~ _____ day of _____, 20 ___.

_____
~~Signature of Appellant~~

_____
~~Signature of Surety~~

_____
~~Signature of Surety~~

Appellant's signature Surety's signature Surety's signature

Appellant's telephone number Surety's printed name Surety's printed name

Surety's printed address Surety's printed address

Surety's telephone number Surety's telephone number

The appeal bond is:

☐ Approved

☐ Disapproved for the following reason: _____

Signed this _____ day of _____, 20 ___.

_____
Justice Presiding

~~RULE 750. SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT~~
(PROPOSED) RULE 750. POSSESSION PENDING APPEAL
BY TENANT TO COUNTY COURT

~~(a) In a forcible entry and detainer case an appellant who has perfected an appeal under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~
~~(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ; or~~
~~(2) filing with the justice court a good and sufficient supersedeas bond; or~~
~~(3) making a deposit with the justice court in lieu of a supersedeas bond; or~~
~~(4) providing alternate security as ordered by the justice court.~~

~~(b) Supersedeas Bonds~~
~~(1) must be in an amount required by this rule;~~
~~(2) must be made payable to the judgment creditor of the county in which the case was heard;~~
~~(3) must be signed by the appellant or the appellant's agent;~~
~~(4) must be signed by a sufficient surety or sureties as approved by the justice court.~~
~~(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.~~

~~(c) Deposit in lieu of supersedeas bond.~~
~~Instead of filing a surety supersedeas bond, a party may deposit with the justice court;~~
~~(1) cash;~~
~~(2) a cashier's check payable to the judgment creditor, drawn on any federally insured and federally or state chartered bank or savings and loan association; or~~
~~(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.~~

~~(a)Conditions of Liability~~
~~The surety of sureties on a bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor up to the amount of the supersedeas bond, deposit, or security if;~~
~~(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or~~
~~(2) the debtor does not perform an adverse judgment final on appeal.~~

~~(e)Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the county court will promptly issue a writ of supersedeas.~~

~~(f)Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;~~

~~(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;~~

~~(2) the amount of attorney's fees awarded for the appellee;~~

~~(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or~~

~~(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.~~

~~(5) Lesser amount. The justice court may order a lesser amount than required by subsections 1-4 above if the justice court finds that;~~

~~(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and~~

~~(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.~~

~~(g) Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.~~

~~(1) During the pendency of the appeal an appellant who is a tenant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. Upon sworn motion filed in county court, either party may contest the findings set forth in the justice court judgment as to rent or fair market rental value. The court may hold a hearing on the motion. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of the county court as they become due, the court must issue a writ of possession.~~

~~(2)During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:~~

~~(A) did not cause the agency to cease making the payments: and~~
~~(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.~~
~~(3)The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;~~
~~(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;~~
~~(B) dismissal of the appeal, or~~
~~(C) order of the court upon final hearing.~~
~~(4)All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(h)When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.~~

~~(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to enforce or suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.~~

~~(j)If the appeal is perfected and the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time. The duty of the defendant to pay rent into the registry of the county court as it becomes due exists even if the appeal is perfected by the approval of an affidavit of indigence.~~

~~(k) If the appeal is perfected by the approval of an affidavit of indigence, the defendant need not post a supersedeas bond, deposit, or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment.~~

(a) Right of Continued Possession.
A defendant who has perfected an appeal of an eviction case under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal by complying with the following procedure:

(1) filing with the justice court a written agreement with the plaintiff stating the terms under which the defendant may stay in possession; or

(2) depositing rent or rental value into the justice and county court registry as required by this rule.

(b) Rent Payments.

A defendant shall deposit rent, or rental value if there is no oral or written rental agreement, in the justice or county court registry in the form of cash, money order, or other mode of payment acceptable to the justice;

(c) Initial Deposit of Rent with Justice Court.

(1) A defendant who has perfected appeal by filing an appeal bond or making the required deposit in lieu of the bond and paying the county court filing fee is entitled to stay in possession of the premises by depositing any amount awarded by the justice court for unpaid rent and late fees under the rental agreement, or the amount awarded by the justice court for rental value as determined by the justice court if there is no oral or written rental agreement, within five days of the approval of the appeal bond or the deposit in lieu of the appeal bond.

(2) A defendant who has perfected appeal by filing an affidavit of indigence is entitled to stay in possession of the premises without depositing rent or other amounts into justice court, unless the eviction is for nonpayment of rent. If the defendant perfected appeal by filing an affidavit of indigence and the eviction is for nonpayment of rent, the defendant must deposit any alleged unpaid rent and late fees under the rental agreement, or the alleged unpaid rental value as determined by the justice court if no oral or written agreement, within five days of the filing of the affidavit or the overruling of any contest to the affidavit, whichever is later.

(3) The justice court may order a deposit less than that required under subparagraph (1) or (2) of this rule if the justice court finds that (i) the rent or a portion of the rent has been contracted to be paid to the landlord by third parties, (ii) the plaintiff has received no notice that the third party payments have ceased or will cease, (iii) the plaintiff has received all rent due from the third party under the third party's agreement with plaintiff or defendant, (iv) the plaintiff did not request the third party to cease making such third party's payments, and (v) justice requires a lesser deposit.

(4) If a defendant does not timely file an agreement between the defendant and the plaintiff, or deposit rent or rental value as required by this rule, the justice court shall, after notice to the parties and a hearing, issue a writ of possession pending appeal by the defendant. Except under Rule 740, a writ of possession may not be

issued until the expiration of five days after the date of the judgment in justice court.

(d) Rent Deposits with County Court.

(1) During the pendency of the appeal the defendant must pay rent, or if the defendant does not have a rental agreement that requires rent payment, the defendant must pay the value of the fair market rent of the premises as set by the justice court for each month, into the registry of the county court within five days of its due date under a rental agreement, or if there is no rental agreement, the first day of each month thereafter. Upon sworn motion filed in county court, either party may contest the justice court determination of the amount of rent or fair market rental value that must be deposited.

Upon motion by the tenant, the county court may order rent payments to be tendered in an amount less than that required under this rule if the court finds that (i) the rent or a portion of the rent has been contracted to be paid to the landlord by third parties, (ii) the plaintiff has received no notice that the third party payments have ceased or will cease, (iii) the plaintiff has received all rent due, from the third parties under the third party's agreement with plaintiff or defendant or such rent has been tendered to the county court, (iv) the plaintiff did not request the third party to cease making such third party's payments, and (v) justice requires a lesser deposit.

(2) If the defendant fails to make timely payments into the registry of the county court or breaches the terms of an agreement with the plaintiff allowing the defendant to stay in possession, during the appeal, the plaintiff may file a notice of default in the county court where the cause is pending. Upon sworn motion by the plaintiff, and a showing of defendant's default in making payments into the registry of the county court as they become due, the court may issue a writ of possession to plaintiff after notice to the defendant, and a hearing. No writ of possession may be issued by the county court until the expiration of five days from the date an order is signed, awarding possession to the plaintiff under this rule.

(3) The county court may allow a party to withdraw deposited amounts from the county court registry upon:

(i) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;

(ii) dismissal of the appeal, or

(iii) order of the court upon final judgment.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

~~Rule 751 Form of Supersedeas Bond~~
(PROPOSED) RULE 751. (NONE)

Note: Old Rule 751 entitled "Transcript" has been incorporated, in part into Proposed Rule 749(b).

~~The supersedeas bond authorized in the preceding article may be substantially as follows:~~

~~SUPERSEDEAS BOND~~

~~"The State of Texas"~~
~~"County of _____"~~
~~"Cause No. _____"~~

~~WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of _____ (plaintiff/defendant), hereinafter referred to as appellee against _____ (plaintiff/defendant), hereinafter referred to as appellant for;~~
~~____Possession,~~
~~____Court costs of $_____,~~
~~____Back rent and contractual late charges of $_____,~~
~~____Attorney's fees of $_____,~~
~~together with interest thereon from the date of the judgment, at the rate of ____percent per annum, from which judgment appellant has appealed to the county court of _____ County, Texas.~~
~~WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:~~
~~NOW, THEREFORE, WE _____ (appellant), as principal, and _____ as surety at _____ (address of surety), and _____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ (appellee), the sum of $_____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.~~

~~"Given under our hands this _____ day of _____, _____."~~

~~Signature of Appellant~~

~~Signature of Surety~~

~~Signature of Surety~~

(PROPOSED) RULE 752. DAMAGES

On the trial de novo of the cause in the county ~~court the appellant or appellee~~ court, the plaintiff or defendant shall be permitted to plead, prove and recover ~~his~~ damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal. Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney's fees in the justice and county courts provided, as to attorney's fees, that the requirements of Chapter 24 of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party.

(PROPOSED) RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The county clerk shall immediately notify all parties to the justice court judgment of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court and shall advise the defendant that default judgment may be entered unless a timely answer is filed. The style of the case in county court must be the same as in justice court.

(PROPOSED) RULE 753a. JUDGMENT BY DEFAULT IN COUNTY COURT

If the defendant has filed a written answer in the justice court, the same shall be taken to constitute the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and fails to file a written answer within ~~ten full~~ eight days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(PROPOSED) RULE 754. TRIAL OF THE CASE IN COUNTY COURT

(a) ~~The trial of a forcible entry and detainer appeal as well as all~~ The trial of an eviction appeal and all related hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of ~~a forcible entry and detainer, unless a written request for a~~ an eviction case unless, a request for jury trial is filed ~~with~~ and payment of jury fee is made to the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than five days in advance. ~~The fee required by law for requesting a jury trial in countycourt must be deposited with the county clerk within the time for making a written request for jury trial.~~ The clerk shall promptly enter a notation of any ~~the payment of such fee upon~~ jury fee payment on the court's docket sheet.

~~(c)Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.~~

(c) ~~(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time~~ The trial of an eviction case on appeal to county court shall be de novo and may be held any time after the expiration of ~~ten full~~ eight days after the date the justice court transcript is filed in the county court. The county court may set ~~appeals of forcible entry and detainer cases for~~ an eviction trial on written ~~motion~~ request of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. ~~The case shall be docketed in the county court in the name of the plaintiff in the justice court as plaintiff, and in the name of the defendant in the justice court as defendant.~~ Regardless of which party appealed from the ~~judgment in the~~ justice court, only the plaintiff in the county court may take a non-suit. If the county court's jurisdiction is invoked, ~~then it~~ the court must dispose of all parties and issues before the court, including the issue of possession unless the writ of possession has already been issued.

(d) ~~(e)~~ On written motion by ~~the appellee~~ a party contesting the sufficiency of the appeal ~~bond or the supersedeas~~ bond, the county court ~~may~~ shall hold a hearing on the ~~appellee's~~ motion. If ~~upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be~~ the judge finds the bond deficient, the ~~court~~ judge may disapprove the bond and allow the ~~appellant~~ appealing party five days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected ~~then~~ within the five-day period, the bond may be approved. If the deficiencies on the appeal bond are not corrected ~~then~~ within the five-day period, the appeal may be ~~dismissed~~ and the writ of possession shall issue. ~~If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession~~.

(e) ~~(f) When the appellant~~ If the appealing party fails to prosecute the appeal with ~~effect~~ diligence or the county court renders judgment against the ~~appellant, then~~ party, the county court

~~must~~ shall also render judgment against the surety or sureties on the ~~appellant's~~ appeal ~~bond or supersedeas~~ bond, for the ~~performance of the judgment~~ costs of court up to the amount of the bond.

(PROPOSED) RULE 755. WRIT OF POSSESSION IN COUNTY COURT

The writ of possession~~, or execution, or both,~~ shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, ~~as in other cases; and such writ of possession shall not be suspended or superseded or in any case by appeal from such final judgment in the county court unless the premises in question are being used for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.~~ However, if the defendant is leasing a manufactured home lot, the writ of possession shall be issued as provided in Section 94.203 of the Texas Property Code, as amended. A writ of possession issued from a county court may not under any circumstances be issued until the expiration of ten days after the signing of the judgment and only if the appellant has not filed a supersedeas bond in an amount set by the county court. The writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used for residential purposes only. The county court shall give precedence to the hearing to set the amount of the supersedeas bond necessary to suspend the judgment or the portion of the judgment the appellant elects to supersede.

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REPLY TO:
P.O. BOX 4547
HOUSTON, TEXAS 77210

May 14, 2002

Via email tom_lawrence@jp.co.harris.tx.us

Judge Tom Lawrence
Precinct 4 Position 2
7900 Will Clayton Rd.
Humble, Texas 77338

RE: Eviction Rules 738 – 755 Ver. 7.7 (5/06/02)

Dear Judge Lawrence:

As you know, the undersigned attorney is the general counsel to the Houston Apartment Association. Thank you for the opportunity to comment on the proposed eviction rules being considered by the Supreme Court Advisory Committee. The following are my comments (if a rule is not addressed, I don't have any comment to the proposed rule):

1. GENERAL COMMENTS.

It is essential that we preserve the eviction process as a summary, inexpensive, expedited and efficient remedy for landlords to allow good, rent paying tenants to remain in the premises free of problem tenants and that landlords can effectively address problems caused by tenants that are in default of their leases, present a danger to others or hold over after the termination of their leases.

- If there is the potential for delay in the eviction process, tenants will stay in possession of a rented premises without paying rent or when continuing to be a problem for others that live (or work) at the property.

- If the eviction process becomes too expensive, landlords will have no choice but to pass those expenses on to tenants in the form of increased rent. The tenants that pay rent in a timely fashion and comply with their leases will have to absorb these increased costs.

2. RULE 739. CITATION.

I would suggest deleting the last sentence which has been added to the first paragraph (see comments to rule 741).

3. RULE 740. COMPLAINANT MAY HAVE POSSESSION. Version #2.

Ideally, this rule will be used by landlords as a remedy to address the concerns of tenants of a property that one tenant is presenting a danger to others that live (or work) at a property. Although law enforcement should be called whenever a crime has been committed and the eviction process should not be looked at as a security measure, if a tenant presents a danger to others that live (or work) at a property, a means by which a landlord can use this rule to obtain possession prior to the 3 or 4 weeks (from notice to vacate to writ, absent appeal) would be beneficial.

- In order to make this process meaningful, all time periods should be shortened. A defendant could remain in possession if either the counterbond is filed or demand for trial is made within 2 days. If the counterbond or demand for trial is made within this time period, the trial could be held within 2 days after the counterbond is filed or demand is made. If the counterbond or demand is not filed or made, writ would immediately issue. If a trial is held and the judgment is for the plaintiff, the writ of possession could issue within 2 days, as long as the defendant does not appeal the justice court ruling within the 2-day period.

- With a maximum 6 day process from service to writ, a landlord would be able to use this rule as it is intended, to rid the property of a dangerous tenant.

- The nonjury approach is preferred due to the potential delay in impaneling a jury.

- Since the defendant's right to appeal to the county court after a justice court ruling will remain intact, a defendant that has a valid defense should not be prejudiced by this expedited proceeding.

4. RULE 741 REQUISITES OF COMPLAINT.

Generally, the requisites of a complaint should be those that allow the court to determine whether it has jurisdiction and not limit access to the courts. If a plaintiff is required to attach the information required in the proposed rule, and the plaintiff does not attach the required documents, a plaintiff may be jeopardized from going forward in the justice court, even if the merits of the plaintiff's case can be proven at the time of trial. I am not aware of any problem with the current rule; I would suggest that the current rule remain.

- The eviction process is designed to be used by non-attorneys that need a summary, expedited, efficient and inexpensive process to recover possession from problem tenants. To the extent that the rules become too burdensome or complicated, the rule would defeat the purpose of the eviction process.

- If a plaintiff is required to attach certain information but does not, an argument might be made that the plaintiff may not go forward. This will severely jeopardize the plaintiff from pursuing rights under the eviction process.

- The Texas Property Code already requires that a notice to vacate be given by a landlord to a tenant as a prerequisite to proceeding with an eviction action. It has not been my experience that a tenant is unaware of lease provisions or the reasons why an eviction is being pursued.

- If a tenant receives federal assistance with the payment of rent, a notice of proposed termination under which a tenant is able to request a meeting to discuss the proposed termination of tenancy with a landlord is also given.

- It is unnecessary to introduce these additional burdens and complexities into the rules. The justice has the authority to develop the facts at trial in any manner the justice so desires. The rules (current or proposed) would not prevent a justice from asking whatever questions, or requiring whatever documents, the justice may require to determine the merits of an eviction proceeding.

5. RULE 742. SERVICE OF CITATION.

This proposal introduces the concept that private process servers may serve citation in eviction cases. We have had no problems with the constable serving evictions.

6. RULE 743. DOCKETED.

I would strongly suggest that the rule does not provide for any discovery.

- The discovery process can be easily abused and will disrupt the longstanding policy that evictions are meant to be summary and inexpensive proceedings.

- If a defendant is allowed to ask for depositions, requests for production, interrogatories, etc., the parties and justices will be required to entertain discovery motions, deal with discovery disputes and schedule discovery proceedings. There will be no choice but to delay the eviction trial pending the outcome of these motions, disputes and proceedings.

- Discovery is not necessary in an eviction process. Justices can certainly use discretion in allowing facts to be developed at trial. Justices can ask questions, review documents, examine evidence, etc. to the extent the justice so requires to determine the merits of a case.

- The eviction process is most often used by non-attorneys. The parties will have no choice but to obtain the assistance of attorneys if discovery is pursued. This will increase the cost of an eviction, thereby increasing rents.

- The benefit the parties receive from introducing the discovery process into eviction actions will be far outweighed by the negative impact discovery will have on the process as a summary and inexpensive proceeding.

- Crowded eviction dockets will become even more crowded with additional hearings, motions and discovery issues.

7. RULE 745. TRIAL POSTPONED.

The rule should allow one postponement upon a showing of exceptional circumstances, etc., rather than incorporating two postponements. Additional postponements (after the first postponement) can be granted upon the agreement of the parties.

- There is no reason to delay the proceeding unilaterally more than one time.

- The eviction process is designed to be a summary and speedy mechanism for landlords to obtain possession from a problem tenant. Multiple unilateral postponements is unwarranted and should not be available to a party without the agreement of the other party.

8. RULE 748. JUDGMENT AND WRIT.

The proposed rule creates additional burdens for the parties by requiring that the judgment contain more detailed information. While I appreciate the need for certain information to be contained in judgments, I am not aware of any problems we have had with the form or content of judgments. This approach raises the issue of whether a judgment would be valid if it did not meet the requirements of this rule and begs the question of who should suffer the consequences of a faulty judgment.

- The word "authorized" in the 9th line of the first paragraph should be changed to "sought". The prevailing party should only be entitled to a judgment for attorney's fees if "sought" and established by proof. Since this is already required in the proposed rule with respect to the plaintiff's right to recover attorneys fees, this change would make the proposal reciprocal.

- The judgment should not be required to be "in a separate document". It is my understanding that many judges render their judgment on the docket sheet (which may or may not be considered in a separate document) or on the file jacket.

- If the judgment does not meet the requirements of this rule, could the judgment be argued to be void? Can the landlord be exposed to a wrongful eviction action if the landlord relies on a judgment that fails to follow the requirements of this rule? If the landlord is going to be prejudiced in any way by the form of the judgment not being in accordance with this rule, the effect of the rule is far too harsh on parties that are not represented by counsel.

- If any specific requirements are adopted, the rules should expressly state that, if the judgment does not meet these requirements, the judgment remains in full force and effect to the extent provided in the judgment.

- Since the county court hears the appeal de novo, if there are any problems with the judgment or information in the judgment, the county court can revise the judgment accordingly in its proceeding.

9. RULE 749. MAY APPEAL.

I would suggest that no additional motions be infused into the process. The proposed rule should not change the existing rule which states that no motion for new trial shall be filed. While I understand that you would like to allow a motion to set aside a default judgment if one party shows up late after a default judgment has been rendered, in order to maintain the eviction process as an expedited summary proceeding, the party subject to the default judgment would be required to either appeal or refile, as the case may be. Introducing a motion practice into the provisions will create the potential of delay in having to consider the motion and reschedule a trial. Since the appeal is by trial de novo, if a party suffers a default judgment, but has a meritorious defense, the party can appeal and have the case retried at the county court level.

- Even though subsection (a) provides that the filing of a motion does not extend the deadline to perfect an appeal, if a motion is able to be filed, the rule can be abused, disrupt the intended eviction process and cause the parties to spend unnecessary time and expense to deal with this motion.

- For the sake of judicial economy as well as the cost associated with making an extra appearance for the parties, I would suggest that we simply allow the judgment to be appealed or not, as the case may be, within 5 days from the date the judgment is signed.

- Since the trial is de novo in the county court, neither party should be prejudiced by keeping the concept unchanged.

- On some of these longer rules, such as this rule, it may be beneficial to break it down into sub-rules with subtitles. In order to minimize confusion and to make each rule a little less complicated I would suggest that rule 749 describe all the ways in which a party can appeal and then subsequent rules 749(a), 749(b), etc. can address one of the ways by which a party may appeal.

- In subparagraph (e), I would suggest that if the proper filing fee is not paid to the justice court, a prevailing plaintiff should be entitled to obtain a writ of possession from the justice court before the case is transferred to the county court. This would eliminate the delay a plaintiff often faces waiting for the case to be docketed in a county court so that a writ can be obtained.

10. RULE 749(b). APPEAL PERFECTED.

I would suggest that the third sentence of the third paragraph be changed to: "If the appeal is an appeal of a judgment which includes a judgment for possession and court costs, then the tenant's failure to pay a supersedeas bond, when required, will allow the appellee to seek a writ of possession, and the issues of possession may not be further litigated in the forcible entry detainer action in the county court". This change is necessary to avoid certain problem situations and potential issues. If a supersedeas bond is not filed (thereby not suspending the enforcement of the judgment) and a landlord obtains the writ of possession and relets the premises, but then the tenant prevails in the appeal and is re-awarded possession, how will this work since the premises is no longer available? The issue of possession should no longer be a valid issue on appeal if the supersedeas bond was not obtained.

11. RULE 749c. FORM OF APPEAL BOND.

The form of appeal bond should require the addresses and phone numbers of the sureties.

12. RULE 750. SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT.

Generally the concept of a suspension of the judgment seems to work; however, with any new concept, this will raise some issues.

- In subparagraph (a), if a suspension of the enforcement of the judgment is based upon an agreement between the parties, and that agreement is breached, can the plaintiff appear before the court and obtain a writ of possession, without proceeding with a full blown eviction trial? If not, is there value, from a plaintiff's standpoint, in allowing the suspension of the judgment based upon an agreement?

- In subsection (d), there should be a time deadline for performance of the justice court's judgment (in subpart (1) and subpart (2) needs to be reworded. I believe the language should be: "the debtor does not comply with an adverse final judgment on appeal". Additionally, subpart (2) should have a time deadline (perhaps 30 days) on performance of the appellate judgment.

- In the last sentence of subsection (e), the proposed rule states that if execution of a writ of possession has been issued, the county court will promptly issue a writ of supersedeas. This illustrates my prior concern with respect to a landlord's exposure if a writ of possession is served and a subsequent writ of supersedeas is obtained, but the landlord has relet the premises to another tenant. Generally, the supersedeas bond should be required to be filed in the justice court and, if not filed, the justice court may issue the writ of possession. If a writ of possession was issued, a writ of supersedeas should not be later available to the party.

- In subsection (f), there are not parameters whereby a justice court can order a lesser amount. If the "irreparable harm" of a tenant is that the tenant can't afford to pay the rent, the tenant should not be able to stay in the premises.

- In subsection (g), it should be clarified that the "amount of fair market value" is only relevant when the lease does not identify a rental amount or if there is no lease. Additionally, in subpart (2)(B), this should only be effective if the landlord is not able to "immediately" take action. Also, this section should be clarified to apply only if a governmental agency is responsible "to the landlord" for payment of a portion of the rent. This would eliminate a situation where the tenant has arranged with a governmental agency to pay a portion of the rent, but this arrangement has not been previously agreed to by the landlord.

- In subsection (g), I would suggest that this section be a separately identified rule, to identify the importance of the effect of an appellant's not paying rent into the registry of the court. Also, it should be made clear in this section that the payment into the registry of the court must be made with any type of appeal. Also, as indicated above, I would suggest a requirement that something be paid into the registry of the court within 5 days from the date the judgment is signed and that this payment be required in order to perfect the appeal under rule 749b.

13. RULE 751. FORM OF SUPERSEDEAS BOND.

I have the same comment as Rule 749c.

14. RULE 752. DAMAGES.

I would suggest adding contractual late fees and interest to the damages that can be recovered in the second paragraph.

15. RULE 753a. JUDGMENT BY DEFAULT.

I would suggest not changing that the written answer must be filed within 8 days.

16. RULE 754. TRIAL OF THE CASE IN COUNTY COURT.

I have the same comments with respect to subsection (c) as I did for rule 743. Additionally, in subsection (d), I would suggest that 8 days remain as the beginning time frame for trials to be held.

I appreciate the opportunity to discuss my comments or any of the proposed rules with you or the Supreme Court Advisory Committee. Once you have had an opportunity to review my comments, please let me know if you have any questions.

Very truly yours,

HOOVER SLOVACEK LLP

Howard M. Bookstaff

HMB:dm/

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Draft of Proposed Eviction Rules – May 8, 2002

SECTION 3. EVICTION

Comment: Rather than use "forcible detainer" and "forcible entry and detainer," the term "eviction" is used to include both suits. This term is consistent with Sections 24.005(e), 24.006, 24.0061, 24.007, 24.008, 24.011, 92.331, 92.332, and 92.335 of the Texas Property Code.

RULE 738. JOINDER OF ADDITIONAL CLAIMS

A claim for rent and a claim for attorney's fees may be joined with an eviction suit when the rent amount and attorney's fees are within the jurisdictional limits of the justice court.

Comment: The proposed rule provides that a claim for attorney's fees may be joined. All proposed rules consistently refer to a "plaintiff" and a "defendant" (as opposed to an "aggrieved party," an "appellant" or "appellee," or a "landlord" or "tenant"). Post- judgment interest and costs are allowed, but addressed in subsequent rules where appropriate. This rule relates to other claims.

RULE 739. CITATION

(a) When a plaintiff or the plaintiff's authorized agent files a written sworn complaint for eviction, the justice shall immediately issue citation directing the defendant to appear for trial before the justice at a time, date and place named in the citation, on a date not less than six nor more than ten days from the date of service of the citation. In lieu of directing the defendant to appear for trial, the justice may in the citation direct the defendant to answer orally or in writing with the clerk of the court by the time, date and place named in the citation. The citation shall inform the parties that upon request and payment of a jury fee no later than five days after the defendant is served with citation the case shall be heard by a jury. The officer or other authorized person serving the citation and shall return the citation to the justice who issued the citation at least one day before the answer date or trial date designated in the citation.

(b) The citation shall include the following warning in English and Spanish in bold type on the citation:

"NOTICE: A lawsuit has been filed to attempt to evict you. There are some immediate deadlines. You should have these papers translated immediately.

NOTICIA: Una demanda ha sido archivada contra usted para tratar de expulsarlo. Hay algunas cosas con venciminto y se deben de hacer de inmediato. Usted debe traducir estos papeles inmediatamente."

The justice may state this warning in other languages, as well.

> ***Comment:** The proposed rule allows the justice to select the procedure that best fits his or her docket. The proposed rule allows the justice to set the trial date to occur within six to ten days of the defendant being served, or allows the justice to require an answer be filed within this time period, with the trial to be set only if an answer is filed. The latter method is widely used to more accurately predict the number and duration of trials and eliminate the necessity for plaintiffs and their attorneys to show up on the answer date when the defendant does not plan show up or appear. The proposed rule also provides for a warning to be included on the citation in English and Spanish that clearly warns the defendant about the possibility the defendant could be evicted. The proposed rule gives the justice the discretion to provide other translations of the warning when other populations that speak different languages are present.*

RULE 740. POSSESSION BOND

(a) The plaintiff may, at the time of filing an eviction suit, file a possession bond to be approved by the justice, in a form provided in Rule 740a, and in such amount as the justice may fix as the probable costs of suit and damages which may result to defendant if the suit has been improperly instituted but not less than four times the monthly rent. The bond shall be conditioned that the plaintiff will pay the defendant all costs and damages as shall be adjudged against plaintiff.

(b) The justice court shall notify the defendant that the plaintiff has filed a possession bond. The notice shall be served on the defendant in the same manner as service of citation in an eviction

suit and shall inform the defendant of the procedures in subparagraphs (c) and (d) below. Unless otherwise requested by plaintiff, the answer date shall be the trial date and shall be set six days from the service of the citation and notice of the bond, and the date shall be specifically designated in the citation. The officer or other authorized person serving notice of the possession bond shall return the notice to the justice who issued the notice at least one day before the trial date designated in the citation.

(c) Unless the defendant appears for trial as directed in the citation, the justice shall, on request of the plaintiff, enter a default judgment and issue a writ of possession immediately. If the defendant appears for trial as designated in the citation, the case shall be tried in the same manner as other eviction suits; and any writ of possession may be issued and executed only according to Rule 748.

(d) Whenever a justice court issues a writ of possession under this rule, the defendant may appeal
in the same manner as a defendant may appeal an eviction judgment when a possession bond has
not been posted.

> ***Comment:** The proposed rule clarifies the prior rule. The proposed rule makes clear that if a plaintiff posts a possession bond, the defendant must appear for trial as designated in the citation; otherwise, a writ of possession can be immediately issued by justice court on the designated trial date. The judgment is subject to appeal. The provisions in the current rules regarding a demand for trial or the posting of a counterbond have been eliminated because these are unnecessary. The proposed rule indicates that a designated bond form must be used and it shall be set at a minimum of four times the monthly rent.*

RULE 740a. POSSESSION BOND FORM

To be approved by the justice, the possession bond must be in substantially the same form as
follows:

CAUSE NO. _____

_____	§	**IN THE JUSTICE COURT**
Plaintiff	§	
	§	
v.	§	**PRECINCT _____**
PLACE ____		
	§	
_____	§	
Defendant	§	**_____ COUNTY,**

TEXAS

POSSESSION BOND

The above entitled and numbered eviction has been filed by Plaintiff. Plaintiff wishes to invoke the procedures of Rule 740 of the Texas Rules of Civil Procedure. Therefore, Plaintiff, and the sureties listed below, represent and warrant that Plaintiff has properly instituted this eviction suit and will pay Defendant costs of suit and damages that may be adjudged against Plaintiff in the event this suit has been improperly instituted in amount not greater than $_____.

NOW, THEREFORE, We, _____, Plaintiff, as principal and _____., as surety at _____ (address of surety), and _____ as surety at _____ (address of surety) acknowledge ourselves as bound to pay to _____ Defendant, the sum of $_____, which amount is at least four times the monthly rent for the premises, in the event that Plaintiff has not properly instituted this eviction suit against Defendant.

Given under our hands this _____ day of _____, 20____.

_____	_____	_____
Signature of Plaintiff	**Signature of Surety**	**Signature of Surety**

The possession bond is:

☐ **Approved**
☐ **Disapproved for the following reason:**

_____
_____
____

Signed this _____ day of _____, 20____.

_____
Justice Presiding

Comment: The proposed rule provides a form for the possession bond.

RULE 741. REQUISITES OF COMPLAINT

The sworn complaint shall describe the premises, the possession of which is claimed, with sufficient certainty. It shall also state the facts that entitle the plaintiff to possession and authorize the suit under Chapter 24 of the Texas Property Code.

Comment: No substantive changes.

RULE 742. SERVICE OF CITATION

(a) Persons Authorized to Serve Citation in Eviction Suits.

Persons authorized to serve citation in eviction suits include: (1) any sheriff or constable or other person authorized by law; and (2) any person who is authorized by written order of the court and is over eighteen years of age. No person who is a party to or interested in the outcome of a suit may serve any process.

(b) Method of Service of Citation.

The officer or other person authorized to serve citation shall serve the citation by delivering a copy of it to the defendant, or by leaving a copy with a person over the age of sixteen years at the premises in question at least six days before the trial date or answer date, as specified in the citation. The person serving the citation shall return the citation to the justice who issued it at least one day before the trial date or answer date specified in the citation. The officer or authorized person shall state on the citation when it was served and the manner of service, and it shall be signed by the officer or authorized person.

Comment: The proposed rule provides the justice with the option of using persons other than sheriffs or constables to serve citations. This is proposed to provide greater flexibility to plaintiffs. The proposed rule requires the return of service to be filed with the court one day before the answer date or trial date (whichever date is designated by the justice in the citation). It does not appear necessary for the return to be filed any sooner.

RULE 742a. SERVICE BY DELIVERY TO PREMISES AND MAIL

(a) If the sworn complaint lists all home and work addresses of the defendant known to the plaintiff and if service of citation cannot be readily accomplished under Rule 742, service of citation may be by delivery and mail under subparagraph (b) of this rule.

(b) If the officer or other person authorized to serve citation in eviction suits is unsuccessful in serving citation under Rule 742, the officer or other authorized person shall no later than five days after receiving the citation sign an affidavit based on personal knowledge, confirming that diligent efforts have been made to serve the citation on at least two occasions at all addresses of the defendant in the county where the premises are located. The affidavit shall state the times and places of attempted service. The attempts for service at the home address shall be at least four hours apart; and the attempts for service at a work address, if any, shall be at least four hours apart. The affidavit shall be filed with the justice. After promptly considering the affidavit, the justice may then authorize service by written order according to the following:

> **(1) The officer or other authorized person shall place the citation inside the premises through a door mail chute or by slipping it under the main entry door to the premises; and if neither method is possible or practical, the citation shall be securely affixed to the top half of the main entry door to the premises;**
>
> **(2) The officer or other authorized person shall that same day deposit in the United States mail a copy of the citation with a copy of the sworn complaint attached to it, addressed to the defendant at the premises in question and sent by first class mail;**
>
> **(3) The officer or other authorized person shall note on the return of the citation the date of delivery and the date of mailing under this rule. The return of the citation by an authorized person shall be verified; and**
>
> **(4) The delivery and mailing to the premises under this rule shall occur at least six days before the trial date or answer date as specified in the citation. The officer or other authorized person accomplishing service shall return the citation to the justice who issued it.**

It is not necessary for the plaintiff or the plaintiff's authorized agent to make a request or motion for alternative service under this rule.

Comment: The proposed rule does not eliminate the requirement that the plaintiff identify known work addresses to serve the defendant. Because eviction suit time frames are so short and involve possessory rights to a person's dwelling, the threshold for constitutional due process compliance is higher. Alternative service should be sought only after diligent efforts to serve a defendant personally have been unsuccessful. The proposed rule does not require the plaintiff to search for unknown addresses of the defendant. It is only for identification of possible locations at which the defendant may be served if those locations are already known to the plaintiff. The proposed rule further requires that multiple attempts to serve a defendant at one location be separated by four hours such that a second attempt constitutes a good faith effort to truly accomplish personal service. The requirement that the citation be posted on the top half of the entry door is to minimize the chance that small children might reach and remove it before the defendant sees it.

RULE 743. DOCKETED

The suit shall be docketed and tried as other cases. If the defendant fails to file an answer or appear for trial as designated in the citation, the allegations of the complaint may be taken as admitted and judgment by default entered. If the plaintiff fails to appear when the case is called for trial, the case may be dismissed for want of prosecution. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance and to punish for contempt.

RULE 744. REQUEST FOR JURY

Any party shall have the right of trial by jury, by making a request to the court and paying the jury fee on or before five days from the date the defendant is served with citation. Upon such request, a jury shall be summoned at the earliest opportunity, as in other justice court proceedings.

Comment: No substantive changes from the prior rule. The amount of the fee is removed because this is set in the Texas Government Code.

RULE 745. TRIAL POSTPONED

For good cause shown by affidavit of either party, the trial may be postponed by the justice for a period not exceeding seven days. Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the justice's own motion, the trial may be postponed for an additional seven days. The trial may be postponed for a longer period by agreement of all parties if the agreement is in writing and filed with the court, or the agreement is made in open court.

Comment: The proposed rule extends a continuance to a maximum of seven days instead of six. Since many justices control dockets on a weekly schedule, the rule gives the justice the ability to continue a trial to a day more likely to fit the court's normal caseload. The proposed rule also gives the justice the discretionary ability to postpone the trial an additional seven days in exceptional circumstances. The trial may be postponed for a longer period by agreement of all parties.

RULE 746. ONLY ISSUE

Except as provided in Rule 738, the only issue in an eviction suit under Chapter 24 of the Texas Property Code is the right to actual possession. The merits of the title shall not be adjudicated.

Comment: No substantive changes.

RULE 747. TRIAL

If a jury trial is not timely requested by either party, the justice shall try the case. If a jury trial is timely requested by either party, a jury shall be impaneled and sworn as in other cases. After hearing the evidence, the jury shall return its verdict in favor of the plaintiff or the defendant.

Comment: No substantive changes.

RULE 747a. REPRESENTATION BY AGENTS

In eviction cases for nonpayment of rent or holding over beyond the rental term, the

parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

Comment: The proposed rule tracks the language of Section 24.011 of the Texas Property Code.

RULE 748. JUDGMENT AND WRIT

(a) The justice shall grant judgment for plaintiff or defendant for possession of the premises, post-judgment interest, and costs. The justice may also grant judgment for rent and attorney's fees, if pleaded, established by proof, and authorized by the rental agreement or statute.

(b) The judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the sworn complaint, and shall state for and against whom the judgment is rendered. The judgment shall recite who is awarded:

(1) possession of the premises;

(2) rent, if any, and the amount;

(3) attorney's fees, if any, and the amount; and
(4) court costs and the amount.

Any judgment for rent and attorney's fees shall be within the jurisdiction of the court.

(c) No writ of possession shall issue until the expiration of five days after the date the judgment is signed, but the writ shall be issued immediately under Rule 740 if a default judgment is granted. However, if the defendant is leasing a manufactured home lot, the writ of possession shall be issued as provided in Section 94.203 of the Texas Property Code, as amended.

(d) If the judgment of the justice court is not appealed, it shall remain in force and a prevailing party may enforce their rights under the judgment in the justice court. If an appeal

from the justice court is perfected in accordance with Rule 749b, the county court's jurisdiction is invoked and the justice court may not enforce the judgment. The judgment of the court will be vacated as a matter of law when the appeal from the justice court is perfected.

(e) This rule does not prohibit the county court from making an independent determination, either on its own motion or on sworn motion of either party, as to the amounts and due dates of rent to be paid into the registry of the county court during the pendency of the appeal.

Comment on subparagraph (c): The proposed rule requires that the justice has to decide only who is entitled to possession of the premises, the amount of rent and attorney's fees and court costs. No fact findings are required.

Comment on subparagraph (d): The proposed rule clarifies when a writ of possession can be issued. Typically, a writ can issue on the sixth day after a judgment is entered for plaintiff, but the proposed rule clearly states that the writ can be issued immediately in possession bond cases where the court has entered a default judgment because the defendant did not appear for trial as designated in the citation. The proposed rule also incorporates and references the new statute on the issuance of a writ of possession where the defendant is leasing a manufactured home lot.

Comment on subparagraph (e): The proposed rule follows existing law on de novo appeals. Once a party perfects appeal from a justice court judgment, the judgment is a nullity as a matter of law. See Mullins v. Coussons, 745 S.W.2d 50 (Tex. App.–Houston [14th Dist.] 1987, no writ); Poole v. Goode, 442 S.W.2d 810, 813 (Tex. Civ. App.–Houston [14th Dist.] 1969, writ ref'd n.r.e.); Hall v. McKee, 179 S.W.2d 590, 592 (Tex. Civ. App.–Fort Worth 1944, no writ).

Comment on subparagraph (f): The proposed rule gives the county court the authority to make its own determinations regarding any rent if such sum of money is required under the rules to be deposited by a defendant in order to stay in possession pending an appeal.

RULE 749. MAY APPEAL

(a) Either party may file a motion for new trial. A motion for a new trial is not a

prerequisite to appeal and does not extend the time to appeal. A motion for a new trial shall be verified and state the grounds for the new trial. The justice may rule upon the motion without conducting a hearing. The motion shall be overruled by operation of law if it has not been ruled upon by the justice within five days of the date the judgment is signed by the justice. If the motion for new trial is granted, the new trial must be heard within five days of the original judgment. If a default judgment has been entered in a case in which a possession bond has been filed, and the justice grants a motion for a new trial after the writ of possession has been issued, the court shall issue an order withdrawing the writ of possession if it has not already been executed.

(b) Either party may appeal from a judgment in an eviction case to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed: (1) an appeal bond to be approved by the justice and depositing with the justice court the filing fee required by that county to appeal a case to county court; or, (2) depositing with the justice court the amount of the appeal bond and the county court filing fee in accordance with subparagraph (f) of this rule, or in lieu, an affidavit of indigence showing an inability to pay the appeal bond or deposit and the county court filing fee. The filing fee must be made payable to the county clerk of the county in which the case was heard in justice court.

(c) The justice shall set the amount of the appeal bond at an amount equal to the costs incurred in justice court.

(d) The justice court shall immediately forward all papers in the case file to the county clerk, along with (1) the appeal bond, or deposit in lieu of an appeal bond, and the filing fee, or (2) the affidavit of indigence.

(e) Except as stated in subparagraph (f), an appeal bond must meet the following criteria:

(1) It must be in an amount equal to the court costs incurred in justice court;

(2) It must be made payable to the adverse party;

(3) It must be signed by the judgment debtor or the debtor's authorized agent; and

(4) It must be co-signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(f) Instead of filing an appeal bond, a party may deposit the amount of the appeal bond in:

(1) cash;

(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or

(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(g) Any motions challenging the sufficiency of the appeal bond may be filed with the county court.

(h) Within five days following the filing of an appeal bond, a deposit in lieu of an appeal bond under subparagraph (f) of this rule, or an affidavit of indigence under Rule 749a, the party appealing shall give notice of the filing of the bond, deposit or affidavit to the adverse party. No default judgment may be taken by a party in county court without the party showing substantial compliance with this rule.

(i) If a default judgment has been entered in a case in which a possession bond has been filed, the defendant may still appeal after the writ of possession has been issued and executed,

so long as the appeal is filed within five days of the date the judgment is signed. If the defendant timely files an appeal and the writ of possession has been issued but not yet executed, the court shall issue an order withdrawing the writ of possession.

Comment on subparagraph (a): The proposed rule gives the justice a discretionary right to grant a new trial where circumstances may justify a new trial. This is most likely to occur in default judgment cases where the defendant demonstrates to the court in the motion for new trial that a valid defense exists. The justice does not have to set the motion for a hearing or even consider the motion at all. If the justice does not set it for hearing, it will be automatically overruled. Filing the motion does not extend the deadline for filing an appeal or otherwise delay the issuance of a writ of possession (unless the motion is granted). If the motion is granted the new trial is to be heard within five days of the original judgment. The proposed rule gives the justice the ability to withdraw a writ of possession if one has been issued but not yet executed, if the justice grants a motion for new trial.

Comment on subparagraph (c): The proposed rule requires that the amount of the bond be equal to the costs incurred in justice court.

Comment on subparagraph (f): The proposed rule provides for methods of payment other than cash.

Comment on subparagraph (i): The proposed rule identifies the parties as "plaintiff" and "defendant" since any appeal to the county court is de novo, and the parties will keep these designations in any county court trial.

RULE 749a. AFFIDAVIT OF INDIGENCE

(a) Establishing Indigence.

A party who cannot pay the costs to appeal to the county court, including the county court filing fee, may proceed without filing an appeal bond and paying the county court filing fee or making a deposit under Rule 749(f) if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of Affidavit.

The affidavit of indigence must identify the party filing the affidavit and state the amount of
costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns other than household furnishings, children's
toys and wearing apparel;

(4) cash the party owns and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party; and

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed.

An appealing party must file the affidavit of indigence in the justice court within five days after the justice court judgment is signed.

(d) Duty of Clerk or Justice of the Peace.

Upon the filing of an affidavit of indigence, the justice of the peace or clerk of the court shall give notice to the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) Contest to Affidavit.

The opposing party may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice court clerk or justice of the peace to the opposing party. The contest need not be sworn.

(f) No Contest Filed.

If a contest is not timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed under subparagraph (a) of this rule.

(g) Burden of Proof.

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the party who filed the affidavit is incarcerated at the time the hearing on a contest is held, the affidavit shall be considered as evidence and shall be sufficient to meet the party's burden to present evidence without the party's attendance at the hearing.

(h) Hearing and Decision in Justice Court.

(1) Notice required.

If the affidavit of indigence is filed in justice court and a contest is filed, the justice court shall set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court shall either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.
The time for conducting a hearing shall not be extended for more than five

days from the date the extension order is signed.

(4) Time for written decision; effect.

If the justice court does not timely sign an order sustaining the contest, the affidavit of indigence shall be deemed approved, and the party shall be allowed to proceed under subparagraph (a) of this rule.

(i) Appeal from the Justice Court Order Disapproving the Affidavit of Indigence.

(1) If the justice of the peace disapproves the affidavit of indigence, the appealing party may appeal the order disapproving the affidavit by filing within five days thereafter a motion in county court seeking de novo review of the justice court order. On request, the justice shall send to the county court the affidavit of indigence, any written contest, and the justice court's order on the contest. The county court shall hold a de novo hearing and rule on the matter within five days from the date the motion is filed with the county court. If the affidavit of indigence is approved by the county court, it shall direct the justice to send to the clerk of the county court, the complete transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, the appealing party may perfect an appeal of the justice court judgment by filing an appeal bond, or, in lieu depositing the amount of the appeal bond in accordance with Rule 749(f), and paying the county court filing fee to the justice court within five days of the date the county court signs the order. If no appeal bond is filed in the justice court within five days, the justice court may issue a writ of possession.

(2) A writ of possession may not issue pending a hearing by the county court on the appealing party's right to appeal on an affidavit of indigence.

Comment to subparagraph (b): The proposed rule follows Rule 20 of the Texas Rules of Appellate Procedure except that it does not require a listing of the party's household furnishings, children's toys and wearing apparel, and it requires a listing of cash the party "owns" rather than "holds." Also, unlike Rule 20, the proposed rule does not require that the party represent that legal services are being provided without a contingency fee.

Comment to subparagraph (i): The proposed rule incorporates a modified procedure to contest an affidavit of indigence and appeal the justice's finding of indigency or non- indigency.

RULE 749b. APPEAL PERFECTED

(a) An appeal of the justice court judgment shall be perfected when the appealing

party timely files:

(1) an appeal bond, or deposit in lieu of an appeal bond in conformity with Rule 749, and
pays the filing fee required for the appeal of cases to the county court; or

(2) an affidavit of indigence approved in conformity with Rule 749a.

(b) When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on its docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond or deposit, in lieu in conformity with Rule 749, and the county court filing fee, or the affidavit of indigence approved in conformity with Rule 749a, with the county clerk of the county in which the case was heard.

(c) The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both plaintiff and defendant of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

(d) The perfection of an appeal in an eviction case does not suspend the issuance and execution of a writ of possession if a judgment for possession is granted for the plaintiff in justice court unless the defendant has complied with Rule 750.

(e) No factual determination in an eviction case, including determination of the right to possession, will be given preclusive effect in other suits that may be brought between the parties.

Comment: No substantive changes.

RULE 749c. FORM OF APPEAL BOND

The appeal bond may be substantially as follows:

CAUSE NO. _____

_____	§	IN THE JUSTICE COURT
Plaintiff	§	
	§	
v.	§	PRECINCT _____
	PLACE _____	
	§	
_____	§	
Defendant	§	_____ COUNTY,
	TEXAS	

APPEAL BOND

Judgment was signed in the above entitled and numbered eviction on the _____ day of _____, 20___ in favor of _____ (Plaintiff/Defendant). (Plaintiff/Defendant) _____ wishes to appeal to the county court. Therefore, the appealing party, and sureties, represent and warrant that the appealing party will prosecute the appeal with effect and pay all costs that may be adjudged against himself or herself, provided the sureties shall not be liable in an amount greater than $_____, which is the amount of the bond.

NOW, THEREFORE, We, _____, (Plaintiff/Defendant), as principal and
_____, as surety at _____ (address of surety), and
_____ as surety at _____ (address of surety) acknowledge ourselves as bound to pay to _____ (Plaintiff/Defendant), the sum of $_____, conditioned that the appealing party shall prosecute the appeal with effect and will pay costs of court in the event of an adverse final judgment on appeal.

Given under our hands this _____ day of _____, 20____.

_____	_____	_____
Signature of Appealing Party	Signature of Surety	Signature of Surety

The appeal bond is:

☐ Approved
☐ Disapproved for the following reason:

_____

_____

____

Signed this _____ day of _____, 20____.

_____

Justice Presiding

Comment: The proposed rule makes minor changes in the appeal bond. The bond more clearly secures the justice court costs incurred, and has a designated place where the justice can approve or disapprove the bond and state the reason if disapproved such that an appealing party may attempt to correct the defect if any.

RULE 750. POSSESSION PENDING APPEAL BY DEFENDANT TO COUNTY COURT

(a) Right of Continued Possession.
A defendant who has perfected an appeal of an eviction case under these rules shall be entitled to
stay in possession of the premises during the pendency of the appeal by complying with the
following procedure:

(1) filing with the justice court a written agreement with the plaintiff stating the terms under which the defendant may stay in possession; or

(2) depositing rent into the justice and county court registry as required by this rule.

(b) Rent Payments.

A defendant shall deposit rent if there is no oral or written rental agreement, in the justice or county court registry as follows:

(1) cash;

(2) a cashier's check payable to the county clerk, drawn on any federally insured and
federally or state chartered bank or savings and loan association; or

(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and

loan association.

(c) Initial Deposit of Rent with Justice Court.

(1) A defendant who has perfected appeal by filing an appeal bond or making the required deposit in lieu of the bond and paying the county court filing fee is entitled to stay in possession of the premises by depositing one rental period's rent payment, according to the terms of the rental agreement, in the justice court registry within five days of the approval of the appeal bond or the deposit in lieu of the appeal bond. If the defendant does not have a rental agreement that requires the payment of rent, the defendant must deposit the value of the fair market rent for one month as determined by the justice court.

(2) A defendant who has perfected appeal by filing an affidavit of indigence is entitled to stay in possession of the premises without depositing rent into justice court, unless the eviction is for nonpayment of rent. If the defendant perfected appeal by filing an affidavit of indigence and the basis for the eviction is nonpayment of rent, the defendant must deposit one rental period's rent payment, according to the terms of the rental agreement, into the justice court registry within five days of the filing of the affidavit or the overruling of any contest to the affidavit, whichever is later.

(3) The justice court may order a deposit less than that required under subparagraph (2) of this rule if the justice court finds that posting a rent deposit as required by this rule will irreparably harm the defendant and that justice requires a lesser deposit.

(4) If a defendant does not timely file an agreement between the defendant and the plaintiff, or deposit the rent as required by this rule, the justice court may, after notice to the parties and a hearing, issue a writ of possession pending appeal. The writ of possession may not be issued until the expiration of two days from the date of the hearing.

(d) Rent Deposits with County Court.

(1) During the pendency of the appeal the defendant must pay rent, or if the defendant does not have a rental agreement that requires rent payment, the defendant must pay the value of the fair market rent of the premises as set by the justice court for each month, into the registry of the county court within five days of its due date under a rental agreement, or if there is no rental agreement, the first day of each month thereafter. Upon sworn motion filed in county court, either party may contest the justice court determination of the amount of rent that must be deposited. The county court may order a

deposit less than that required under this rule if the court finds that posting a deposit as required by this rule will irreparably harm the defendant and that justice requires a lesser deposit.

(2) If the defendant fails to make timely payments into the registry of the county court or breaches the terms of an agreement with the plaintiff allowing the defendant to stay in possession, during the appeal, the plaintiff may file a notice of default in the county court where the cause is pending. Upon sworn motion by the plaintiff, and a showing of defendant's default in making payments into the registry of the county court as they become due, the court may issue a writ of possession to plaintiff after notice to the defendant, and a hearing. No writ of possession may be issued by the county court until the expiration of five days from the date an order is signed, awarding possession to the plaintiff under this rule.

(3) During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the plaintiff or into the registry of the county court, the plaintiff may file a motion with the county court requesting that the defendant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the plaintiff:

(i) did not cause the agency to cease making the payments or to otherwise pay all or part of the rent; and

(ii) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(4) The county court may allow a party to withdraw deposited amounts from the county court registry upon:

(i) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;

(ii) dismissal of the appeal, or

(iii) order of the court upon final judgment.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

Comment: The proposed rule allows a defendant to remain in possession

pending an appeal of a judgment giving possession to plaintiff in justice court. The proposed rule reflects case decisions which declare a justice court judgment a nullity once an appeal has been perfected to county court. See e.g., Mullins v. Coussons, 745 S.W.2d 50 (Tex. App.–Houston [14th Dist.] 1987, no writ); Poole v. Goode, 442 S.W.2d 810, 813 (Tex. Civ. App.–Houston [14th Dist.] 1969, writ ref'd n.r.e.); Hall v. McKee, 179 S.W.2d 590, 592 (Tex. Civ. App.–Fort Worth 1944, no writ). Supersedeas bonds are appropriate in appeals from county and district court because judgments of these courts remain live and can be enforced pending appeal. By filing a supersedeas bond in county and district court cases, a party can prevent execution of the judgment being appealed. Because an appeal of a justice court judgment nullifies the judgment, there is no judgment to supersede; therefore, the proposed rule simply requires an appealing defendant to deposit a designated amount of rent into the registry of the justice court in order to stay in possession pending appeal. (A defendant who perfects appeal by filing an affidavit of indigence is exempted from depositing the first rental payment with the justice court if the eviction was based upon grounds other than nonpayment of rent.)

The proposed rule clarifies the prior rule and specifically allows the justice court to issue a writ of possession where an appealing defendant does not deposit the required rent timely into the registry of the court. The proposed rule makes other clarifications from the prior rule.

The proposed rule does not prohibit a defendant from continuing with an appeal of the justice court judgment, even though a writ of possession has been issued. Indigency cannot deny a party a right of appeal of a decision the indigent otherwise would have had. The right of possession and rent may be the only issue on appeal. Possession may be given to plaintiff during the pendency of the appeal if the defendant fails to timely make a required deposit in a nonpayment of rent case; however, this event does not moot the appeal. Cf. Employees Finance Co. v. Latham, 369 S.W.2d 927, 930 (Tex. 1963) (involuntary payment of a judgment does not moot the case). As prescribed in county and district court appeals in Section 34.022 of the Civil Practice and Remedies Code, a successful defendant is still entitled to collect damages even if a writ of execution has been executed during the pendency of the appeal. A defendant appealing an eviction case should have the same right to continue appeal. In addition, eviction records are frequently accessed and used by landlords and reported by credit bureaus. While the defendant may have lost possession, the issue of who correctly had the right to possession is not moot because of the stigma caused by a judgment. See Employees Finance Co. v. Latham, 369 S.W.2d at 930-31 (discussing whether stigma of a judgment may avoid mootness).

RULE 751. (DELETED)

Comment: Since the proposed rules do not require the posting of a supersedeas bond, it is not necessary to provide a supersedeas bond form.

RULE 752. DAMAGES

On the trial de novo of the case in the county court, the plaintiff or defendant shall be permitted to plead, prove and recover damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal. Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney's fees in the justice and county court provided, as to attorney's fees, that the requirements of Chapter 24 of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party.

Comment: No substantive changes.

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

In an appeal of an eviction case, the county clerk shall docket the case with the justice court plaintiff shown as plaintiff and the justice court defendant shown as defendant in county court. The clerk shall immediately notify all parties of the date of receipt of the justice court transcript and the county court's docket number of the case. The notice shall advise the defendant that if the defendant pleaded orally in the justice court, the defendant must file a written answer in the county court no later than ten days after the justice court transcript is filed with the county court to avoid issuance of a writ of possession because of a default judgment in county court.

Comment: The proposed rule changes the time period to file a written answer from eight days to ten days.

RULE 753a. JUDGMENT BY DEFAULT IN COUNTY COURT

If the defendant filed a written answer in the justice court, the answer shall be taken

**to constitute
the defendant's appearance and answer in the county court. The answer may be amended as in
other cases. If the defendant did not file a written answer in the justice court and fails to file a
written answer in county court within ten days after the justice court transcript is filed in the
county court, the allegations of the complaint may be taken as admitted and judgment by default
may be entered accordingly, but only after notice to the defendant under Rule 21a and hearing.**

***Comment: The proposed rule tracks the holding of the Texas Supreme Court which requires notice to the defendant of any default judgment motion and an opportunity for a
hearing before granting a default judgment for failure to file an answer in county court.
See Hughes v. Habitat Apts., 860 S.W.2d 872 (Tex. 1993).***

RULE 754. TRIAL OF THE CASE IN COUNTY COURT

**(a) The trial of an eviction appeal and all related hearings and motions shall be entitled to
precedence in the county court.**

**(b) No jury trial shall be had in any appeal of an eviction case unless, within ten days after the
date that the county clerk mails notice of the receipt of the justice court transcript, a jury fee as required by law is paid and a written request for the jury trial is filed with the clerk of the court. The clerk shall promptly enter a notation of any jury fee payment on the court's docket sheet.**

**(c) The trial of an eviction case on appeal to county court shall be de novo and may be held any
time after the expiration of ten days after the date that the county clerk mails notice of the receipt of the justice court transcript. The county court may set an eviction trial on written request of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. Regardless of which party appealed from the justice court, only the plaintiff in the county court may take a nonsuit. If the county court's jurisdiction is invoked, the court must dispose of all parties and issues before the court, including the issue of possession.**

(d) On written motion by a party contesting the sufficiency of the appeal bond, the county court

shall hold a hearing on the motion. If the judge finds the bond deficient, the judge may disapprove the bond and allow the appealing party five days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected within the five day period, the bond may be approved. If the deficiencies on the appeal bond are not corrected within the five day period, the appeal may be dismissed.

(e) If the appealing party fails to prosecute the appeal with diligence or the county court renders judgment against the party, the county court shall also render judgment against the surety or sureties on the appeal bond, for the costs of court up to the amount of the bond.

> ***Comment:** The proposed rule requires a jury to be demanded within ten days of the date that the county clerk mails notice of the receipt of the justice court transcript, and further provides that the trial in county court may be held after the expiration of ten days from the date that the county clerk mails notice of the receipt of the justice court transcript. The proposed rule also provides a procedure to contest the sufficiency of the appeal bond in county court.*

RULE 755. WRIT OF POSSESSION IN COUNTY COURT

The writ of possession shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable. A writ of possession issued from a judgment of a county court may not be issued until the expiration of ten days after the signing of the judgment and only if the defendant has not filed a supersedeas bond in an amount set by the county court. However, if the defendant is leasing a manufactured home lot, the writ of possession shall be issued as provided in Section 94.203 of the Texas Property Code, as amended. The writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used only for residential purposes. The county court shall give precedence to the hearing to set the amount of the supersedeas bond necessary to suspend the judgment or the portion of the judgment the appellant elects to supersede.

> ***Comment:** The proposed rule incorporates Section 24.007 of the Texas Property Code which give a defendant evicted from a residence ten days to post a supersedeas bond in appealing a county court judgment to the court of appeals. The proposed rule also incorporates and references new statutory requirements relating to the issuance of a writ of possession where the defendant is leasing a manufactured home lot.*

APPENDIX C-REVISED DRAFT APPROVED BY JUDICIAL COUNCIL

RULES OF JUDICIAL ADMINISTRATION

RULE 13. VISITING JUDGE PEER REVIEW.

13.1 Definitions. In this rule:

(a) *Peer Review Committee* means a committee established under ~~Section _____ of this rule~~Rule 13.4.

(b) *Presiding Judge* means the presiding judge of an administrative judicial region.

(c) *Visiting Judge* means a retired or former judge who is eligible for assignment in an administrative judicial region[1] under Section 74.055, Government Code.

13.2 Biennial Peer Review Required.[2] The performance of each visiting judge must be reviewed biennially by a peer review committee in each administrative judicial region in which the visiting judge is subject to assignment. A visiting judge must be reviewed as follows[3]:

(a) a judge whose last year of active service ended in an even-numbered year must be reviewed during each even-numbered calendar[4] year afterward in which the judge is subject to assignment in the administrative judicial region; and

(b) a judge whose last year of active service ended in an odd-numbered year must be reviewed during each odd-numbered calendar year afterward in which the judge is

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[1]Each administrative judicial region maintains its own list of visiting judges eligible to sit. *See* Tex. Govt. Code § 74.055.

[2]I reorganized the rule to emphasize the requirement of peer review rather than the composition and duties of the peer review committees.

[3]The substance of this sentence and the following has been moved from subpart (a) of the "Duties of Peer Review Committee" section in the original draft.

[4]My intent here is to clarify that the period in which the judge is to be reviewed runs between January and December of the even- or odd- numbered year, not from the date that the judge ceased active service. *See also* note 5, *infra*.

subject to assignment in the administrative judicial region.[5]

13.3 Procedures for Biennial Peer Review.

(a) ***In general.*** The peer review committee must evaluate the visiting judge's performance and make a recommendation — either "favorable" or "unfavorable" as concerning each of the judge's areas of specialization under Section 74.055(b) of the Government Code[6] — to the presiding judge.

(b) ***Considerations.***[7] The peer review committee must consider the following factors in evaluating the visiting judge's performance:

(1) the visiting judge's temperament and demeanor;

(2) the visiting judge's mental and perceptual capacity;

(3) the visiting judge's knowledge of law and procedure; and

(4) the visiting judge's competence[8] in each of the judge's areas of specialization under Section 74.055(b) of the Government Code[9]; and

(5) any other factor that may be relevant in evaluating judicial performance.

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[5]Should these time periods be expressly linked to the period for which a visiting judge is certified under Section 74.055 of the Government Code? To be subject to assignment, a visiting judge must file an initial certification of willingness not to appear and plead effective for a two-year period beginning January 1 of the year in which the certificate is filed or the year in which the judge leaves full-time judicial service. Tex. Govt. Code § 74.0551. The certification is renewed automatically for every successive two-year period, beginning on January 1, unless the judge files a written revocation at least 30 days before the revocation is to take effect. *Id.*, § 74.0551(c).

[6]The Legislature requires that presiding judges divide the list of visiting judges in their regions according to areas of specialization, criminal, civil, or domestic relations, and assign judges only to cases within their areas of specialization. *See* Tex. Govt. Code § 74.055(b). Consistent with this legislative mandate, visiting judges should be reviewed according to each of their areas of specialization.

[7]Subparts (b)-(f) are taken from the "Duties of Peer Review" section in the original draft.

[8]Or "performance"?

[9]See note 6.

(c) ***Written comments or other information.*** In considering the factors in Subsection (b), the peer review committee must consider information submitted by:

(1) the presiding judge;

(2) any sitting judge in whose court the visiting judge's services were performed;

(3) any member of the bar who has participated in a case before the visiting judge;

(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and

(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.[10]

(d) ***Response by Visiting Judge.***

(1) *Right to response.* A visiting judge need not submit materials to a peer review committee in support of a favorable recommendation.[11] However, a ~~Before the~~ peer review committee may not makes an unfavorable recommendation concerning a visiting judge unless it first gives ~~to the presiding judge, the committee must notify the visiting judge in writing and give~~ the visiting judge an reasonable opportunity to respond to it's a proposed unfavorable recommendation. ~~The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of any person who submits comments or other evaluative information under this rule.~~

(2) ***Procedure for requesting response.***

(A) Content of request. To request a response from a visiting judge as required by subparagraph (1), a peer review committee must serve written notice on the

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[10]Should these sources be limited solely to the region for which the judge is being peer reviewed? The original draft seemed to contemplate that visiting judges will be reviewed by different regions' peer review committees based on the same information. This suggests that a visiting judge could be "blackballed" statewide by a complaint within a single region. But perhaps this should be the case if the complaint concerns sufficiently egregious misconduct or incompetence.

[11]My draft makes such filings optional. Should the rule go further to prohibit such filings?

visiting judge stating:

(1) the peer review committee is proposing to make an unfavorable recommendation or recommendations concerning the visiting judge;

(2) the area or areas of specialization that each proposed unfavorable recommendation concerns;

(3) the visiting judge has a right to respond to each proposed unfavorable recommendation; and

(4) the deadline and location for filing the response.

(B) Service on presiding judge. The peer review committee must also serve the presiding judge with a copy of the notice required by (A).

(e) ***Committee Recommendation.***

(1) *Time.* The peer review committee must make a recommendation concerning each of the visiting judge's areas of specialization under Section 74.055(b) of the Government Code nNot later than the 30th day after the peer review committee completes its review.[12]

(2) *Form.* The committee's recommendation must be in writing and must ~~make a written recommendation to the presiding judge stating~~ state only whether the recommendation concerning each area of specialization is "favorable" or "unfavorable." A "favorable" recommendation means that a the visiting judge should ~~or should not~~ continue to be assigned by the presiding judge to sit in cases within that area of specialization. An "unfavorable" recommendation means that a visiting judge should not continue to be assigned by the presiding judge to sit in cases within that area of specialization.

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[12]When does a peer review committee "complete its review"? What does this term mean?

(3) *Service.* The committee must serve the recommendation on the presiding judge.[13] ~~The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.~~

(f) ***Reconsideration and Amendment of Recommendation by Committee.***

(1) *Request for Reconsideration.* A visiting judge who receives an unfavorable recommendation ~~that the visiting judge not continue to be assigned~~ may submit a written request for reconsideration ~~by~~ to the peer review committee not earlier[14] than the 180th day after the date that the committee issued its recommendation.

(2) *Amendment of Recommendation.* ~~If at any time the~~ The peer review committee may, either in response to a request for reconsideration or on its own initiative at any time, serve ~~the~~ serve the presiding judge with an amended recommendation.[15] ~~determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration. The administrative director shall retain a copy of the amended recommendation for public inspection.~~

(g) ***Powers and Duties of Presiding Judge.***[16]

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[13]The following text has been moved to the sections concerning the powers and duties of the presiding judge and the administrative director of OCA.

[14]Should this be not *later* than the 180th day?

[15]The following text has been moved to the sections concerning duties of the presiding judge and administrative director of OCA.

[16]The draft rule said nothing concerning whether a presiding judge is obligated to follow or even consider an unfavorable recommendation. Shouldn't the presiding judge be required at least to consider the recommendation, if not to defer to it altogether? Why would we require the peer review committee to review a visiting judge at great time and expense if the presiding judge is free to disregard the recommendation?

(1) *Obtaining additional information.* The presiding judge may, upon request, obtain additional information concerning a recommendation or a visiting judge from the peer review committee. ~~The committee must provide additional information to the presiding judge upon request of the presiding judge.~~

(2) *Dissemination of recommendation.* Upon ~~receipt of~~ receiving the a recommendation or recommendations or any amendments thereto, the presiding judge must forward copies ~~of the recommendation~~ to the administrative director of the Office of Court Administration and to the visiting judge.

(h) *Duties of administrative director.* The administrative director of the Office of Court Administration must ~~shall~~ retain a copy of a each recommendation or amendment ~~that is issued to the presiding judge~~ for public inspection.[17]

(i) *Additional rules and procedures.* The presiding judge may promulgate additional rules and procedures that are reasonably necessary to conduct biennial peer review of visiting judges under this rule, including procedures for obtaining comments concerning the performance of a visiting judge. The presiding judge may delegate this rulemaking power to the peer review committee.[18]

13.4 **Peer Review Committee; Administration.**

(a) *Composition/Membership.* The presiding judge must appoint at least five persons to serve as members of a peer review committee. The peer review committee's membership must adhere to a ratio of 2/5 active judges, 2/5 citizen members who are members of the State Bar of Texas, and 1/5 citizen members who are not licensed to practice law.

I would recommend prohibiting a presiding judge from assigning a visiting judge to a case in an area of specialization in which the judge has received an unfavorable recommendation unless and until the judge sets forth good cause for the assignment in an order or other writing. I would also extend this prohibition or requirement to presiding judges' assignment of visiting judges to cases outside the visiting judges' areas of specialization. *See* Tex. Govt. Code § 74.055(b).

Alternatively, or in addition, parties might be permitted to strike without limit any visiting judge — whether a former judge or retired judge — who is appointed over an unfavorable recommendation.

[17]For how long?

[18]Should these rules be subject to this Court's approval?

(b) *Terms.* A member of the peer review committee serves a term of two years. The presiding judge may re-appoint a person to the committee whose term has expired.

(c) *Expenses.* A member of the peer review committee may not receive compensation for service on the committee. The presiding judge may use regional funds[19] to reimburse a member for actual and necessary expenses incurred in the performance of committee duties under this rule.

~~(d) *Rules and Procedures.*[20] The presiding judge may promulgate rules and procedures that are reasonably necessary to comply with this rule including procedures for obtaining comments about the performance of a visiting judge. The presiding judge may delegate to the peer review committee the authority to adopt procedures that are reasonably necessary for the performance of the committee's duties under this rule.~~

~~Duties of Peer Review Committee.~~

~~(a) *Biennial Review.* The peer review committee must conduct a biennial review of the performance of each visiting judge who is eligible for assignment in the region. For purposes of this rule, a visiting judge is subject to review as follows:~~

~~(1) for a judge whose last year of active service ended in an even-numbered year, the next even-numbered year and every two years afterward; or~~

~~(2) for a judge whose last year of active service ended in an odd-numbered year, the next odd-numbered year and every two years afterward.~~

~~(b) *Considerations.* The peer review committee must consider the following factors in evaluating the visiting judge's performance:~~

~~(1) the visiting judge's temperament and demeanor;~~

~~(2) the visiting judge's mental and perceptual capacity;~~

~~(3) the visiting judge's knowledge of law and procedure; and~~

~~(4) any other factor that may be relevant in evaluating judicial performance.~~

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[19]Is the meaning of this term sufficiently clear?

[20]The substance of this paragraph has been moved to the section concerning the presiding judge's powers and duties.

(c) *Written comments or other information.* In considering the factors in Subsection (b), the peer review committee must consider information submitted by:

(1) the presiding judge;

(2) any sitting judge in whose court the visiting judge's services were performed;

(3) any member of the bar who has participated in a case before the visiting judge;

(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and

(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.

(d) *Response by Visiting Judge.* Before the peer review committee makes an unfavorable recommendation to the presiding judge, the committee must notify the visiting judge in writing and give the visiting judge an opportunity to respond to its proposed recommendation. The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of any person who submits comments or other evaluative information under this rule.

(e) *Committee Recommendation.* Not later than the 30th day after the peer review committee completes its review, the committee must make a written recommendation to the presiding judge stating only whether the visiting judge should or should not continue to be assigned by the presiding judge. The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.

Reconsideration by Committee.

(a) *Request for Reconsideration.* A visiting judge who receives a recommendation that the visiting judge not continue to be assigned may submit a written request for reconsideration by the peer review committee not earlier than the 180th day after the date that the committee issued its recommendation.

(b) *Amendment of Recommendation.* If at any time the peer review committee determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration.

~~The administrative director shall retain a copy of the amended recommendation for public inspection.~~

13.5 Confidentiality.

(a) ***In general.*** Except as otherwise provided by this rule or by statute, all written and oral communications made to a peer review committee and the records and proceedings of the peer review committee are confidential and privileged against disclosure. The peer review committee must not reveal the name of any person who submits written comments or other information under Rule 13.3.

(b) ***Rule of Judicial Administration 12.*** For purposes of Rule 12, Rules of Judicial Administration, information that is collected in connection with a peer review committee's evaluation of a visiting judge's performance is not a judicial record.

Option 1 - Mandatory 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 motion; the response, if any; 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.

Option 2 - Hearing at the Option of the Trial Court

If the trial court determines that an oral hearing would be useful, it must schedule a hearing as soon as practicable. The court shall determine the motion on the basis of the motion; the response, if any; 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 the oral testimony, if any. 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.

E-Mail from Judge Peeples, June 14, 2001:

Chip:

Attached are two documents:

(1) Proposed revisions of rules 306 and 306a and

(2) a memo explaining these revisions and my thoughts.

Briefly: Revised rule 306 restates current law and puts it into one rule.

If we want to do more than this, I offer amended rule 306a. Amended rule 306a does two main things: (1) It says that if the Lehmann language is not used in a judgment all timetables are delayed, and (2) it requires clerks to send a more thorough notice of final judgment and delays timetables if the notice is not received.

I have sent all this to the committee members by copy of this email, but I will bring hard copies of everything to the meeting Friday.

David

TRCP 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT

1. Beginning of Periods. No change

2. Date to Be Shown. No change.

3. Notice of Judgment. No change.

4. No Notice of Judgment. No change.

5. Motion, Notice and Hearing. In order to establish the application of paragraph (4) of this rule~~, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.~~:

a. **Requisites of Motion, Amendment.** The party adversely affected must file a verified motion in the trial court setting forth:

(1) The date judgment or appealable order was signed;

(2) That neither the party nor its attorney received the notice required by paragraph (3) of this rule or acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and

(3) The earliest date upon which either the party or its attorney first

(a) received the notice required by paragraph (3) of this rule; or

(b) 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.

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

c. **Hearing.** [See attachment]

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

(1) whether the movant or its attorney received the notice required by paragraph (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

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

PROPOSED CHANGES IN RULES 306 AND 306a
(new language in *italics*)

Rule 306. ***Finality*** **of Judgment** ***or Order***

1. Final judgment. *At the conclusion of the litigation, the court shall render a final judgment or order.*

2. Judgment after conventional trial on merits. *A judgment rendered after a conventional trial on the merits is presumed to dispose of all claims between all parties and is presumed to be final and appealable.*

3. Other judgments and orders. *A judgment or order rendered without a conventional trial on the merits is final only if it:*

(a) expressly disposes of all claims between all parties,

(b) is the latest of two or more orders that, considered together, expressly dispose of all claims between all parties, or

(c) states with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that it is final as to all claims between all parties and is appealable.

4. Interlocutory judgments and orders. *Any judgment or order that does not comply with paragraph (2) or (3) remains interlocutory and is not final.*

Rule 306a. Periods to Run From Signing of Judgment or Order

1. **Beginning of periods.** The date *a* judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose. *The beginning date of all such periods is extended [90] days for all final judgments or final orders that do not state with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that the judgment or order is final as to all claims between all parties and is appealable.*

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

3. **Notice of judgment.** When the final judgment, *final order,* or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. *The notice*

of final judgment or final order must state that the court has disposed of all claims between all parties and that the judgment or order is final and appealable. Failure to comply with the *notice* provisions of this *paragraph* shall not affect the periods mentioned in paragraph (1) , except as provided in paragraph (4).

4. No notice of judgment. If within twenty days after the *beginning date for all periods, as determined under paragraph (1),* a party adversely affected by the judgment or order or his attorney has *not* received the notice required by paragraph (3) nor acquired actual knowledge of the *signed* order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the *signed order*, whichever occurred first, but in no event shall such periods begin more than ninety days after the *beginning date as determined under paragraph (1)* .

5. Motion, notice and hearing. In order to establish the application of paragraph (4) , the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received *the* notice *required by paragraph (4)* or acquired actual knowledge of the *signed judgment or order* and that this date was more than twenty days after the *beginning date as determined under paragraph (1).*

6. Nunc pro tunc order. When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.

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

MEMORANDUM

TO: All members of the Supreme Court Advisory Committee

FROM: David Peeples

RE: Finality of Judgments

DATE: June 14, 2001

At our meeting on March 30, I was asked to write up my suggestions for improving the existing finality rules without a comprehensive rewrite. Here they are.

1. **General observations.** First some general thoughts.

   A. Finality is not a problem in the trial courts. Now that *Lehmann* has clarified and improved the law, it is okay with me to leave things alone.

   B. Even if we decide to leave present law as it is, the supreme court has asked us to draft a rule of some kind. My new rule 306 (attached) is offered in that spirit. I think we should do something like this because it would put the case law in one concise rule with one minor improvement (requiring the language to be near the judge's signature).

   C. There are of course occasional appellate problems, but most of our efforts to solve those problems with new rules (e.g., mandatory language or mandatory death certificate) threaten to create fresh problems in the trial courts (i.e. many judgments remaining interlocutory and pending indefinitely). Put to the choice, I would prefer the status quo to the mandatory-language solutions we have been discussing so far.

   D. In the event we decide to go beyond merely restating present law in a concise rule, my revised rule 306a (attached) tries to reduce the inadvertent loss of appeal rights by negligent attorneys—by requiring a more thorough notice of judgment and giving additional time for correction of mistakes.

2. **Existing law.** I submit that the following principles can be distilled from the cases:

   A. Complete relief. When the court has granted or denied all relief sought as to all parties (whether in one instrument or in two or more instruments taken together), there is a final judgment, and all trial-court and appellate timetables begin to run from the date the last order was signed.

B. *Severance.* By carving one case into two, a severance can make an existing interlocutory order become final. The severance does this by factoring out the unadjudicated claims and/or parties from the others. After the severance, if one case contains only adjudicated claims, the severance has created a final judgment in that case.

C. *Language.* Under the supreme court's recent decision in *Lehmann*, traditional Mother Hubbard catch-all language is no longer effective to adjudicate claims and thereby create finality. Under *Lehmann*, general language can have Mother Hubbard effect only if it shows with unmistakable clarity that all claims by and against all parties have been adjudicated.

3. Problems with existing law. The committee's discussions have identified three principal problems under the present rules. There may be others, but these are the main ones. (*Lehmann* has ameliorated Problem *A* below, but not entirely.)

A. *Inadvertent loss of appeal rights by catch-all clause.* This problem seems to occur primarily in summary judgments, but it can happen in other situations too. After a hearing on a motion for partial summary judgment, the court *should* sign an order dealing specifically with the issues presented and nothing else. But until *Lehmann* a Mother Hubbard clause in the order has had the effect of denying all other claims, including claims as to parties that the motion did not even mention. *See Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). As a result, the trial-court and appellate timetables would start to run, and they sometimes expired before unwary litigants and lawyers realized that the catch-all clause had denied their claims. *Lehmann*'s requirement of neon language will help put everyone on notice that a final judgment has been signed, but I am sure there will still be negligent and inattentive lawyers who do not notice or do not understand.

B. *Inadvertent loss of appeal rights by cumulative orders.* When the rulings in successive orders add up to a complete adjudication of all claims between all parties, the result is a final judgment, even if the last order does not mention the earlier ones or contain language of finality. Some lawyers do not realize that the timetables begin to run when the last order is signed, and they have a rude awakening when they learn later that the time for perfecting appeal has passed. *Lehmann* does not address this problem.

C. *Finality hard to determine.* After a series of interlocutory rulings in complicated cases, judges sometimes have difficulty determining whether there has been a complete adjudication. District and County Clerks, who must send notice of final judgment under Rule 306a(3), have the same difficulty.

4. The attached rules vs. other proposals.

A. Other proposals. It has been suggested that we *require* neon language in the judgment, or perhaps require a death certificate signed by the judge. My main objection to these suggestions is that they focus only on the appellate issues (inadvertent loss of appeal rights) at the expense of trial-court finality concerns. Both the appellate and trial-court issues are important. But if the language (or the death certificate) is *mandated*, judgments without the language (or the death certificate) will remain interlocutory until someone learns about it and gets the language included (or the death certificate signed). I consider it unacceptable to have so many cases remain interlocutory and pending indefinitely.

B. The attached proposals. If we decide to do more than restate existing law in proposed rule 306, I propose the modified rule 306a. Amended rule 306a would do these things:

(1) Clarify present law of finality. Judgments become final in the following three ways (or some combination of them):

- By presumption after a conventional trial on the merits,
- By expressly disposing of all parties and issues (including series of orders),

or

- By including *Lehmann*-type neon language.

(2) Put final/appealable language in prominent place. Lawyers who want the judgment to become final quickly would be motivated to include the *Lehmann* language because if such language is not used the timetables would be delayed automatically for 90 days. In other words, when the language is not used all timetables are extended, even if the judgment expressly disposes of all issues between all parties. Judges would usually insist on the language when they intended finality and would certainly strike it out when they did not.

(3) Require more meaningful notice from the clerk. The clerk's notice would have to say the court has signed a judgment that disposes of all issues between all parties and is final and appealable.

(4) Extend timetables. If anyone can prove that this notice was not received, the timetables will be extended for potentially 90 more days. Thus, if the judgment lacks the required language *and* the beefed-up notice is not given, the timetables would be extended for two consecutive 90-day periods, for a total of 180 days.

TO: **SCAC R. 300-330 Sub-committee**

FROM: Skip

RE: Justice Hecht's 5-26-01 e-mail to Chip Babcock concerning whether the holding of *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), should be changed by rule in light of its application in *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688 (Tex.App. – Amarillo, 2000 pet. denied.).

PROBLEM

Some courts have limited a trial court's power to reinstate a judgment previously set aside by granting a motion for new trial, to 75 days after the judgment was originally signed. As a result, a court must re-try a case if it waits too long to re-enter judgment.

POSSIBLE SOLUTION

Amend Rule 329 b (h) to read:

"If a motion for new trial is granted, the judgment that has been set aside may be re-entered, modified, corrected or reformed, or a new judgment may be signed at any time prior to [the commencement of/close of evidence] in the new trial. The time for appeal shall run from the time the order granting judgment is re-entered, modified, corrected or reformed, or the new judgment is signed."

BACKGROUND

Ferguson v. Globe Texas, Co., 35 S.W.3d 688, 691-92 (Tex.App. – Amarillo, 2000, pet. denied) held that a "trial court may only vacate an order granting a new trial during the period when it continues to have plenary power" and that "the trial court's plenary power only continues for 75 days after the date judgment is signed."

In *Ferguson* the Amarillo court held that the trial court lacked plenary power to grant a motion to reinstate a judgment originally signed 100 days earlier, which had been set aside by a motion for new trial signed on day 71. It held that the plain meaning of Rule 329(e) limits trial courts' plenary power to the "grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after such timely filed motions are overruled." Thus, it reasoned, because no motion for new trial was overruled, the court's plenary power to reinstate judgment ended when the motion for new trial would have been overruled by operation of law. *Id.* at 690.

The court stated that Rule 329(e) was clear and unambiguous in specifying the types of powers it vested in trial courts and those powers did not expressly include the power to ungrant a new trial. It held the rule should not be construed to mean something other than its plain words "unless application of the literal language would produce an absurd result." *Id.* at 691.

The court did not consider whether it was an absurd result to require a district court to retry a case that could have been, and should have been, disposed of by entry of judgment mistakenly set aside by an order granting a new trial. The court did not consider whether the apparent basis for Rule 329(e)'s time limits (the need for a judgment to become final within a finite time after signing) did not apply when the judgment, and the finite plenary period its signing invoked, had been set aside by the granting of a new trial. The problem appears to be supreme court precedent.

The court of appeals relied on the supreme court's opinion in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), for its holding that a trial court may only vacate an order granting a new trial during the period when it continues to have plenary power. *Porter v. Vick* was a per curiam mandamus issued by the supreme court to set aside an order vacating an order of new trial. The trial had been non-jury. A new trial had been mistakenly granted by default by a visiting judge when opposing counsel's message to the trial judge that he had been delayed in another court was not relayed to the visiting judge at the new trial hearing. The default order granting new trial was set aside by the original judge who had presided over the trial and entered the judgment. Because the order vacating the new trial order was signed "long past the time for plenary power over the judgment, as measured from the date the judgment was signed," the supreme court held it was void. *Id.*, citing *Fulton v. Finch*, 346 S.W.2d 823, 826 (Tex. 1961).

However, as noted by Justice Hecht's e-mail, the holding in *Fulton v. Finch* was based on a prior version of Rule 329(b) that required that all motions for new trial "must be determined within not exceeding forty-five (45) days after the. . . .motion is filed. . . ." The language was dropped when the rule was rewritten in 1981. In *Porter v. Vick*, the per curiam court apparently relied on the holding of *Fulton v. Finch* without considering the reason for that holding.

The problem was fully briefed for the supreme court on Petition for Review in *Ferguson v. Globe Texas Co.* The Petition was denied after the court requested briefing. It may prefer to address the problem created by *Porter v. Vick* by clarifying the rule.

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.

[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.

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:

(1) The date the judgment or appealable order was signed;

(2) 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

(3) the date upon which either the party or its attorney first

(a) received the notice required by paragraph (e)(3) of this rule; or

(a) 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.

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

(c) **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.

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

(1) 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

(1) 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)

(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

I. **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:

1. within thirty days after the judgment is signed, or

1. if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment <u>or any other motion that requests relief that could be included in the judgment</u>, (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 <u>or any other motion that requests relief that could be included in the judgment</u>;

January 22, 2002

M E M O

To: SCAC Members

From: O. C. Hamilton, Jr.

Gentlemen:

In addition to what Skip Watson has included in his memo, I want to comment and mention a couple of cases.

I strongly believe that once the trial Court has granted a Motion for New Trial, the Court retains jurisdiction of the case for all purposes and should not be precluded from ungranting the Motion for New Trial at any time if the Court later decides that is the appropriate action to take.

The 14th Court of Appeals in Houston has essentially said the same thing in two cases, *Gates vs Dow Chemical Company*, 777 S.W.2d 120 (Tex.App–Houston [14th Dist.] 1989), judgment vacated by agreement, 783 S.W.2d 589 (Tex. 1989), and *Biaza vs. Simon*, 879 S.W.2d 349 (Tex. App. – Houston [14th Dist.] 1994 Pet Denied). In *Gates,* the 75 day period of Rule 329b expired on Saturday, September 26th and on Monday, September 28th, the Judge granted a new trial (which was held to be proper). However, on October 22nd, the Judge vacated the Order Granting a New Trial. That Court approved the "ungranting" of a new trial within the 105 day period following the Judgment, but stated,

> ... Once a new trial is granted, the trial court has exclusive jurisdiction in the case. (at page 123)
>
> ...
>
> ...There is no provision in the rule giving the trial court the power to vacate the granting of a new trial. The reason lies in common sense. Once a new trial is granted, the trial court is the only court having authority to rule on the case. The trial court has the sole discretion in ruling on the case. This discretion includes the power to enter orders which correct earlier errors. This is in contrast to where a motion for new trial is overruled. The trial court and the appellant court then have a quasi-concurrent jurisdiction in the case. The only step necessary for a litigant to invoke appellate court jurisdiction is to file an appeal bond. Nowhere does Rule 329b restrict the trial court from overturning an order for a new trial. Holding that the trial court lacked power to vacate its previous order would impair its authority to enter orders necessary for the efficient administration of its docket. (at page 124)

In *Biaza vs. Simon*, the Motion for New Trial was filed on January 14th. On March 22nd the trial court granted a Motion for New Trial, and on August 15th (eight months after the

judgment) set aside the order granting the Motion for New Trial and reinstated the order that had been signed December 14th of the preceding year. In that case, the 14th Court affirmed the trial court, saying,

> Appellants' argument presents the question of when a trial court may rescind its order granting a new trial and reinstate a previously vacated judgement. In *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961), the court reasoned that it could be done at any time when the trial court had the power to deny the motion for a new trial in the first place. See also *Homart Dev. Co. v. Blanton*, 755 S.W.2d 158, 159 (Tex.App.– Houston [1st Dist.] 1988, orig. proceeding) (holding that any reconsideration of the order granting a new trial must be accomplished with 75-day period); TEX.R.CIV.P. 329b(c). Under the current Rules of Civil Procedure, that would mean that the trial court would have seventy-five days after judgment to "ungrant" a motion for new trial. See TEX.R.CIV.P. 329b(c).
>
> Two recent cases have added to the seventy-five day period the thirty days of plenary power that the court would have retained had the motion been denied on the seventy-fifth day, effectively giving a trial court 105 days to "ungrant" a motion for new trial. Gates v. Dow Chemical Co., 777 S.W.2d 120, 123 (Tex.Appl–Houston [14th Dist.] 1989), *judgement vacated by agr.*, 783 S.W.2d 589 (Tex. 1989); *Wood v. Component Constr. Corp.*, 722 S.W.2d 439, 442 (Tex.App.–Fort Worth 1986, no writ); *see* TEX.R.Civ.P. 329b(e). Thus, some courts hold that the trial court has seventy-five days to grant an order setting aside a previous order granting a motion for new trial; others hold that the court has 105 days.
>
> In the most recent Texas Supreme Court opinion on this issue, the court reaffirmed the trial court's power to "ungrant' a motion for new trial within the seventy-five days and held that the court of appeals erred in holding that a trial court does not have the authority to vacate an order for new trial during the seventy-five day period. *Fruehauf Corp. v. Carrillo*, 848, S.W.2d 83, 84 (Tex.1993) (citing Fulton, 346 S.W.2d at 827). However, in its reasoning, the court stated that a trial court has plenary power over its judgment until it becomes final and retains continuing control over interlocutory orders and has the power to set aside those orders any time before a final judgment is entered. *Carrillo*, 848 S.W2d at 84. Because an order granting a new trial is an unappealable, interlocutory order, *id.*, the court thus retains continuing control over orders granting new trials until a final judgment is entered. *See id.* Based on this reasoning, it appears that a new trial may be "ungranted" at any time before a new final judgment. *See id.* This appears to be the most logical result based on the well-established principle that orders granting new trials are interlocutory and it harmonizes these orders with the rules pertaining to other interlocutory orders. But see *Hunter v. O'Neill*, 854 S.W.2d 704, 705-06 (Tex.App.–Dallas 1993, orig. proceeding) (post-*Carrillo* case adhering to the 75-day rule).
>
> Several cases cited by appellant hold that a once a trial court grants a motion for new trial, the court is without authority to set aside that order and reinstate the

> vacated judgment without another trial. Most of these cases pre-date all of the cases cited above, and based on the holdings in *Fulton* and *Carrillo* have been implicitly overruled. We hold, based on the court's reasoning in *Carrillo,* that a trial court has authority to rescind its order granting a motion for new trial and reinstate the vacated judgment at any time before a new final judgement is signed. (at pages 356-357)

It is my opinion that the Houston court has correctly stated what the law ought to be and to the extent that it may be different as a result of *Porter vs. Vick*, I would urge the Advisory Committee to ask the court to overrule *Porter vs. Vick* by a change in Rule 329b. The change I would suggest would be an addition to Rule 329b of sub-paragraph (i), which would read:

> "Once a new trial is granted, the trial court has exclusive jurisdiction in the case until a final judgment is entered and the court's plenary power, as set forth in this rule, has expired."

Proposed TRAP 11

On February 13, 2002 Nathan Hecht emailed to Bill Dorsaneo an Charles Babcock with a cc: to Chris Griesel the following concerning TRAP 11.

[A] Minor matter, raised by one of my colleagues, is whether we should change TRAP 11 to accommodate a concern of FRAP 29.4 that a court may refuse an amicus brief that would require a judge or justice to recuse. A simple change would be to add after the first sentence of TRAP 11, which states, "An appellate clerk may receive, but not file, an amicus brief.", the following sentence: "but the court for good cause may refuse to consider the brief and order that it be returned.", and an explanatory comment.

Sharon Magill

From: William Dorsaneo [wdorsane@mail.smu.edu]
Sent: Friday, March 08, 2002 11:03 AM
To: smagill@mail.smu.edu
Subject: FW: amicus briefs and recusal

-----Original Message-----
From: PAMELA BARON [mailto:PBARON1@austin.rr.com]
Sent: Tuesday, February 26, 2002 3:24 PM
To: Paula Sweeney (E-mail); wdorsane@post.cis.smu.edu; sarah.duncan@courts.state.tx.us; jan.patterson@3rdcoa.courts.state.tx.us; nathan.hecht@courts.state.tx.us; Chris Griesel; Charles Babcock; Skip Watson; fgilstrap@trilligilstrap.com; Nina Cortell; martinj@tddaw.com; wedwards@edwardsfirm.com
Subject: amicus briefs and recusal

My memory is slipping away quickly. The recusal on amicus issue is more complicated than I indicated at the meeting today. Here is what I wrote on the subject last year. Pam

D. Participation by an amicus may necessitate disqualification or recusal of a judge. Rules governing disqualification and recusal are not limited just to parties. Under Tex. R. Civ. P. 18b, applicable to appeals through Tex. R. App. P. 16.2, disqualification is mandatory if a judge has "served as a lawyer in the matter in controversy." Tex. R. Civ. P. 18(1)(a). This would include representation of an amicus by the judge or his or her former law firm. Similarly, recusal is necessary if the judge (or certain relatives) has an "interest that could be substantially affected by the outcome of the proceeding." Tex. R. Civ. P. 18(2)(f)(ii). A amicus with a similar suit pending is likely to be substantially affected, thus necessitating recusal. Finally, recusal is required if the judge (or certain relatives) has acted as a lawyer "in the proceeding." Tex. R. Civ. P. 18b(2)(g). This phrase is broad enough to encompass participation by an amicus. The parties may, however, waive any ground for recusal. Tex. R. Civ. P. 18b(5).

There are no statistics on how often participation by an amicus has necessitated recusal of an appellate judge. One publicized incident, though, underscores the complexities of determining when recusal is mandated or simply advisable. In *Gifford-Hill & Co. v. Wise County Appraisal Dist.*, the daughter of a sitting justice served as a lobbyist for an amicus. Although the Court overruled the motion of a party to require recusal on rehearing, 35 Tex. Sup. Ct. J. 463 (Feb. 19, 1992), the matter developed into an issue in the justice's subsequent election campaign. *See Super Tuesday Scramble*, The Texas Lawyer 1 (Mar. 2, 1992).

From: Nathan Hecht
To: Charles Babcock, Bill Dorsaneo
Date: 5/26/01 3:33PM
Subject: <No Subject>

In Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961), we held that a trial court lacked power to un-grant a motion for new trial more than 45 days after the motion was filed, based on TRCP 329b, s. 3, which then read: "All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed . . . ." The rule was completely rewritten in 1981 and no longer contains such language. However, in Porter v. Vick, 888 S.W.2d 789 (Tex. 1994) (per curiam), we cited Fulton as authority for the proposition that "any order vacating an order granting a new trial . . . signed outside the court's period of plenary power over the original judgment is void", without reference to the rule. Now the rules argument is that a trial court cannot ungrant a motion for new trial after its plenary jurisdiction would have expired, not because the rule prohibits it, but because the rule does not permit it – is silent on the subject. See, e.g., Ferguson v. Globe-Texas Co., 35 S.W.3d 688 (Tex. App.--Amarillo 2000, pet. denied). The court in Ferguson observed that a federal trial court may ungrant a motion for new trial at any time, subject to review for abuse of discretion. The Court requests that the Advisory Committee consider whether the holding of Porter should be changed by rule. As always, the Court greatly appreciates your service and that of the other members of the Committee.

Nathan L. Hecht

Logged

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January 11, 2002

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

Re: Supreme Court Advisory Committee - Ex Parte Communications and Physician-Patient Confidentiality

Dear Justice Hecht:

The recent case of Durst v. Hill County Memorial Hospital, San Antonio Court of Appeals No. 04-00-00540-CV, decided December 19, 2001, succinctly states what appears to be a serious problem with respect to confidential communications protected by the physician-patient relationship.

There is apparently no explicit procedure provided for parties to litigation to learn discoverable information from a party's treating physician. Accordingly, the San Antonio Court of Appeals has concluded that there is no bar to ex parte communications with a party's physician by attorneys for the opposing side.

Not all information in the hands of a treating physician is necessarily discoverable under exceptions to a physician-patient confidentiality. It would appear that the patient should be the first to determine if information in the hands of the patient's physician is discoverable, and, if the opposing party should disagree with the decision of the patient, then it should be the Court, not opposing party or opposing counsel, who makes the decision as to whether or not the information is discoverable.

At any rate, it would appear that discovery of medical evidence from a treating physician should be no different than discovery of any information from an expert witness, that is, with the permission of the opposing party or with notice to the opposing party and an opportunity for the opposing party to protect whatever privileges may exist.

It is requested that this matter be placed on the agenda of the Committee at the earliest possible time.

Thank you for your consideration of this matter.

Yours very truly,

William R. Edwards

WRE/bam

[redacted]

[redacted] *Plaintiffs,* v. [redacted] HOSPITAL, ET AL., *Defendants.*	IN THE COUNTY COURT OF DALLAS COUNTY [redacted]

ORDER BARRING *EX PARTE* COMMUNICATIONS WITH TREATING PHYSICIANS

On August 31, 2001, Plaintiffs filed a Motion for Protective Order Barring Ex-Parte Interviews Between Defense Counsel & Mrs. [redacted] Treating Physicians. Defendants requested an opportunity to brief the Court on that issue, and a hearing was therefore set on Plaintiffs' motion for September 5, 2001. At the hearing, all interested parties appeared and a record was made of the proceedings. Following the hearing, Plaintiffs presented additional authorities regarding the propriety of *ex parte* interviews between defense counsel and plaintiff's treating physicians.

As many of the authorities presented state, this issue is not settled in Texas. In this Court's opinion, however, the better-reasoned decisions are those that prohibit *ex parte* communications. In addition to all of the reasons set forth in the various cases, the mere fact that *ex parte* communications with Plaintiff's treating physicians are an issue in this case at all suggests the real-world significance of allowing or disallowing such communications. Although counsel for Defendants are to a person

highly competent and professional, whatever privileges[1] may remain between Mrs. [redacted] and her treating physicians, regardless how brief the treatment, are hers to assert, not Defendants.[2]

IT IS THEREFORE ORDERED that Defendants immediately cease communications with Mrs. [redacted] treating physicians or staff[3] regarding Mrs. [redacted] treatment at issue in this cause except as expressly authorized by Mrs. [redacted] the Texas Rules of Civil Procedure, or further order of this Court.

IT IS SO ORDERED this 5th day of September, 2001.

[redacted]

---

[1] As the Court in *Perkins* wrote, "the problem is not *whether* the physicians' opinions are discoverable, the issue is the *manner* in which those opinions can be obtained." *Perkins v. United States*, 877 F. Supp. 33, 332 (E.D. Tex. 1995).

[2] Defense counsel, of course, have an ethical duty to zealously advocate Defendants' interests, and owe no such duty to Plaintiffs.

[3] That Defendants' employees might have privileged information of Mrs. [redacted] does not make that information any less privileged.

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February 21, 2002

Mr. Charles L. Babcock, Chair
Supreme Court Advisory Committee
Jackson & Walker L.L.P.
1100 Louisiana Street, Suite 4200
Houston, Texas 77002

Dear Chip:

Enclosed herein please find Disposition Chart reflecting the recommendations of the Evidence Subcommittee following a meeting of the committee on February 7, 2002. We will be prepared to discuss these recommendations at the next meeting of the Supreme Court Advisory Committee.

Thank you very much.

Sincerely,

Buddy Low

BL:cc
Enclosure
cc: Mr. Chris Griesel

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February 8, 2002

To: Supreme Court Advisory Subcommittee on Evidence

From: Gilbert I. Low

Dear Members of the Evidence Subcommittee:

Thanks for your thoughts and comments on our telephone conference meeting of February 7, 2002. I am enclosing herein Disposition Chart which shows action taken. If you have any corrections to make to the same or any suggestions, please let me know. I will hold off a couple of weeks before putting this together and mailing it for consideration at our next meeting.

In summary, we still have two matters for consideration. First will be Rule 509, and secondly will be Rule 614 that Mark Sales mentioned. He is getting me something on that and I will forward it to you. These are the only two matters we will have still pending.

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosure

DISPOSITION CHART
TEXAS RULES OF EVIDENCE

RULE NO.	HISTORY	RECOMMENDATION OF EVIDENCE SUBCOMMITTEE	REASONS
409	Referred by SBOT Administration of Rules of Evidence Committee - was considered previously and sent back to SBOT Committee for further study which resulted in amended recommendation by said committee	Proposed revised rule attached	No need to limit rule just to medical expenses. *Attached is copy of present rule and copy of proposed rule
103	Referred by SBOT Administration of Rules of Evidence Committee to add sentence that was included in Federal Rule 103	Leave rule the same and not add sentence included in the Federal Rules	Present rule meets the practices and customs in Texas and is unambiguous. *Attached is copy of Federal Rule 103, as well as present Texas Rule 103
904 (New)	Referred by SBOT Administration of Rules of Evidence Committee	Adopt the proposed amendment	For simplicity and savings of costs. *Subcommittee had reservations about implementation of this, whether through legislative action or amendment to rule with approval of the legislature. Full discussion to be held at meeting. *Proposed amendment attached
509	Referred by Bill Edwards - concerning ex parte conversations with a doctor under Exception (e)(4) to 509	Mark Sales to submit this to SBOT Administration of Rules of Evidence Committee for further consideration before we reconsider same	Further research needed, particularly on statutes that may affect same (providing penalties for disclosure by physician). Also, need for further discussions on effect any amendment will have.

Attachment 1

Stam v. Mack, 984 S.W.2d 747, 752 (Tex.App.—Texarkana 1999, no pet.). "Settlement agreements may be admissible ... if offered for other purposes, such as proving bias or prejudice. One kind of settlement agreement that is admissible is a 'Mary Carter' agreement. ... These agreements are admissible to show the true alignment of the parties."

State Farm Mut. Auto. Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex.App.—Houston [14th Dist.] 1992, orig. proceeding). "[O]ffers of settlement and compromise are excluded in order to allow a party to buy his peace and encourage settlement of claims outside of the courthouse."

Ochs v. Martinez, 789 S.W.2d 949, 959 (Tex.App.—San Antonio 1990, writ denied). "The [TRE] 408 exception allowing for admission of evidence of bias or prejudice [even if statement made during settlement negotiations] is a narrow one drafted in consideration of strong Texas judicial policy favoring the disclosure of conflicts of interest among parties to a lawsuit...."

TRE 409. PAYMENT OF MEDICAL & SIMILAR EXPENSES

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

See *Commentaries*, "Motion in Limine," ch. 5-E; Herasimchuk, *Texas Rules of Evidence Handbook*, p. 332 (2001).

History of TRE 409 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 409.

Port Neches ISD v. Soignier, 702 S.W.2d 756, 757 (Tex.App.—Beaumont 1986, writ ref'd n.r.e.). A letter from an insurance company authorizing medical expenses for a workers' compensation [P] and stating that all future medical bills should be sent to the insurance company goes beyond TRE 409 and actually admits coverage, and thus is admissible.

TRE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS & RELATED STATEMENTS

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

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

(2) in civil cases, a plea of *nolo contendere*, and in criminal cases, a plea of *nolo contendere* that was later withdrawn;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding, in a civil case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere*, or in a criminal case, either a plea of guilty that was later withdrawn or a plea of *nolo contendere* that was later withdrawn; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority, in a civil case, that do not result in a plea of guilty or that result in a plea of guilty later withdrawn, or in a criminal case, that do not result in a plea of guilty or a plea of *nolo contendere* or that results in a plea, later withdrawn, of guilty or *nolo contendere*.

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

See *Commentaries*, "Motion in Limine," ch. 5-E; Herasimchuk, *Texas Rules of Evidence Handbook*, p. 336 (2001).

History of TRE 410 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 410.

Cox v. Bohman, 683 S.W.2d 757, 758 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). "Unless a plea of guilty to a traffic offense was made in open court ... evidence of such guilty plea is not admissible in a civil suit for damages arising out of negligence giving rise to the charge. ... A plea of *nolo contendere* to a traffic violation cannot be admitted into evidence in a civil suit for damages arising out of the same incident."

TRE 411. LIABILITY INSURANCE

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

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 349 (2001).

History of TRE 411 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xl). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xli). Source: FRE 411.

Thornhill v. Ronnie's I-45 Truck Stop, Inc., 944 S.W.2d 780, 794 (Tex.App.—Beaumont 1997, writ dism'd). TRE 411 "only prohibits the admission of

Current Proposed Revision of Rule 409:

> **Payment of Damages or Expenses.** Evidence of furnishing or paying or offering or promising to furnish or pay any damages or expenses occasioned by a personal injury or property damage is not admissible to prove liability for such personal injury or property damage.

EXHIBIT

D

Attachment 2

ARTICLE I. GENERAL PROVISIONS

FRE 101. SCOPE

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

Cross references to FRE 101: *Commentaries*, "Introduction to the Federal Rules," ch. 1-A, p. 3. Power of Supreme Court to prescribe rules of procedure and evidence, see 28 U.S.C. §2072.

Source of FRE 101: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1929; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.

In re Nautilus Motor Tanker Co., 85 F.3d 105, 111 (3d Cir.1996). The FREs "were enacted by Congress and must be regarded ... as any other federal statute. *At 112:* Accordingly, [administrative regulations cannot] limit the authority of Congress to prescribe and enforce rules for the admissibility of evidence in the federal courts."

Washington v. Department of Transp., 8 F.3d 296, 300 (5th Cir.1993). "In a diversity action, we apply federal procedural law, such as the [FREs]."

Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir.1989). The FREs "are intended to have uniform nationwide application...."

FRE 102. PURPOSE & CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Cross references to FRE 102: *Commentaries*, "Introduction to the Federal Rules," ch. 1-A, p. 3.

Source of FRE 102: Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1929.

New York v. Operation Rescue Nat'l, 80 F.3d 64, 72 (2d Cir.1996). "Both the mandate of [FRCP 1] that those rules be construed 'to secure the just, speedy, and inexpensive determination of every action,' the dictate of [FRE 102] that those rules be construed to eliminate 'unjustifiable expense and delay,' and the allowance in [FRE 1006] for complex evidence to be presented in summary form should be read to preclude an absolute right of a litigant to command that a videotape be shown in full, or every word of a document be read, in open court."

Krumme v. West Point-Pepperell, Inc., 735 F.Supp. 575, 580 (S.D. N.Y.1990). "[W]hen considering [FRE] 102, it should be noted that the core provisions of the [FREs] were 'chiefly designed to serve [the] fundamental and comprehensive need in our adversary system to develop all relevant facts before the trier [of fact]'. ... Specifically, the court should also be concerned with the 'elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.'"

Gentile v. County of Suffolk, 129 F.R.D. 435, 458 (E.D. N.Y.1990), *aff'd*, 926 F.2d 142 (2d Cir.1991). "The trial court is given broad discretion to control the trial by the [FREs]. ... In controlling the trial the court will necessarily consider 1) whether the jury is in a position to properly evaluate the evidence before it without further help and 2) the amount of time the evidence will require as compared to alternate forms of proof. These general administrative considerations for the judicial officer presiding at the trial are designed to carry out the direction and policy of [FRE] 102. They are related to, but much broader in scope, than the special factors set out in [FRE] 403."

FRE 103. RULINGS ON EVIDENCE

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

2000 Notes of Advisory Committee

[¶1] The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g.*, Collins v. Wayne Corp., 621 F.2d 777 (5th Cir.1980). Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g.*, Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir.1996) (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g.*, Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir.1993). Another court, aware of this Committee's proposed amendment, has adopted its approach. Wilson v. Williams, 182 F. 3d 562 (7th Cir.1999) (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

[¶2] The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. *See* Fed.R.Civ.P. 46 (formal exceptions unnecessary); Fed.R.Cr.P. 51 (same); United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993) ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g.*, United States v. Vest, 116 F.3d 1179, 1188 (7th Cir.1997) (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); United States v. Valenti, 60 F.3d 941 (2d Cir.1995) (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

[¶3] The amendment imposes the obligation on counsel to clarify whether an in limine or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g.*, Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir.1997) (although the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

[¶4] Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. The court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve a claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. United States Aviation Underwriters, Inc. v. Pratt & Whitney Canada Wings, Inc., 896 F.2d 948, 956 (5th Cir.1990) ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that is granted"); United States v. Roenigk, 810 F.2d 809 (8th Cir.1987) (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

[¶5] A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof or motion to strike. *See* Old Chief v. United States, 519 U.S. 172, 182, n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. *See* Huddleston v. United States, 485 U.S. 681, 690, n.7 (1988) ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

[¶6] Nothing in the amendment is intended to affect the provisions of Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. Fed.R.Civ.P. 72(a) provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. 28 U.S.C. §636(b)(1) provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g.*, Wells v. Shriners Hospital, 109 F.3d 198, 200 (4th Cir.1997)("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When Fed.R.Civ.P. 72(a) or 28 U.S.C. §636(b)(1) is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

[¶7] Nothing in the amendment is intended to affect the rule set forth in Luce v. United States, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. Luce answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The Luce principle has been extended by many lower courts to other situations. *See* United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985) (applying Luce where the defendant's witness would be impeached with evidence offered under Rule 608). *See also* United States v. Goldman, 41 F.3d 785, 788 (1st Cir.1994) ("Although Luce involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); Palmieri v. DeFaria, 88 F.3d 136 (2d Cir.1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); United States v. Ortiz, 857 F.2d 900 (2d Cir.1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); United States v. Bond, 87 F.3d 695 (5th Cir.1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

[¶8] The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g.*, United States v. Fisher, 106 F.3d 622 (5th Cir.1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); Judd v. Rodman, 105 F.3d 1339 (11th Cir.1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996) ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); United States v. Williams, 939 F.2d 721 (9th Cir.1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

Cross references to FRE 103: *Commentaries*, "Making Objections & Preserving Error," ch. 1-F, p. 26; "Objecting to Evidence," ch. 8-D, p. 433.

The annotated cases, reference notes, and history notes that follow the rules are not part of the official rules; they are copyrighted material included with the rules to assist in research.

TEXAS RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

TRE 101. TITLE & SCOPE

(a) **Title.** These rules shall be known and cited as the Texas Rules of Evidence.

(b) **Scope.** Except as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.

(c) **Hierarchical Governance in Criminal Proceedings.** Hierarchical governance shall be in the following order: the Constitution of the United States, those federal statutes that control states under the supremacy clause, the Constitution of Texas, the Code of Criminal Procedure and the Penal Code, civil statutes, these rules, and the common law. Where possible, inconsistency is to be removed by reasonable construction.

(d) **Special Rules of Applicability in Criminal Proceedings.**

(1) *Rules not applicable in certain proceedings.* These rules, except with respect to privileges, do not apply in the following situations:

(A) the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104;

(B) proceedings before grand juries;

(C) proceedings in an application for habeas corpus in extradition, rendition, or interstate detainer;

(D) a hearing under Code of Criminal Procedure article 46.02, by the court out of the presence of a jury, to determine whether there is sufficient evidence of incompetency to require a jury determination of the question of incompetency;

(E) proceedings regarding bail except hearings to deny, revoke or increase bail;

(F) a hearing on justification for pretrial detention not involving bail;

(G) proceedings for the issuance of a search or arrest warrant; or

(H) proceedings in a direct contempt determination.

(2) *Applicability of privileges.* These rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(3) *Military justice hearings.* Evidence in hearings under the Texas Code of Military Justice, Tex. Gov't Code §432.001-432.195, shall be governed by that Code.

Comment to 1998 change: "Criminal proceedings" rather than "criminal cases" is used since that was the terminology used in the prior Rules of Criminal Evidence. In subpart (b), the reference to "trials before magistrates" comes from prior Criminal Rule 1101(a). In the prior Criminal Rules, both Rule 101 and Rule 1101 dealt with the same thing—the applicability of the rules. Thus, Rules 101(c) and (d) have been written to incorporate the provisions of former Criminal Rule 1101 and that rule is omitted.

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 65 (2001).

History of TRE 101 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvi): added "Civil" to title of rules in (a). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: For TRE 101(a), see FRE 1103; for TRE 101(b), see FRE 101.

TRE 102. PURPOSE & CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

See Herasimchuk, *Texas Rules of Evidence Handbook*, p. 78 (2001).

History of TRE 102 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: FRE 102.

TRE 103. RULINGS ON EVIDENCE

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) **Record of Offer and Ruling.** The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the

absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental Error in Criminal Cases. In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Comment to 1998 change: The exception to the requirement of an offer of proof for matters that were apparent from the context within which questions were asked, found in paragraph (a)(2), is now applicable to civil as well as criminal cases.

See *Commentaries*, "Motion in Limine," ch. 5-E; "Objecting to Evidence," ch. 8-D; "Offer of Proof & Bill of Exceptions," ch. 8-E; Herasimchuk, *Texas Rules of Evidence Handbook*, p. 79 (2001).

History of TRE 103 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxii). Amended eff. Jan. 1, 1988, by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xciv): Added 2d sentence to (a)(1), to conform to TRAP 52(b); deleted the phrase "or was apparent from the context within which questions were asked" from (a)(2); and added 1st sentence to (b), requiring party make offer before jury is charged. Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxx): Substituted the words "a party" for "counsel" in the last sentence of (b). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvi). Source: FRE 103, with changes: Party entitled to make offer in question-and-answer form.

Bean v. Baxter Healthcare Corp., 965 S.W.2d 656, 660 (Tex.App.—Houston [14th Dist.] 1998, no pet.). "[A]ppellant[ ] preserved error after its initial offer of the videotape. If exclusion of evidence is based on the substance of the evidence, however, the offering party must reoffer it if it again becomes relevant. This may occur when the evidence is pertinent to rebuttal. Error is waived if the offering party fails to reoffer evidence for a limited purpose after it has been excluded pursuant to a general objection."

Hill v. Heritage Resources, Inc., 964 S.W.2d 89, 136 (Tex.App.—El Paso 1997, pet. denied). "To obtain a reversal of judgment based upon a trial court's decision to admit or exclude evidence, the appellant must show: (1) that the trial court abused its discretion in making the decision; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. [¶] It has been held that when evidence is sharply conflicting and the case is hotly contested, any error of law by the trial court will be reversible...."

Ludlow v. Deberry, 959 S.W.2d 265, 270 (Tex. App.—Houston [14th Dist.] 1997, no writ). "The primary purpose of the offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful. A secondary purpose is to permit the trial judge to reconsider his ruling in light of the actual evidence. An offer of proof is sufficient if it apprised the court of the substance of the testimony and may be presented in the form of a concise statement. ... When the trial court excludes evidence, failure to make an offer of proof waives any complaint about the exclusion on appeal."

Rendleman v. Clarke, 909 S.W.2d 56, 58 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd). "We do not reach the merits of the admissibility of evidence of other falls because in each case, appellant either failed to object, or objected only after the testimony had been offered and received. To preserve a complaint for appellate review, a party must present to the trial court a *timely* request, objection, or motion, state the specific grounds therefor[e], and obtain a ruling before the testimony is offered and received."

Chance v. Chance, 911 S.W.2d 40, 52 (Tex.App.—Beaumont 1995, writ denied). "[T]he rule requiring that proffered evidence be incorporated in a bill of exception does not apply to cross-examination of an adverse witness.... When cross-examination testimony is excluded, appellant need not show the answer to be expected but only need show that the substance of the evidence was apparent form the context within which the question was asked."

TRE 104. PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Attachment 3

PROPOSED NEW RULE 904

§ 18.001. Affidavit Concerning Cost and Necessity of Services

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

(b) ~~Unless a controverting affidavit is filed as provided by this section,~~ An affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary but does not require such a finding.

(c) The affidavit must:
(1) be taken before an officer with authority to administer oaths;
(2) be made by:
(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and
(3) include an itemized statement of the service and charge.

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

(e) A party ~~intending~~ may not offer evidence to controvert a claim reflected by the affidavit ~~must~~ unless that party files a counteraffidavit with the clerk of the court and serves a copy of the counteraffidavit on each other party or the party's attorney of record:
(1) not later than:
(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or
(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must ~~give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit~~ specifically set forth the factual basis for controverting the contested charges reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. The counteraffidavit may not be based upon the assertion that an affiant testifying under section (c)(2)(B) is not qualified by knowledge, skill, experience, training, education, or other expertise to testify concerning the matters set forth in section (b).

(g) Affidavits properly filed under (c) and (d) and counteraffidavits properly filed under (e) and (f) may be submitted to the trier of fact.

EXHIBIT
F

PROPOSED NEW RULE 904

§ 18.001. Affidavit Concerning Cost and Necessity of Services

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

(b) ~~Unless a controverting affidavit is filed as provided by this section,~~ An affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary but does not require such a finding.

(c) The affidavit must:
(1) be taken before an officer with authority to administer oaths;
(2) be made by:
(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and
(3) include an itemized statement of the service and charge.

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

(e) A party ~~intending~~ may not offer evidence to controvert a claim reflected by the affidavit ~~must~~ unless that party files a counteraffidavit with the clerk of the court and serves a copy of the counteraffidavit on each other party or the party's attorney of record:
(1) not later than:
(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day on which evidence is first presented at the trial of the case; or
(2) with leave of the court, at any time before the commencement of evidence at trial.

(f) The counteraffidavit must ~~give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit~~ specifically set forth the factual basis for controverting the contested charges reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. The counteraffidavit may not be based upon the assertion that an affiant testifying under section (c)(2)(B) is not qualified by knowledge, skill, experience, training, education, or other expertise to testify concerning the matters set forth in section (b).

(g) Affidavits properly filed under (c) and (d) and counteraffidavits properly filed under (e) and (f) may be submitted to the trier of fact.

EXHIBIT
F

CHARLES BACARISSE
HARRIS COUNTY DISTRICT CLERK

April 15, 2002

Mr. Charles Babcock
Jackson & Walker L.L.P.
1100 Louisiana, Suite 4200
Houston, Texas 77002

Dear Mr. Babcock:

I was advised that you serve as a member of the committee on the Texas Rules of Civil Procedure. Therefore, this letter is to advise you that our office has begun to consider providing notices to attorneys via electronic mail. However, in considering providing notices by electronic mail we discovered that the Texas Rules of Civil Procedure do not contain provisions for notice by electronic mail.

I request that you provide me with the guidelines we may follow to request a change in the Texas Rules of Civil Procedure to allow notices by electronic mail.

Thank you in advance for your cooperation.

Sincerely,

Wayne Clemon

W. Clyde Lemon
Assistant Director-Special Projects

301 FANNIN • P.O. Box 4651 • Houston, Texas 77210-4651 • (713) 755-5734

THE SUPREME COURT OF TEXAS

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

(512) 463-1315

March 12, 2002

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

Re: Supreme Court Judicial Committee on Information Technology (JCIT)

Dear Richard,

Since its inception in 1997, JCIT has been investigating electronic filing in the trial courts of Texas. Given the current state of technology and the demand for this service, it is inevitable that electronic filing will eventually come to Texas courts. A JCIT subcommittee has been reviewing the electronic filing vendors, with a view to adopting statewide standards.

Once these standards are adopted, the Court will probably ask the Supreme Court Rules Advisory Committee to consider whether any changes should be made to the rules of civil and appellate procedure. As the State Bar representative to JCIT, you will undoubtedly play an important part in this process.

We would also like the Bar's views on what practical changes will be necessary or desirable in a world of electronic filing. For example, to what extent should the Bar increase its efforts to collect e-mail or telefax addresses, and what privacy concerns would be implicated by such changes?

We would appreciate the Bar's thoughts on these issues.

Sincerely,

Thomas R. Phillips
Chief Justice

cc: Hon. Nathan Hecht
Charles Babcock, Esquire
Antonio Alvarado, Esquire
Craig Ball, Esquire
Broadus Spivey, Esquire
Peter Vogel, Esquire, JCIT Chair
Mike Griffith, JCIT Director
Jerry Benedict, Esquire, OCA Director

Chip Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
1100 Louisiana , Suite 4200
Houston, Texas 77002

Dear Chip,

I would like to make the following two referrals to your committee. Attached are copies of two letters from members of the bar relating to changes in the Texas Rules of Civil Procedure. A Waco attorney suggests that TRCP Rule 87 might need an overhaul because of a statutory cross-reference that has been amended recently by the legislature.

We also have received a suggestion from the Harris County Attorney's office regarding Rule 103, service of process. This suggestion deals with what public servants may serve process. I believe a copy of the letter suggesting this change is already been posted on the website. I would appreciate the committee taking a look at both proposals to see if any changes need to be made.

Nathan Hecht

MORRIS ATLAS
ROBERT L. SCHWARZ
GARY GURWITZ
CHARLES C. MURRAY
A. KIRBY CAVIN
MIKE MILLS
MOLLY THORNBERRY
FREDERICK J. BIEL
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March 22, 2002

Richard Orsinger
Attorney at Law
1616 Tower Life Building
San Antonio, Texas 78205

Dear Richard:

Enclosed is a letter which a member of my committee received from the Harris County Attorney regarding service of process which might be of some importance to the work you are doing in connection with that matter.

Sincerely,

O. C. Hamilton, Jr.

OCH:PGB
CourtRules.Orsinger.3222002
Attachment

cc: Charles Babcock
901 Main Street
Suite 6000
Dallas, Texad 75202-3797

Chris Grissel
Supreme Court Building
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Michael A. Stafford
Harris County Attorney

January 31, 2002

Ms. Barbara Baruch, Member
Court Rules Committee of
The State Bar of Texas
1019 Congress, 15th Floor
Houston, Texas 77002

Re: TEX. R. CIV. P. 103

Dear Barbara:

I am writing this letter to request your assistance in presenting my request for a change to TEX. R. CIV. P. 103 to the Court Rules Committee.

TEX. CODE CRIM. PROC. ANN. §2.12 (Vernon Supp. 2002) provides who qualifies as a "peace officer" in the State of Texas. The list includes Sheriffs and Constables, but is not limited to these officials. TEX. CODE CRIM. PROC. ANN. §2.12 (Vernon Supp. 2002) then provides the duties and authority of peace officers, and makes clear that peace officers can serve official process in this State. Id. ("The officer shall . . .execute all lawful process issued to the officer by any magistrate or court. . .") While the peace officers who have authority to serve official process in this State includes numerous officials other than the Sheriff and Constable, the Rule of Civil Procedure concerning who can serve civil process in this state appears to be more restrictive.

TEX. R. CIV. P. 103 provides, in pertinent part, as follows:

> Citation and other notices may be served anywhere by (1) the sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age.

As can be seen Rule 103 does not refer to peace officers, consistent with the statutory authority for service of lawful process, but instead, refers specifically to sheriffs, constables or any "other person authorized by law."

I would request that the rule be changed to be consistent with the statutory authority given to peace officers under 2.13 of the Code of Criminal Procedure, because in our County some courts have expressed confusion as to whether "other person authorized by law" can include other peace officers listed in 2.12 when the Rule indicates a limitation. To avoid this confusion and make the rule consistent with statute, I would recommend that the rule be changed as follows:

> Citation and other notices may be served anywhere by (1) ~~the sheriff or constable or other person authorized by law~~ peace officers ~~or,~~ (2) by any person authorized by law or (3) by written order of the court who is not less than eighteen years of age.

Please contact me, if you require any further information. Thank you for your attention to this matter.

Very truly yours,

MIKE STAFFORD
HARRIS COUNTY ATTORNEY

By: Sandra D. Hachem
Assistant County Attorney