SCAC Meeting
December 8, 2006
Index

1. Agenda

2. Initial Report of the SCAC Subcommittee on Legislative Mandates regarding "Rocket Dockets" and the "Vanishing Jury Trial" (12/8/06)

3. Email correspondence from Jeff Boyd regarding Rocket Docket (12/06/06)

4. Selected Rocket Docket articles:

   - Cates and Myers, "Fast Track"
   - Brister, "Lonesome Docket"
   - Ross, "The Rocket Docket"
   - Ellis, "Judicial Management of Patent Litigation in the U.S."
   - Smith, "Rocket Docket"

5. Letter from Justice Hecht to Chip Babcock re: Referral of Various Proposed Changes to Rules of Civil and Appellate Procedure (9/22/06)

6. Carlson reports on TRCP 216-299a dated 12/6/06 and 10/16/06

next time

7. Dorsaneo report on various TRAP proposals (12/06/06)

8. Alan Bennett (Waco COA) email re: proposed amendment to TRAP 41.1 (12/07/06)

9. Buddy Low correspondence re proposed TRE 904

SCAC MEETING AGENDA – Revised (12/6/06)
December 8, 2006
9:00 a.m.

Location: **State Bar Building**
1414 Colorado, Room 101
Austin, Texas 78711
512-463-1463

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM JUSTICE HECHT**

FN rules amendments
Electronic discovery - fed cts; do we need corresponding change in Tx rules?

Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the October 2006 meeting. Justice Hecht may refer new issues for the committee's study.

3. **ROCKET DOCKET (Boyd)**

Initial Report of Subcommittee

Email from Jeff Boyd dated 12/1/06 to the Legislative Mandates Subcommittee with list of articles and some articles attached

4. **LETTER FROM JUSTICE HECHT DATED SEPTEMBER 22, 2006 W/ VARIOUS ISSUES (Continuation)**

A. TRCP 296 (**Carlson**) (Requests for Findings of Fact and Conclusions of Law)

Report of SCAC Subcommittee on TRCP 216-299a dated 12/6/06

B. TRAP 24, 41 and proposed new rule (**Dorsaneo**)
(24 – Suspension of Enforcement of Judgment Pending Appeal in a Civil Case)
(41 – Panel and En Banc Decision)
(Proposed new rule re: sealed records – comparable to TRCP 76a)

Memorandum from Professor Dorsaneo dated 12/6/06

5. **PROPOSED AMENDMENT TO RULE 226a (Carlson)**

Letter from David Beck (2007 President of American College of Trial Lawyers) dated June 15, 2006 w/ proposed language

Report of Subcommittee on TRCP 216-299a dated 12/6/06

6. **PROPOSED AMENDMENT TO RULE 904 (Low)**

Letter from Buddy Low dated September 29, 2006 with Disposition Chart and proposed recommendations referred by the SBOT Administration of Rules of Evidence Committee

Speaker: Bruce Williams – Cotton, Bledsoe, Tighe & Dawson, PC
Midland, Texas

Texas Supreme Court Advisory Committee

Initial Report of the SCAC Subcommittee on Legislative Mandates Regarding "Rocket Dockets" and the "Vanishing Jury Trial" December 8, 2006

A. Subcommittees' Charge

To explore, evaluate, and advise the SCAC on whether and how the implementation of a "rocket docket" within the Texas state court system may reduce cost and delay and thereby promote the role and use of jury trials in the resolution of legal disputes.

B. Preliminary List of Issues to Address

1 Background data.
   a. What are the current Texas state court statistics for time from filing to disposition by jury trial, and how have they changed over time?
   b. How have changes in the discovery process (under both the "new" rules and the "old new" rules) affected the percentage of jury resolutions and the time required for resolution.

2. What is a "rocket docket?"

3. Does a "rocket docket" offer a method to address the perceived problem of "the vanishing jury trial?"

4. What courts have previously implemented a form of a "rocket docket?" (e.g., E.D. Virginia; E.D. Texas; N.D California; S.D. California; N.D. Georgia; W.D. Wisconsin; W.D. Pennsylvania; E.D. Oklahoma; W.D. Oklahoma; W.D. Arkansas; D. Maine; Vermont State Courts (appellate))

5. What rules and procedures do "rocket dockets" use?
   a. Early setting of fixed and immutable trial date.
   b. Short discovery period that begins soon after filing of petition/answer.
   c. Short period for pleading amendments and dispositive motions.
   d. No continuances or delays permitted (with rare exceptions).
   e. Central docket, rather than individual dockets.
   f. Mediation/settlement conferences occur in parallel with discovery.

6. What other factors are inherent in successful "rocket dockets?"
   a. Judges committed to speedy resolutions and willing to work hard.
   b. A bar that accepts and commits to the concept.
   c. Leaders (among bench and bar) who will promote the concept early on.
   d. Magistrate or pro tem judges (?)

PENGAD 800-631-6989
EXHIBIT
D6-11

7. How can a court successfully transition to a "rocket docket?"

8. What are the benefits/downsides to a "rocket docket?"
   a. Limits time and cost required to resolve disputes.
   b. Tends to favor the (well-prepared) plaintiff.
   c. Requires local counsel experienced with that "rocket docket."

9. Under what circumstances could "rocket dockets" be made available?
   a. Mandatory for all cases.
   b. Mandatory if one side requests.
   c. Mandatory if one side requests, subject to court order removing.
   d. Available if both sides agree.
   e. Available if court orders for good cause.
   f. Available if court orders based on objective criteria.

10. Other issues
   a. Types of cases: civil, criminal, family, juvenile?
   b. Types of courts: trial, appellate, district, county, etc.?
   c. State-imposed vs. encouraged locally?

Senneff, Angie

From: Parsons, Carol on behalf of Babcock, Chip
Sent: Monday, December 04, 2006 10:32 AM
To: Senneff, Angie
Subject: FW: SCAC - Rocket Docket issue
Attachments: 20061201155622471.pdf

Carol Parsons
Secretary to Charles L. Babcock
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
T: 214-953-6052
F: 214-953-5822
cparsons@jw.com

From: Jeff.Boyd@tklaw.com [mailto:Jeff.Boyd@tklaw.com]
Sent: Friday, December 01, 2006 5:09 PM
To: SCAC_Legislative_Mandates_Subcommittee%TKPC@tklaw.com
Cc: Babcock, Chip
Subject: SCAC - Rocket Docket issue

To Members of SCAC Subcommittee on Legislative Mandates:

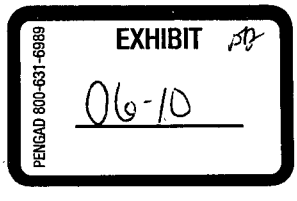
I have gathered and (very quickly) reviewed a number of articles re: Rocket Dockets and other "fast-track" systems throughout the country.
My initial reaction is to note the irony that rocket dockets were created (as early as 1962 in the E.D. Virginia) to address a perceived problem with too much litigation ("congested dockets," and a "litigaton crisis"), and now we're being asked to consider them to address a perceived problem with too little litigation ("vanishing jury trials").

In any event, I'm attaching a list of the materials I've gathered so far. The articles are listed in chronological order of publication dates, from 1981 through 2006. I will follow with seperate emails attaching six of the articles on this list (those that I've numbered 8, 12, 15, 17, 18, and 21). (I will send them each by separate email to hopefully avoid overloading any of your systems, or mine.) These six articles are not necessarily the "best" ones on the list, and the list obviously does not contain all the articles that will be helpful, but these six should provide a good start before our meeting next week. I have copies of all of the others on the list, so let me know if you want me to send you any of those.

Also, last year the South Texas Law Rev. published an article by Justice Hecht that I should have read by now but still haven't pulled up; and that volume also had one by Brister. Their cites, in case you want to pull them up yourselves, are:
- Hecht, The Vanishing Civil Jury Trial . . . , 47 S. Tex. L. Rev. 163 (2005)
- Brister, The Decline in Jury Trials . . . , 47 S. Tex. L. Rev. 191 (2005).

As you skim through these materials, you may want to take notes (or mental notes) of what you read regarding the following issues, which may be the focus of our discussions during the coming meetings:

1. What is a Rocket Docket?



2. What courts have adopted a Rocket Docket?
   - E.D. Virginia
   - E.D. Texas
   - N.D. California
   - S.D. California
   - N.D. Georgia
   - W.D. Wisconsin
   - W.D. Pennsylvania
   - E.D. Oklahoma
   - W.D. Oklahoma
   - W.D. Arkansas
   - D. Maine
   - Vermont State Courts (appellate)
   -
   -
3. What rules & procedures do Rocket Dockets use?
   - Early setting of a fixed and immutable trial date.
     - Resolution w/in 6-8 months (Va.)
   - Short discovery period, which begins soon after filing/answer.
     - 4-5 months (Va).
   - Short period for pleading amendments and dispositive motions
   - No Continuances
   - Central docket, rather than individual dockets
   - Mediation/settlement conferences occur in parallel with discovery.
   -
   -
4. What else does it take to have a Rocket Docket?
   - Judges committed to speedy resolutions and willing to work hard
   - Magistrate or pro tem judges?
   - Commitment of the practicing bar.
     - Plaintiffs must research and prepare their cases before they file them.
   - Leaders (among judges and the bar) who will promote it from the beginning.
5. How can a court transform its system into a Rocket Docket?
6. What are the benefits/downsides of a Rocket Docket?
   - Limits time and cost to resolve disputes.
   - Tends to favor the (well-prepared) plaintiff.
   - Requires local counsel with experience with that docket.
7. Other thoughts and issues?
   - Types of cases: civil, criminal, family?
   - Trial courts vs. appellate courts? (Vermont)
   - Mandatory vs. optional track?
   - State imposed or encouraged locally?

Again, the attachment to this email is the list of materials gathered so far. Separate emails will follow with copies of the six articles attached.
Happy reading, and I look forward to visiting on Weds at 2:00 p.m.

Jeff

Jeffrey S. Boyd
Thompson & Knight LLP
98 San Jacinto Boulevard Suite 1900
Austin, Texas 78701
512/469-6109 (direct line)
512/482-5095 (direct fax)

jeff.boyd@tklaw.com
www.tklaw.com

"Rocket Docket" (aka Fast Track System, Delay Reduction) Materials

Articles

1. Analyzing Court Delay-Reduction Programs: Why Do Some Succeed?, 65 Judicature 58 (Aug. 1981)

2. State Trial Court Delay: Efforts at Reform, 31 Am. U. L. Rev. 213 (1982)

3. Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure, 60 Notre Dame L. Rev. 431 (1985)

4. Fast Track Reduces Trial Court Delay, 2 J. Contemp. Legal Issues 135 (1989)

5. The Fast Track System: A Yellow Brick Road to Speedier Trials?, 2 J. Contemp. Legal Issues 221 (1989)

6. Fast Track: Are We on the Right Track?, 2 J. Contemp. Legal Issues 229 (1989)

7. Point and Counterpoint—The San Diego Fast Track Experience, 2 J. Contemp. Legal Issues 251 (1989)

8. "Fast Track": Its Evolution and Future, 21 Ariz. St. L. J. 219 (1989)

9. Case Management in the Eastern District of Virginia, 26 U.S.F. L. Rev. 445 (Spring 1992)

10. Fast Track: A Panacea for a Delayed and Cluttered Court System?, 1 San Diego Just. J. 443 (1993)

11. Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform, 25 Tex. Tech L. Rev. 261 (1994)

12. Lonesome Docket: Using the Texas Rules to Shorten Trials and Delay, 46 Baylor L. Rev. 525 (1994)

13 Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action, 67 Temple L. Rev. 179 (1994) (relevant portion of article only)

14 Patent Litigation in the Eastern District of Virginia, 35 IDEA 361 (1994-95)

15 The Rocket Docket, 22 Litigation 48 (Winter 1996)

16 Rocket Dockets: Reducing Delay in Civil Litigation, 85 Cal L. Rev. 225 (1997)

17 The Eastern District of Virginia: A Working Solution for Civil Justice Reform, 32 U. Rich. L. Rev. 799 (1998)

18 Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects, 9 Fed. Cir. B.J. 541 (1999-2000)

19 To Expediency and Beyond: Vermont's Rocket Docket, 4 J. App. Prac. & Process 277 (2002)

20 Trials in "Rocket Dockets": More Than Just a Legal Strategy, Washington Legal Foundation Legal Opinion Letter, Oct. 17, 2003

21 How Much Justice Can We Afford?: Defining the Court's Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice, 2006 J. Disp. Resol. 213 (2006)

22 The Eastern District of Texas: A Magnet for Patent Litigation, Metropolitan Corporate Counsel, Sept. 2006

Court Rules and Plans

23 Local Rules for the U. S. District Court, Eastern District of Virginia (effective Aug. 1, 2006) (relevant portion only)

24 Local Rules for the U.S. District Court for the Eastern District of Texas with Appendix M—Rules of Practice for Patent Cases (as of Oct. 27, 2006)

25 San Diego County Superior Court Rules (revised July 1, 2006) (relevant portion only)

26 Civil Justice Expense and Delay Reduction Plan Pursuant to the Civil Justice Reform Act of 1990, 9 Ga. St. U. L. Rev. 99 (1992) (Plan for the U.S. District Court for the Northern District of Georgia dated December 17, 1991)

"Fast Track": Its Evolution and Future

Honorable Jeffrey S. Cates*
Robert D. Myers**

I. Introduction and Background

This comment is not about rules and policies governing the court delay reduction ("fast track") program in place in Maricopa County,[1] Arizona. It concerns the history and future of the delay reduction efforts of the Superior Court of Arizona in Maricopa County; how and why one jurisdiction reacted to the old but true adage, "justice delayed is justice denied."

Delay in the litigation process was once viewed as an inevitable problem; the product of court size, judicial caseload, complexity of cases and jury trial rate. We believed that the only way to ameliorate the problem was to add judges and implement diversionary and settlement programs.

In 1979, the Arizona Superior Court in Maricopa County was one of eight urban trial courts that participated in a nationwide research project to determine the causes and cures of pretrial delay in civil litigation. We learned from this project that court delay is not inevitable; it is primarily the result of "local legal culture"—the attitudes, expectations and practices of attorneys and judges regarding court delay. To reform the system, attorneys and judges had to change the way they customarily conducted their business. More than fifty percent of today's membership in the Maricopa County Bar Association were not practicing

* Judge Cates is a graduate of Boston College, and received his J.D. at Boston University School of Law. He served as president of the Arizona Judges Association, chairman of the Maricopa County Superior Court Civil Study Committee, and Presiding Judge of the Maricopa County Superior Court Civil Division.

** Robert Myers is a graduate of the University of Massachusetts, and received his J.D. at Boston University School of Law. He served as president of the Maricopa County Bar Association and the Arizona Trial Lawyers Association. Since 1981, Mr. Myers has been a member of the Maricopa County Superior Court Civil Study Committee and has served as a *pro tem* judge. He was appointed to the Maricopa County Superior Court bench on July 17, 1989.

1. Maricopa County encompasses the Phoenix metropolitan area, among other cities.

HeinOnline -- 21 Ariz. St. L.J. 219 1989

law in the county ten years ago. For them and the lawyers who may have forgotten how the legal system used to function, we will revisit the local legal culture that existed before our conversion to "fast track," and examine how changes evolved.

II. The Local Legal Culture Before "Fast Track"

In early 1979, the civil department of the Superior Court in Maricopa County functioned with an individual calendar system; each of its seventeen divisions handled an inventory of approximately 1,200 cases. It was a long-standing practice for attorneys to file a Certificate of Readiness for trial soon after they filed an answer. The rationale was to "get in line" for a trial date two to three years in the future, because trials were almost always continued a number of times. Because attorneys filed these Certificates of Readiness prematurely, nearly one-third of the total inventory of civil cases, or 400 per division, were set for trial.

In some instances, judges set up to eight trials per day, four days per week, as late as fifteen months from the filing of a motion to set the case for trial. Knowing that judges could handle only one trial at a time, and that trials were often continued or "bumped," attorneys usually prepared for a continuance rather than trial. This lack of preparation and readiness for trial increased continuances, undermined meaningful settlement discussions, and recycled the daily trial calendar.

Many in the legal community viewed judges as umpires, having little or no role in expediting the pace of litigation. When attorneys presented a stipulation for continuance without a supporting reason, they expected judges to continue the trial. It was common for trials to be continued four, five, or six times. Attorneys effectively controlled the courts' civil calendars, determining when and if cases went to trial.

As the numbers of continuances increased, judges were in trial even less frequently, and there was a great deal of "down time" for the court. It seemed at times that a judge's primary function was to sign orders granting stipulations and motions to continue. In an effort to stay productive, judges further overset the number of trials on their calendars. They believed that the greater the number of trial settings, the more productive the division would be, and that at least one of the six or eight trials set on a particular day would actually commence. The intended result did not occur. It is obvious to us now that the manner in which the bench and bar did business prior to "fast track" was inefficient, counterproductive and illogical. Yet, in 1979 many judges and attorneys believed that efforts at change would be futile.

HeinOnline -- 21 Ariz. St. L.J. 220 1989

III. Reversing the Cycle of Delay

Changes in the legal culture reversed the cycle of delay. Fewer cases were set for trial, all with reliable trial dates. This became possible because the court used *pro tem* judges to try cases if a sitting judge was in trial. There was credibility in the court's limited continuance policy and its ability to deliver firm trial dates. Attorneys now complete their investigation and discovery, and usually are prepared for trial. Settlements have dramatically increased because of the imminence and certainty of trial; the trial date is not repeatedly postponed as before. This improved the overall pace of litigation and reduced trial calendars to a more manageable level. Too many judges and lawyers, however, suggest that the delay cycle has been reversed by the foregoing changes. The recipe for success is not so simple.

A. The Essence of "Fast Track": People

Local legal culture is the primary cause of delay. *People* are the key to delay reduction. When we lose sight of these facts, we revert to the pre-1979 mind-set of attempting to solve these problems by adding judges and diversionary programs. The system's success can best be understood by reviewing the transformation of the legal culture, and the human factors that motivated the players to regroup and change.

B. The Transformation

Before the "fast track" program commenced, the Superior Court's civil divisions[2] functioned essentially autonomously. Each division focused on its own calendar, cases, and productivity. Divisions rarely assisted each other; to help another division translated into time away from an increasing caseload and burgeoning calendar. Cooperation, in some instances, meant taking a long, complex, or distasteful trial that was "dumped" by a judge who might not reciprocate. There were no rewards or incentives for cooperation.

It was recognized early in the planning stages that the success of a delay reduction program depended upon a commitment to a concerted effort among the judges. The system would have to take priority over a judge's own cases. What caused judges to leave the comfort of their fiefdom, and abandon long-established habits and practices?

Crucial to the program's success was the involvement and strong support from the organized local bar. Its leadership participated in the

2. The word "divisions" is intended to include the judges, their staffs, and, in particular, their secretaries.

HeinOnline -- 21 Ariz. St. L.J. 221 1989

planning of the program and challenged the bar's membership to join the effort. With leadership's endorsement came the message that the bar was committed to the change. Judges agreed to control the pace of litigation and lawyers agreed to comply with court rules (albeit, often reluctantly), particularly on the issue of continuances. This gave judges the primary responsibility for making the court system work effectively and efficiently.

Initially, the court took up the challenge with four of its seventeen civil divisions participating in the project, using new rules, procedures and policies. Although the non-participating judges were skeptical at first, they soon realized that the experimental divisions were disposing of more cases faster. As the program gained credibility, the outsiders wanted in, and gradually all of the civil divisions made the transition. As settlements increased and the number of cases set for trial decreased, the rewards and incentives for cooperation became evident. This engendered an "esprit de corps" among the civil divisions, and with it came even more cooperation and productivity. Justice actually was delivered with relatively minimal delay.[3]

An important factor in the ultimate success of "fast track" in the Phoenix legal community was the strong leadership and vision of then-Chief Presiding Judge Robert C. Broomfield, now a judge of the U.S. District Court, District of Arizona. He truly understood the value of "fast track" and what the system needed to keep working effectively. Foremost among his strengths as an administrator was his ability to see the "big picture," and act in accordance with it. Everyone in the court system had to be personally involved with, and committed to, reducing court delay by delivering firm trial dates and trials.

Aware that people have a natural tendency to revert to their old habits, and aware that those old habits were detrimental to the program's continued success, Judge Broomfield mandated continual, yet subtle, reinforcement of the program's precepts. Newly-appointed judges beginning their civil assignments were indoctrinated in the program and its procedures. This training undoubtedly carried forward to later court assignments in the criminal and domestic relations divisions. The orientation program for newly-appointed judges was also offered to the veteran judges, who joined "fast track" for the first time; and a refresher program was offered to the more experienced judges returning to a civil assignment. Civil division judges and judicial

3. Today, the median time from filing to disposition of civil cases involving jury trials is twenty months; prior to the delay reduction program the median time was 32.7 months.

HeinOnline -- 21 Ariz. St. L.J. 222 1989

support personnel held monthly group meetings. The agendas for both groups covered the program's procedures, problems and benefits. Judge Broomfield frequently attended these orientation sessions and monthly meetings to demonstrate his commitment to and support of "fast track."

Today the role of a Superior Court judge in Maricopa County is appreciably different than it was in 1979. Although most civil judges are now in trial more frequently and have at least as much, if not more, work, the judges know that their effort and cooperation benefits litigants and the entire court system.

C. The Bar

Hesitant to speak for the entire trial bar, we canvassed a number of experienced trial lawyers for their input. Several threads run through lawyers' opinions and beliefs about the system. Whether these perceived drawbacks justify changes in the system remains to be seen. Although lawyers had input in the planning, organization and operation of the "fast track" system, they frequently complain that the system does not give enough priority and attention to their "problems." Whether they represent plaintiffs or defendants, trial lawyers' major complaint is that judges too often resist postponing the process, even if lawyers on both sides submit what they believe to be valid and compelling reasons.

To remedy judges' reluctance to postpone deadlines, lawyers made the following suggestions:

(a) If all the *parties*, as distinguished from lawyers, consent, postponement should be assured.

(b) Judges need to take a more "realistic" view in excluding cases from the rigors of the delay reduction system.

(c) The system should extend the nine-month inactive calendar period. This would give every case an additional calendar life. Many lawyers believe that nine months is not enough time to identify witnesses and exhibits, and if counsel want to shorten the time limits and proceed to trial quicker, they may request it.

(d) Judges lack uniformity in applying the rules. Perhaps an answer lies in additional judicial attention to and education about these issues.

(e) In personal injury actions, judges routinely should grant motions to remain on the inactive calendar if the plaintiff's physical condition has not stabilized. Lawyers cited this issue frequently, which suggests that many judges do not believe this reason is "good cause" for postponements.

Lawyers also allege that many *pro tem* judges are not adequately qualified or trained to perform the duties associated with applying and

HeinOnline -- 21 Ariz. St. L.J. 223 1989

enforcing the rules governing civil litigation. The National Center for State Courts, sponsored by the National Institute of Justice, studied the use of volunteer lawyers to supplement judicial resources. It published a 225-page report of its study and recommendations on this subject in 1987.[4] Perhaps the courts need to reexamine the methods of the selection, appointment, training, and orientation of *pro tems*.

Not to belabor the point, less-than-perfect lawyering in adhering to the system's rules can be terminal for both clients and lawyers. The rules are complex, and busy trial lawyers need to establish and maintain accurate and "foolproof" calendar systems. The Maricopa County Superior Court judges developed and approved "Rule V, Uniform Rules of Practice and Continuance Policies" in 1985. Lawyers had little input in developing these policies, which might account for the "harshness" and "inflexibility" lawyers perceive in their application.

Arizona appellate courts have ruled on some of the issues arising from trial judges' refusals to exempt cases from the rules.[5] In *Gorman v. City of Phoenix*, the Arizona Supreme Court held:

> Lawyers who fail to comply with Uniform Rule V(e) do so at their peril. . . . However, trial courts should consider carefully a Rule 60 motion to set aside a Uniform Rule V(e) dismissal when, as here, there is evidence that (1) the parties were vigorously pursuing the case, (2) the parties were taking reasonable steps to inform the court of the case's status, and (3) the moving party will be substantially prejudiced by, for example, the running of the limitations period if the dismissal is not set aside. If all these factors are present, even doubtful cases should be resolved in favor of the party moving to set aside the dismissal.[6]

In *Flynn v. Cornoyer-Hedrick*, the Court of Appeals, after quoting the Guidelines' provisions regarding the meaning of "good cause," said:

> The record in this case demonstrates no unforeseeable circumstances or unusual discovery or procedural problems. The delay was primarily caused by Flynn's voluntary decision to postpone serving the defendants. We find that the trial court did not abuse its discretion by concluding that Flynn failed to show good cause to continue this case on the inactive calendar.[7]

---

4. *See* A. Aikman, Friends of the Court: Lawyers as Supplemental Judicial Resources (1987).

5. *See, e.g.*, Gorman v. City of Phoenix, 152 Ariz. 179, 731 P.2d 74 (1987); Flynn v. Cornoyer-Hedrick Architects & Planners, Inc., 23 Ariz. Adv. Rep. 66 (Ct. App., Dec. 15, 1988).

6. *Gorman*, 152 Ariz. at 183-84, 731 P.2d at 78-79 (citations omitted).

7. *Flynn*, 23 Ariz. Adv. Rep. at 68.

HeinOnline -- 21 Ariz. St. L.J. 224 1989

Of course, courts must decide each case on its own facts, and determine on a case by case basis whether "good cause" has been shown or whether judicial discretion has been "abused."

Clearly, a substantial number of local lawyers believe that there should be some "liberalization" or easing of the bench's "nose to the grindstone" attitude. Many of the issues that concern trial lawyers are not new. The same concerns existed in 1984.[8] Lawyers made the following points:

(a) Many cases would settle if lawyers were given more time, but they are forced to trial instead.

(b) Lawyers try to take advantage of the complex rules in order to disadvantage their opponents, and this frequently leads to "pit bull" litigation.

(c) Time limitations should begin to run upon service of the complaint, rather than filing.

(d) More attention is paid to form than substance in the application of the rules.

(e) Judges need to take a more realistic view of cases that do not fit the mold. They need to show more consideration for attorneys' trial calendars and be more flexible on deadlines.

(f) The system has created constant problems for lawyers in meeting deadlines, and judges have had to spend inordinate amounts of time ruling on motions because of nonsensical time requirements.

(g) Many judges receive their civil trial experience on the bench and have no practical experience from which to draw. This disables them in their understanding of problems lawyers face in handling a heavy civil calendar.

The local legal culture generally approves of the system. Our unscientific survey discloses that, despite the criticism, most of the lawyers surveyed believe that the civil delay reduction system is effective: clients benefit from the system and judges are able to handle cases more expeditiously; however, the rules and requirements imposed are too complex and they impede the lawyers' practice. In summary, the system has substantially reduced delay but some changes may be necessary.

IV. CONCLUSION

The change in the Maricopa County legal culture did not come easily or quickly. It evolved primarily because of leadership in both the judiciary and the bar; a commitment by *people* in the court system to

8. *See* Myers, *What's in It for Lawyers*, 23 THE JUDGES' JOURNAL No. 1 at 6 (1984).

HeinOnline -- 21 Ariz. St. L.J. 225 1989

deliver firm trial dates; and continuing communication within the court, as well as between the court and lawyers, about the system's procedures, problems and benefits. Because judges "control" the management of the system, they may not feel the "pressure" of lawyer complaints. They may fail to recognize the seriousness of lawyer malcontent, or they simply may be unwilling to believe that lawyers can evaluate objectively the benefits of the system.

There must be continual reinforcement of the program's precepts and the human factors that initially motivated the change in our legal culture. Otherwise, the players (lawyers, judges and staffs) revert to their old habits and delay will again become prevalent. If we return to the idea that adding judges is a panacea for problems that arise, we should question whether we have lost sight of the reasons that enabled us to change our legal culture. These changes occurred because *people* were motivated by their desire to improve the administration of our justice system and their respect for the public the system serves.

HeinOnline -- 21 Ariz. St. L.J. 226 1989

Brister: can't make rocket docket only voluntary for both sides — won't ever agree

LONESOME DOCKET: USING THE TEXAS RULES TO SHORTEN TRIALS AND DELAY

Hon. Scott A. Brister*

TABLE OF CONTENTS

> *"The legislature has said in no uncertain terms that civil litigation should not be drawn out but should be disposed of with dispatch. By court rules we have sought to adhere to that policy. The end result should be a better administration of justice."*[1]

* Judge, 234th District Court, Harris County, Texas; J.D., *cum laude*, Harvard University Law School (1980); A.B., *summa cum laude*, Duke University (1977).

[1] Matlock v. Matlock, 249 S.W.2d 587, 590 (Tex. 1952).

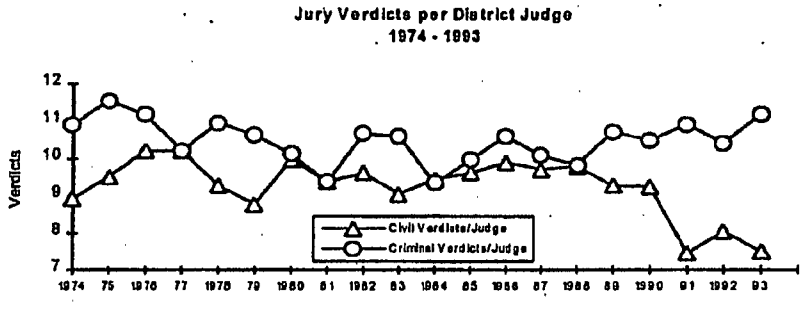
HeinOnline -- 46 Baylor L. Rev. 525 1994

Trials in Texas are slowing down. Despite ongoing improvements such as computerization, increased staffing, visiting judges, and alternative dispute resolution, the courts are not getting more productive in the output only they can provide—trials. The problem appears to be that trials are getting longer, a development without a silver lining for anyone except lawyers. It is the thesis of this article that explicit use of certain forgotten portions of the Texas Rules of Civil Procedure and Civil Evidence can reverse this trend and cut the rising cost of justice.

I. THE TROUBLE ANALYZED

According to the latest Judicial System Annual Report, in 1993 Texas district court judges averaged only nineteen jury verdicts per year, less than seven of which were non-family law civil cases.[2] While the number of criminal jury verdicts per judge has remained steady, the number of civil jury verdicts has dropped sharply in recent years, as shown in Figure 1. This is not because of a shortage of civil cases to try. From 1974 to 1993, the average number of pending civil cases per district court in Texas increased forty-three percent; jury verdicts per court, however, decreased sixteen percent.[3]

Figure 1



Several factors may account for this divergence between the number of cases waiting for trial and the number actually tried. However, one of the primary factors appears to be that trials are getting longer. As shown in

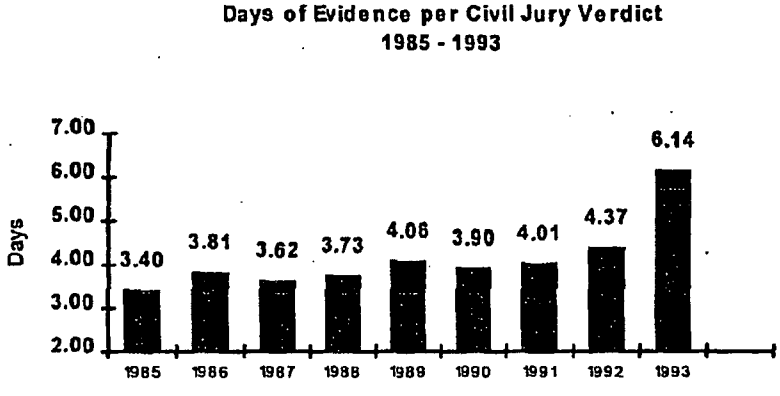
[2] OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT: FISCAL YEAR 1993 at 179-81 (1993).

[3] *Id.* at 181; OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT: FISCAL YEAR 1974 at 137 (1974).

HeinOnline -- 46 Baylor L. Rev. 526 1994

Figure 2 below, records of the twenty-five Harris County civil district courts show that the average number of days of evidence per jury verdict has increased steadily, from 3.40 in 1985 to 6.14 in 1993.[4] While litigants in one case may not think they are asking for much when they seek an additional day or two of evidence, when all litigants do so the effects are staggering. For example, each year the Harris County civil district courts average over 700 cases tried to verdict, with about 130 days of evidence per court.[5] If every case tried takes one additional day of evidence, the effect of adding 700 additional trial days on the system is not unlike abolishing five of the twenty-five courts.

Figure 2



The trend toward longer trials is not just a matter of statistical interest—it has costs. Longer trials are more expensive. For attorneys paid on an hourly basis, the relationship is obvious—more hours mean higher fees. Even for contingency fee or pro bono attorneys, costs go up as trials get

[4] *Harris County District Clerk Report No. 629*, 1985-93 (unpublished reports). The Harris County District Clerk's Office records one day of evidence for each day on which any testimony is taken. These figures overstate the length of evidence presented, as they record one day of evidence even if the testimony lasts only an hour or two. Additionally, days of evidence are included for trials that never reach verdict, either because of settlement, directed verdict, or mistrial. On the other hand, the figures understate trial length by not including voir dire, jury argument, or other days when a trial proceeds but no evidence is taken. Nevertheless, these procedures have remained constant over the years surveyed, so they should not affect the trend reflected in the graph. Additionally, the 1990 and 1991 figures have been adjusted to account for a consolidated trial of 281 asbestos cases.

[5] *Id.*

HeinOnline -- 46 Baylor L. Rev. 527 1994

longer. More witnesses mean more depositions. More experts mean extra fees, often in the tens of thousands of dollars. In most cases, it is the client who ultimately will have to bear these costs. Thus, whatever the justifications may be for longer trials, one result is that clients will have to pay more for them.

Longer trials also increase costs by making trial dates less firm. When trial settings are unpredictable and resettings frequent, attorneys must prepare for trial several times, duplicating time and expenses.[6] The principle by which longer trials make trial dates less predictable is easily illustrated: flip a coin twice, and the probability of getting all heads or all tails is fifty percent; flip it five times, and that probability decreases to six percent. Similarly, if only two long cases can be set per week, there will be many weeks with no trials (all heads) or too many trials (all tails); if five short cases can be set, the probability of this feast or famine is significantly smaller.

Additionally, unpredictable trial dates and fewer settings discourage prompt settlement. Few things encourage settlement as much as a firm trial date.[7] Yet the number of firm trial settings depends upon the number of cases the court can try, which depends in turn upon the length of each trial.

Longer trials cost more than money. Contingency fee clients may be unable to find an attorney who is able or willing to finance their case if the trial requires weeks of time and strings of experts. Jurors who cannot serve for weeks or months are excluded, leaving a panel that may be quite different from a cross-section of the community. Jurors who do serve are placed under heavier stress,[8] and taken away from productive employment in their normal occupations. For them, long trials are not a way to make a living, but may be a way to lose one. As one juror stated after a four-month accounting malpractice trial, "It ruined our lives."[9]

All of this might be justifiable if justice demanded it, but the evidence indicates that it is more the result of the personal practices of judges and attorneys. A 1988 study of trial practices in New Jersey, Colorado, and California found the following averages for civil jury trials:[10]

---

[6] *See* Robert E. Litan, *Speeding Up Civil Justice*, 73 JUDICATURE 162, 162 (1989).

[7] *Id.* at 165.

[8] Thomas L. Haffemeister & W. Larry Ventis, *Juror Stress: What Burden Have We Placed On Our Juries?*, 56 TEX. B. J. 586, 590 (1993).

[9] *Texas Lawyer*, April 27, 1992, at 24, col. 2.

[10] THE NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 14, 34 (1988).

HeinOnline -- 46 Baylor L. Rev. 528 1994

State	Jury selection	Witnesses	Closing arguments	Total trial time
California	3 hrs. 13 mins.	10	2 hrs. 29 mins.	20 hrs. 56 mins.
Colorado	2 hrs. 11 mins.	9	1 hr. 12 mins.	15 hrs. 18 mins.
New Jersey	50 mins.	5	54 mins.	10 hrs. 19 mins.

The study found similar ratios among the states for all types of cases. For example, in auto accident cases, Colorado trials averaged twelve witnesses and California trials averaged ten, while New Jersey trials averaged six.[11] There is no reason to think car wrecks are less serious or complicated in New Jersey—they just try them faster. The study found little perception of unfairness or injustice among New Jersey attorneys, even though all types of trials there were shorter than in the other states.[12]

Even more surprising were the findings of an American Bar Association special committee studying jury comprehension in complex cases in federal district courts. The study found that flooding jurors with information *decreased* their understanding of the case, and that "limiting the amount of evidence, the number of witnesses, and the number and size of exhibits significantly promotes jury comprehension."[13]

Further, there is a strong argument that longer trials for a few result in less justice for all. When one person's day in court becomes a week or a month, others may not get their day. Protracted delay results in witnesses who disappear or forget, postponement of settlement discussions, and a general loss of confidence that the justice system is doing its job. This is why Texas Supreme Court guidelines call for concluding all lawsuits within 18 months.[14] If Sir Edward Coke was right that "justice delayed is justice denied,"[15] then the longer the delay, the greater the injustice.

II. THE TOOLS AVAILABLE

Although costs and delay are of special concern today because of the trend toward longer trials, they are not new concerns. The Texas Rules of

[11] *Id.* at 35.

[12] *Id.* at 3, 66-67.

[13] Thomas R. French, *KISS in the Courtroom: Keep it Short and Simple*, 28 TRIAL No. 11, 130, 132 (1992) (citing Margolis, et al., *Jury Comprehension in Complex Cases*, 1989 A.B.A. SEC. OF LITIG. REP. 25, 28).

[14] TEX. R. JUD. ADMIN. 6(b).

[15] EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 55-56 (4th ed. 1671).

HeinOnline -- 46 Baylor L. Rev. 529 1994

Civil Procedure are crowded with provisions aimed at controlling cost and delay. They are supplemented by similar procedural provisions within the Texas Rules of Evidence. Some are familiar, but many are little used, and others virtually ignored. This section provides a summary of these rules, and discusses some of the more valuable of them.

A. *Rule 1 of the Rules of Civil Procedure*

The Texas Rules of Civil Procedure begin with a provision for limiting costs and delay. Rule 1 states:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.[16]

This little-used rule has great potential impact, as it provides a rule of construction applicable to the several hundred rules that follow. To the extent those rules are ambiguous or silent, this rule mandates that judges ask: (1) What will do justice? (2) What will save time? and (3) What will be least expensive?

Of the few cases citing this rule when construing other rules, almost all quote only the clause regarding justice. Perhaps judges neglect the dispatch clause for fear of being identified with Texas' most famous jurist, Judge Roy Bean and his "Law West of the Pecos." But justice and dispatch are complementary, not conflicting, goals. Delay itself creates injustice. "It is a recognized fact that unnecessary delay at any level of the judicial process frustrates the administration of justice. . . ."[17]

Therefore, the Texas Supreme Court stated early on that Rule 1 "emphasizes equally" the goals of justice and dispatch.[18] Abstract justice cannot be the only concern—judges cannot ignore the time limits in rules

[16] Tex. R. Civ. P. 1.

[17] Modine Mfg. Co. v. North E. Indep. Sch. Dist., 489 S.W.2d 458, 459 (Tex. Civ. App.—San Antonio 1972, no writ).

[18] Gonzalez v. United States Fidelity & Guar. Co., 274 S.W.2d 537, 540 (Tex. 1955).

HeinOnline -- 46 Baylor L. Rev. 530 1994

of procedure, for example, simply because they feel they are unfair in a particular case. Nor can promptness be the only concern—judges cannot strike a record on appeal, for example, just because it would dispose of the appeal more quickly.[19] Instead, the rules of civil procedure must be construed with both goals in mind.

Additionally, considerations of cost and delay may provide more concrete guidance in interpreting the rules than the abstract notion of justice. The definition of justice in a particular case usually depends upon which side one is on. If justice is the sole principle, every party who loses may claim a violation of Rule 1, as some have done.[20] By contrast, considerations of delay and expense may give judges clearer guidance as to what justice requires. For example, the rules of procedure require answers to pleadings or discovery within certain time limits. If judges enforce these rules faithfully, occasionally the result will be limitation or even loss of an otherwise valid claim. But if judges ignore them, far more claims will never be able to obtain justice because no one will answer anything. As the Texas Supreme Court has noted, a "disposition to circumvent consequences and avoid final decisions on procedural grounds may well invite a mass of procedural litigation and thus in the long run defeat its own object of deciding cases on the merits."[21]

Courts do consider costs and delay in construing and applying procedural rules, but for some reason they rarely rely upon Rule 1 in doing so. For example, the Texas Supreme Court placed the burden to request a hearing on discovery objections on the party seeking the discovery because it "avoids the needless expense and the use of valuable judicial resources by reducing the number of unnecessary hearings."[22] Similarly, the rule excluding witnesses named within thirty days of trial was justified in part by the continuances and delay such surprise witnesses frequently necessitate.[23] Yet, the supreme court did not mention Rule 1 in these cases. Express reliance by appellate judges on Rule 1 might result in a more consistent application of the principle, and increased consideration of cost and delay in many other contexts.

---

[19] Punch v. Gerlach, 263 S.W.2d 770, 771 (Tex. 1954).

[20] *See, e.g.*, Howell v. Burch, 616 S.W.2d 685, 687 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.).

[21] *Gonzalez*, 274 S.W.2d at 541.

[22] McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989).

[23] *See* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984).

HeinOnline -- 46 Baylor L. Rev. 531 1994

B. *Pretrial Conference Pursuant to Rule 166*

Probably the broadest and most potent tool for limiting cost and delay in the rules of civil procedure is Rule 166. This rule provides for pretrial conferences "to assist in the disposition of the case without undue expense or burden to the parties."[24] Although this rule has been a part of the Texas Rules of Civil Procedure since their inception in 1941, it was little used until broadened by amendment in 1990.[25]

The purpose of the amended 1990 Rule was to improve the efficiency of civil justice, settle more cases, and try the remaining cases more quickly.[26] The amended rule lists several ways a judge may focus and limit both discovery and trial at a pretrial conference, many of which would be unfeasible or impossible otherwise. The judge can set a discovery schedule and limit future amendments to pleadings.[27] The issues for trial can be limited and simplified,[28] often because attorneys will concede points to a judge they would not to opposing counsel.

Most importantly, judges may order the parties to disclose the witnesses and exhibits they intend to use at trial.[29] This information is unavailable through discovery because of work product concerns.[30] Nevertheless, it is perhaps the most critical information a party needs in order to prepare for trial. Knowing who the witnesses will be, attorneys can limit the number of depositions they have to take and the number of rebuttal witnesses they need to prepare. Knowing which documents will be admitted results in similar savings. By limiting the scope of the dispute and the evidence to be tendered, these steps can limit the amount of time and money spent on both discovery and trial.

Obviously, it is highly preferable to hold the pretrial conference as early as practicable in the litigation. As a recent study of urban trial courts found, "[i]f a court is interested in reducing litigation delay, early control over the scheduling of case events is likely to improve the pace of litiga-

---

[24] TEX. R. CIV. P. 166.

[25] Albright, *Rule 166: Pretrial Conference—The Forgotten Rule*, 9 THE ADVOCATE 149 (1990).

[26] *Id.* at 152.

[27] TEX. R. CIV. P. 166(b), (c).

[28] *Id.* 166(e), (f).

[29] *Id.* 166(h), (i), (l).

[30] *See* Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987) (holding improper an interrogatory requesting anticipated trial witnesses); Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989) (holding improper a request for production seeking all documents supporting a party's allegations).

HeinOnline -- 46 Baylor L. Rev. 532 1994

tion."[31] Further by knowing at an early stage what is and is not contested, litigants can avoid the merely routine or prophylactic depositions and discovery activities they would otherwise conduct. In addition, an early indication from the judge on key rulings may assist settlement by reducing some of the uncertainties the litigants have to consider.

An additional benefit of pretrial conferences is that they take place without the presence of either a jury or the heavy pressures of trial. Judges and attorneys frequently disagree regarding what evidence can be presented, what witnesses can testify, and how the trial will be conducted. If this were not the case, judges would be unnecessary. Unfortunately, making these decisions in the midst of a jury trial occasionally results in a verbal feud between the judge and an attorney. As one court of appeals tactfully noted, "Trials are often stressful to counsel and judge alike. They can bring about imperfect conduct from each."[32]

Lawyers have a duty to represent their clients zealously, including making arguments for admitting helpful evidence or excluding harmful evidence.[33] At the same time, the law grants judges liberty to express themselves while controlling the trial of a case.[34] If a judge believes an attorney is wasting time or harassing a witness, the judge may say so.[35] Obviously, it is better for all concerned to conduct these discussions at a pretrial conference without any jury present. When feuds take place in front of a jury, there is the possibility that they may influence some jurors. There is also the potential for a lot of wasted time, as such conduct by either attorneys or judges may require reversal on appeal. Pretrial conferences allow some of these difficult decisions to be made under circumstances where cooler heads may prevail, or at least where there will be much less damage if they do not.

---

[31] John A. Goerdt, *Explaining the Pace of Civil Case Litigation: The Latest Evidence from 37 Large Urban Trial Courts*, 14 THE JUST. SYS. J. 289, 321 (1991).

[32] American Home Assurance Co. v. Faglie, 747 S.W.2d 5, 7 (Tex. App.—El Paso 1988, writ denied).

[33] *Id.*

[34] Marriage of D.M.B. & R.L.B., 798 S.W.2d 399, 401 (Tex. App.—Amarillo 1990, no writ); Food Source, Inc. v. Zurich Ins. Co., 751 S.W.2d 596, 600 (Tex. App.—Dallas 1988, writ denied).

[35] *See, e.g.*, Prudential Ins. Co. of America v. Uribe, 595 S.W.2d 554, 569 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); Texas Emp. Ins. Ass'n. v. Garza, 557 S.W.2d 843, 845 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); French v. Brodsky, 521 S.W.2d 670, 679 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

HeinOnline -- 46 Baylor L. Rev. 533 1994

C. *Other Rules of Civil Procedure*

Beside Rules 1 and 166, there are many other rules throughout the Texas Rules of Civil Procedure aimed at limiting delay and expense. Some rules, like Rule 1, expressly list these considerations. For example, Rule 40 provides for separate trials if necessary to prevent a party's claims from being "delayed, or put to expense" by claims between other parties.[36] Rule 174 allows consolidation of hearings or trials "to avoid unnecessary costs or delay."[37]

Other rules discourage unnecessary costs and delay by providing sanctions against the person causing them. Rule 13 punishes attorneys or parties who make statements in a pleading "which they know to be groundless and false," and "for the purpose of securing a delay of the trial."[38] Rule 70 allows the court to assess costs of a continuance against a party who causes it by filing a late amended pleading.[39] Rule 215 provides for sanctions for discovery requests "made for purposes of delay,"[40] and provides for reimbursement of costs and attorney's fees at least five times.[41]

Several rules of procedure limit the time and cost involved in waiting for trial. Rule 37 prohibits adding parties "at a time" or "in a manner to unreasonably delay the trial of the case."[42] Rule 165a allows dismissal dockets for cases, other than family law cases, not disposed of within eighteen months of answer (twelve months for non-jury cases).[43] Rules 251 and 252 limit trial continuances by requiring verified motions supported by sufficient cause and due diligence in trial preparation.[44]

Other rules of procedure also provide tools for limiting the length of trials themselves. Rule 9 limits each side to two attorneys at trial "except in important cases, and upon special leave of the court."[45] Similarly, Rule 265 limits cross-examination to one counsel per side "except on leave granted."[46] Rule 207 simplifies the logistics of presenting testimony by

[36] TEX. R. CIV. P. 40(b).
[37] *Id.* 174(a).
[38] *Id.* 13.
[39] *Id.* 70.
[40] *Id.* 215(3).
[41] *Id.* 215(1)(d), (1)(e), (2)(b)(2), (2)(b)(8), (4)(c).
[42] *Id.* 37.
[43] *Id.* 165a(2).
[44] *Id.* 251, 252.
[45] *Id.* 9.
[46] *Id.* 265(9).

HeinOnline -- 46 Baylor L. Rev. 534 1994

allowing the use of depositions at trial regardless of a witness's unavailability.[47] Rule 169 provides for requests for admission "to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove."[48]

Some of these rules are used frequently, others hardly at all. All reflect the importance of reducing delay and cost at every stage of the litigation. All should be construed in accordance with Rule 1 to accomplish these purposes.

D. *Procedural Rules of Evidence*

Several procedural tools for keeping trial length within reasonable limits appear not in the Rules of Civil Procedure but in the Texas Rules of Civil Evidence. The volume of admissible evidence obviously determines how long a trial will last. All trials require some selection of the salient facts from the mass of potential ones. Proving every detail surrounding an event may take longer than the event itself; recounting every detail of medical treatment and recovery that lasted a year might take a year as well. The main burden of selecting the salient facts to present to the jury must fall on the lawyers. But once they have made their selection, the rules of evidence provide additional limits on the evidence they might choose to present, and thus to some degree limit trial length as well.

The first and least controversial limit on evidence is that it must be relevant. Rule 401 defines relevant evidence as anything that makes a fact "of consequence to the determination of the action" more or less probable.[49] To some extent this rule is based on concerns of justice. Irrelevant evidence may cause jurors to decide a case on grounds that have no logical basis, or at least cause them to lose sight of important facts because of a forest of unimportant ones. But concerns of delay and expense also justify the relevance rule. If the color of a car, its features and options, and all of its journeys have nothing to do with why a particular accident occurred, they are irrelevant and inadmissible at trial, not because they may mislead the jury, but purely because they are a waste of time.

Other rules of evidence aim directly at reducing unduly long trials. Rule 403 of the Texas Rules of Civil Evidence provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially out-

[47] *Id.* 207(1)(a).
[48] Sanders v. Harder, 227 S.W.2d 206, 208 (Tex. 1950) (referring to TEX. R. CIV. P. 169).
[49] TEX. R. CIV. EVID. 401.

HeinOnline -- 46 Baylor L. Rev. 535 1994

weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[50] This rule establishes an explicit balancing process between the weight of evidence and the time necessary to present it. The less material the evidence, the less likely there is to be any injustice by omitting it. Judges may exclude relevant, admissible evidence solely because it goes over ground already covered.[51] Trial lawyers should note the corollary to this rule—the admissibility of evidence of marginal weight may depend largely on how long it will take to present it.

Similar concerns appear in Rule 611 of the Texas Civil Rules of Evidence: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."[52] "Mode" means "[t]he manner in which a thing is done."[53] This rule requires the judge to control the manner in which witnesses are questioned and evidence is presented—in short, the entirety of a trial—to avoid needless delay. The rule makes this duty mandatory; the judge must act even if there is no objection.

Although the language of these evidentiary rules is broad, courts rarely cite them for purposes of cutting delay at trial. Virtually all reported cases citing Rule 403 discuss prejudice or confusion, not delay or cumulative evidence.[54] Similarly, virtually all reported cases citing Rule 611 discuss the order of presenting witnesses and the form of questions, not consumption of time.[55] As so many trials get longer, surely this balancing of materiality and delay should occasionally come into play.

III. THE TREATMENT APPLIED

It is likely that judges limit uncontrolled growth of long trials more often than reported citations to the above rules suggest. But it is also likely that some judges and attorneys may not do more to enforce reasonable

[50] *Id.* 403.

[51] Ahlschlager v. Remington Arms Co., 750 S.W.2d 832, 836 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

[52] TEX. R. CIV. EVID. 611(a).

[53] BLACK'S LAW DICTIONARY 905 (5th ed. 1979).

[54] *E.g.*, Bushell v. Dean, 803 S.W.2d 711, 711 (Tex. 1991).

[55] *See generally* TEX. R. CIV. EVID. 403 and Annotations.

HeinOnline -- 46 Baylor L. Rev. 536 1994

limits on trial length because of limited authority in appellate opinions for using the existing rules in this way.

The question, then, is how best to use the above rules to reverse the trend toward longer trials. Applying the above rules to every question and answer at trial is not likely to result in shorter trials. Indeed, it may do just the opposite. The only way to ensure significant savings of time is to apply the rules to whole classes of testimony or witnesses rather than individual scraps. The remainder of this article addresses several places where such use of the civil rules of procedure and evidence might change the current trend.

A. *Shortening Voir Dire*

The statistics from different jurisdictions noted at the beginning of this article show that the time used for jury selection varies widely. Although the Texas Constitution declares the right to trial by jury to be "inviolate,"[56] it is well settled that this right is not absolute in civil cases. The right to a jury trial is subject to various procedural rules, such as timely request and payment of the required jury fee,[57] and exceptions such as summary judgments[58] or directed verdicts. Interestingly, the Texas Rules of Civil Procedure do not set out the manner for conducting *voir dire*, and in fact hardly mention it at all. The vast majority of opinions concerning *voir dire* in Texas arise in criminal cases. The criminal courts have upheld time limits on *voir dire* frequently,[59] finding error only if they keep a party from asking a proper question.[60] Any disallowed questions must appear in the record, or error is waived.[61] Repetitious questions,[62] attempts to commit a juror to a particular finding,[63] inquiries into jurors' personal habits rather

[56] TEX. CONST. art. I, § 15.

[57] Green v. W.E. Grace Mfg. Co., 422 S.W.2d 723, 725 (Tex. 1968); First Bankers Ins. Co. v. Lockwood, 417 S.W.2d 738, 739 (Tex. Civ. App.—Amarillo 1967, no writ).

[58] Mills v. Rice, 441 S.W.2d 290, 291-92 (Tex. Civ. App.—El Paso 1969, no writ).

[59] *See, e.g.*, Boyd v. State, 811 S.W.2d 105, 116 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 448 (1991); Clark v. State, 608 S.W.2d 667, 669 (Tex. Crim. App. 1980).

[60] Caldwell v. State, 818 S.W.2d 790, 794 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1684 (1992). *Compare* Barrett v. State, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974), *cert. denied*, 420 U.S. 938 (1975) (holding 30 minute time limit reasonable), *with* De La Rosa v. State, 414 S.W.2d 668, 672 (Tex. Crim. App. 1967) (holding 30 minute time limit unreasonable).

[61] *Caldwell*, 818 S.W.2d at 794.

[62] Guerra v. State, 771 S.W.2d 453, 467 (Tex. Crim. App. 1988).

HeinOnline -- 46 Baylor L. Rev. 537 1994

than prejudices,[64] and other questions that are nothing more than an attempt to prolong *voir dire*[65] do not qualify as proper questions. Spending an inordinate amount of time lecturing the jury is also a consideration.[66]

There are several reasons that the unwritten rules governing *voir dire* in civil cases may be less strict than in criminal cases. First, the right to *voir dire* the jury in criminal cases stems from state and federal constitutional rights to counsel,[67] including the effective assistance of counsel,[68] rights that do not apply to civil trials. Second, specific rules of criminal procedure govern *voir dire* procedures in criminal cases,[69] for which there are no civil counterparts.

However, it is clear in civil cases that a litigant has the right to ask proper questions necessary to exercise challenges for cause or peremptory strikes.[70] The Texas Supreme Court has held that litigants need "broad latitude" in *voir dire* to discover prejudice.[71] Yet this does not justify questions that are duplicative, or revisit subjects already adequately covered.[72]

Accordingly, judges should be able to place reasonable time limits on *voir dire* in civil cases, and cut off even proper questions if counsel has chosen to spend the allotted time for nonessential or improper purposes. In practice, much of what passes as *voir dire* is really an attempt to: (1) make an opening statement, (2) make a closing argument, (3) befriend jurors, (4) call jurors as witnesses ("How did you feel about losing a family member?"), (5) commit jurors to certain verdicts, or (6) find out how they will vote ("If that is what we prove, can you return a verdict in our favor?"). None of these are proper. If an attorney chooses to use a significant part of time allotted to *voir dire* for such purposes, courts should consider this strategy a waiver of any need for additional time.

---

[63] Trevino v. State, 815 S.W.2d 592, 599 (Tex. Crim. App. 1991), *rev'd on other grounds*, 112 S. Ct. 1547 (1992).

[64] Densmore v. State, 519 S.W.2d 439, 440 (Tex. Crim. App. 1975)

[65] Ratliff v. State, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985).

[66] *Id.* at 600.

[67] *Guerra*, 771 S.W.2d at 467.

[68] Smith v. State, 676 S.W.2d 379, 384 (Tex. Crim. App. 1984).

[69] *See, e.g.*, TEX. CODE CRIM. PRO. ANN. art. 35.17 (Vernon 1989 & Supp. 1994).

[70] Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705, 709 (Tex. 1989).

[71] *Id.*

[72] Dickson v. Burlington N.R.R., 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.); Gulf States Utils. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

HeinOnline -- 46 Baylor L. Rev. 538 1994

Judges may also consider innovative methods of conducting *voir dire*. The mode of *voir dire* is largely left "to the sound discretion of the [t]rial [j]udge."[73] For example, there is no rule preventing unusual modes of jury selection, such as allowing all sides to make preliminary opening statements or ask general questions to the jury panel before any party begins specific questions to the jurors.[74] The federal rules allow judges to conduct *voir dire* without any questioning by the attorneys.[75] "Though the trial bar is not likely to agree, judges generally believe that examination by the court is the preferable practice and that it results in great savings of time and improves the character of the examination."[76] If Rule 1 requires consideration of both time and cost in construing the Texas rules, *voir dire* procedures should be developed bearing these concerns in mind.

B. *Material Witnesses in a Material World*

Trial court studies point out that jurisdictions also differ in the number of trial witnesses. It is no secret that many lawyers have a habit of calling several witnesses to go over every point several times. Perhaps the ubiquitous interrogatory for persons with knowledge of relevant facts, and the dire consequence for failing to list a critical witness, is to blame. This practice ensures long lists of potential witnesses, and once listed it becomes easier (and perhaps safer from a malpractice perspective) to call them all.

However, part of the reason for having twelve jurors is to make sure that someone catches every point, no matter how small. Calling a second witness to go over the same ground tells jurors either that (1) the lawyers think they are idiots, or (2) the lawyers think there are reasons to disbelieve the first witness.[77] Wigmore wrote that cumulative witnesses are excluded because, if the jury "did not believe the [first] ten, they will hardly believe two more, and if they did believe the ten, then two more are not needed."[78]

---

[73] Zeh v. Singleton, 650 S.W.2d 518, 519 (Tex. App.—Houston [14th Dist.] 1983, no writ).

[74] *Id.*

[75] FED. R. CIV. P. 47(a).

[76] CHARLES A. WRIGHT & ARTHUR R. MILLER, 9 FED. PRAC. & PROC. § 2482, at 468 (1983).

[77] *See, e.g.*, Paul L. Colby and Robert H. Klonoff, *Sponsorship Strategy*, 17 LITIG. 1, 2 (Spring 1991).

[78] 6 WIGMORE ON EVIDENCE § 1908, at 760 (1976).

HeinOnline -- 46 Baylor L. Rev. 539 1994

As with *voir dire*, the cure for excess witnesses might be placing time limits on a party's presentation of its case.[79] Such limits would then force counsel to exercise more judgment in selecting witnesses and condensing their examination. However, no Texas rule specifically authorizes time limits on witnesses, and thus the propriety of time limit restrictions on testimony is uncertain.

A more conventional method for controlling trial witnesses is to make sure every witness is a material witness. This method has the advantage of precedent; judges have been cutting cumulative witnesses for years.[80] The process for implementing this witness limitation under the Texas rules is simple: (1) determine the nature of each anticipated witness's testimony at a pretrial conference, and (2) apply Rules 403 and 611 of the Rules of Evidence to exclude witnesses whose testimony is cumulative, will cause undue delay, or needlessly consume time. Exclusion of such cumulative evidence is never reversible error.[81]

For example, medical testimony is among the most pervasive and time-consuming portions of personal injury trials. Often, several doctors describe in soporific detail everything that happened to a patient, whether material or not. In this age of specialization, several doctors usually treat a patient, but they do not all need to testify. Why not pick the doctor that is most knowledgeable, most persuasive, or most likable, to summarize all the medical treatment? Attorneys should also use discretion in selecting what treatment the medical witness describes. Successful attorneys know that selecting a few examples to illustrate the severity of an injury or the extent of treatment can be far more persuasive than detailing every MRI administered.

Alternatively, why call a doctor at all to describe facts that the patient or the records can establish? Medical testimony usually consists of five parts: (1) the doctor's background, training, and experience, (2) initial findings, (3) diagnosis, (4) treatment, and (5) current condition and prognosis. Often, very few if any of these matters are contested, and most appear in the medical records. Doctors charge far too much for their time to waste it detailing each time the patient saw the doctor, the complaints, and the treatments. Furthermore, the patient can often present these matters much more persuasively. After all, for the patient this was a vivid and

[79] *See, e.g.*, Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIG. 7, 7 (Fall 1985).

[80] *See* Ballard v. Perry's Adm'r, 28 Tex. 347, 367 (1866).

[81] Reina v. General Accident Fire & Life Assurance Corp., 611 S.W.2d 415, 417 (Tex. 1981).

HeinOnline -- 46 Baylor L. Rev. 540 1994

traumatic episode. For the doctors, it was a routine incident recalled only after reviewing the records.

Collateral witnesses can be another source of trial delay. For example, records custodians should almost never testify at trial. If the records are clearly admissible, an opponent's failure to file a business records affidavit on time does not make them inadmissible. The records are still admissible, but only after calling the custodian as a trial witness to establish the foundation. This routine but wasteful expenditure of trial time should be avoided if at all possible.

Please note, the mere fact that two witnesses will say the same thing does not mean judges have to exclude one. Although duplicative in the strictest sense, a second witness on the critical issue in a case is almost always material. This is not the kind of "needless" presentation of cumulative evidence that the rules prohibit. However, as the number of repetitions increases, there is a decreasing return on materiality, and perhaps even a negative return by angering or boring jurors.[82] At some point, judges must draw a line barring more witnesses who add little or nothing to the case.

C. *Experts We Can Live Without*

Expert witnesses involve much greater expenditures of time and money, and for this reason this section gives them extended consideration. Experts frequently are making more money per hour than anyone else in the courtroom, and perhaps not coincidentally are often the most loquacious. Even when taciturn, they can take up an inordinate amount of trial time. Jurors have to be informed about their extensive education and work experience, what they have reviewed, how often they testify, and how much they are being paid, none of which are involved with most other witnesses.

Additionally, unlike other witnesses, the number of expert witnesses in a case is potentially unlimited. As the United States Supreme Court noted in 1858, "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount. . . ."[83] Experience in the century and a half since then has shown much, much more of the same. Especially in recent years, the number and fields of expert witnesses have

[82] French, *supra* note 13 (citing Call, *Handling the Jury—The Psychology of Courtroom Persuasion*, 1987 A.B.A. SEC. OF TORT & INS. PRACTICE REP. 847-48).

[83] Winans v. New York & Erie R.R. Co., 62 U.S. 88, 101 (1858).

HeinOnline -- 46 Baylor L. Rev. 541 1994

exploded. For example, in January 1973, the *Texas Bar Journal*'s classified ads listed a single expert witness for hire;[84] by January 1993, that number had increased to sixteen individuals and eight groups of experts.[85] The latter pales in comparison to the 108 listings in another publication's recent directory of expert witnesses.[86]

In addition to the rules of civil procedure and evidence already discussed, Rule 702 of the Texas Rules of Evidence further limits the scope of testimony by expert witnesses as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[87] The primary focus of this rule is on the qualifications of the proffered expert, and most cases concern this question. For example, an "expert" cannot criticize the conduct of a licensed professional unless the opposing expert is also licensed.[88]

But the rule has a second hurdle to admissibility—the expert testimony must help jurors understand the evidence or determine a fact issue. This requirement eliminates experts on matters of common knowledge or common sense. A witness cannot help jurors understand something they already know. Thus, if a surgeon operates on the wrong leg, the rule requiring expert testimony in medical malpractice cases does not apply, because jurors need no help to understand this evidence.[89] Neither is expert testimony necessary to show that a nursing home located on a busy highway should not leave unsupervised a patient with a known tendency to wander.[90] Before spending thousands on several experts, reports, and depositions, litigants need to consider how much help the jurors really need on an issue.

The following subsections discuss how the Texas rules place reasonable limits on expert testimony. As with fact witnesses, these questions

[84] *Classified Advertising: Services*, 36 TEX. B. J. 77 (1973).

[85] *Classified Ads: Services*, 56 TEX. B. J. 90-92 (1993).

[86] *Texas Lawyer*, July 19, 1993, at supplement.

[87] TEX. R. CIV. EVID. 702.

[88] Parkway Co. v. Woodruff, 857 S.W.2d 903, 919 (Tex. App.—Houston [1st Dist.] 1993), *writ granted*, 37 Tex. Sup. J. 667 (Apr. 20, 1994); Prellwitz v. Cromwell, 802 S.W.2d 316, 317 (Tex. App.—Dallas 1990, no writ).

[89] Williford v. Banowsky, 563 S.W.2d 702, 705-06 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

[90] Golden Villa Nursing Home, Inc. v. Smith, 674 S.W.2d 343, 349 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

HeinOnline -- 46 Baylor L. Rev. 542 1994

are best addressed at a pretrial conference. The earlier in the litigation they are addressed, the greater the savings to all concerned.

1. Relevance

Rules 401 and 402 provide the basis for excluding classes of experts whose testimony is irrelevant. Some litigants offer experts for purposes of presentation, not substance. Even if there are simpler, cheaper, and faster ways to present proof, they want the expert as "window dressing"—not to help jurors see anything, but to make the case look more attractive by embellishing it with the endorsement of an expert. But trials are not advertisements, and endorsement by a celebrity does not increase the probability that a fact is true.

For example, some litigants have designated economists to place a value on lost consortium or household services. In the first place, it is hard to imagine what an expert with a Ph.D. in economics can tell jurors about love, sex, and cleaning house that they do not already know. After all, jurors have spouses, parents, and children, and know or can imagine what it would be like to lose them.

The primary objection to such testimony is that it is irrelevant. The amount charged by a professional housekeeper does not make any particular amount for lost consortium more or less probably true. The fact that an educated or even famous economist would award one damage figure does not make it more correct than the one found by twelve jurors using their common sense. Analogies highlighting the many things a family member does may be proper jury argument, but they are not evidence that justifies the cost of expert testimony. Accordingly, the courts generally have barred experts from testifying as to a particular dollar figure for lost consortium based on the fees of a psychiatrist,[91] a teacher,[92] or a minister, psychologist, social worker, and counselor.[93]

Economists also may tender "evidence" for closing arguments on punitive damages. In this developing area, the courts have been more recep-

[91] Seale v. Winn Exploration Co., 732 S.W.2d 667, 669 (Tex. App.—Corpus Christi 1987, writ denied).

[92] Celotex Corp. v. Tate, 797 S.W.2d 197, 202 (Tex. App.—Corpus Christi 1990, no writ)

[93] Lopez v. City Towing Ass'n, 754 S.W.2d 254, 279 (Tex. App.—San Antonio 1988, writ denied). *But cf.* Garza v. Berlanga, 598 S.W.2d 377, 381 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (holding opinion testimony of economist on pecuniary damages may properly be admitted).

HeinOnline -- 46 Baylor L. Rev. 543 1994

tive, occasionally allowing such testimony.[94] The amount of punitive damages depends on the twin notions of just punishment and sufficient deterrence. As to the former, appropriate punishment is a matter within the jury's discretion, determined more by the prevailing mores of the community than empirical proof. In Texas criminal cases, where lives are at stake rather than dollars, jurors decide an appropriate punishment without the help of experts.[95] As to deterrence, it is hard to imagine an expert who knows what amount would deter others. How would such an opinion be reached? By conducting a poll inquiring "How large a verdict would make you stop being consciously indifferent to others?" Where the issues are more a matter of lay opinion than science, attorneys should be fully competent to make the necessary arguments, and should not charge their clients two fees by hiring an expert to do so.

2. Prejudice

Rule 403 requires exclusion of expert testimony if its probative value is substantially outweighed by the danger of unfair prejudice. For example, an expert cannot testify as to the "profile" of a typical sexual harasser, which profile just happens to fit the defendant exactly.[96] Under our system of law, the question at trial is whether a person did the alleged act, not whether the defendant is the type of person who normally does such acts. The possibility for discrimination in the latter scheme is apparent.

Similar concerns about prejudice should bar most expert opinions on issues of intent, truthfulness, or state of mind. Almost every trial requires jurors to decide what is, or ought to have been, in another person's mind. Did the parties intend to contract? Was the act committed knowingly? Intentionally? Was the occurrence foreseeable? Is the witness telling the truth? To help the jury on these difficult questions, some litigants now tender psychologists—scientists devoted to studying what is in another person's mind. The first problem with such tenders is that they prove too much. If psychologists are truly reliable experts at judging a person's thoughts and truthfulness, then they should replace jurors in our civil justice system.

---

[94] *See* Borden, Inc. v. De La Rosa, 825 S.W.2d 710, 719 (Tex. App.—Corpus Christi 1991), *vacated by agreement*, 831 S.W.2d 304 (Tex. 1992).

[95] TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1987 & Supp. 1994); Washington v. State, 677 S.W.2d 524, 527 (Tex. Crim. App. 1984).

[96] Bushell v. Dean, 781 S.W.2d 652, 656 (Tex. App.—Austin 1989), *rev'd*, 803 S.W.2d 711 (Tex. 1991) (appellant failed to preserve error for review by the appellate court).

HeinOnline -- 46 Baylor L. Rev. 544 1994

More to the point of the rules, however, is the problem that psychology, like other disciplines, is not foolproof. Psychology is largely a matter of judgment, not scientific proof. For this reason, psychologists often make mistakes, even when using a scientific technique beyond the comprehension of most jurors (such as polygraph tests or malingering indices on tests like the MMPI). Moreover, these mistakes are on very critical questions, like truthfulness or intent. A mistake that miscategorizes an honest person as a liar, backed up by scientific tests jurors may not understand, is especially prejudicial.[97] The very foundation for a jury system is that these critical decisions should be made not by experts, but by the judgment of twelve average citizens.

For this reason, the courts have excluded experts as to whether another witness is telling the truth.[98] Experts cannot opine whether another person thought an insurance policy was in effect,[99] whether a testator intended to include adopted children as descendants in his will,[100] or whether the reason a company fired an employee was for filing a worker's compensation claim.[101] Again, however, few judges cite the rules concerning unfair prejudice and confusion when they make such rulings.

Sometimes the expert's opinion may not expressly address an issue of state of mind or truthfulness, but analysis of the foundation for the expert's opinion discloses it. For example, police officers often give opinions regarding the cause of and fault of an accident. However, this does not justify an expert opinion as to who ran a red light if the opinion is based solely on eyewitness statements. In such circumstances, the officer is acting solely as an expert on who is telling the truth.[102]

---

[97] Romero v. State, 493 S.W.2d 206, 209-11 (Tex. Crim. App. 1973); Berry, Baer, & Harris, *Detection of Malingering on the MMPI: A Meta-Analysis*, 11 CLINICAL PSYCHOLOGY REVIEW 585 (1991).

[98] James v. Texas Dept. of Human Servs., 836 S.W.2d 236, 244 (Tex. App.—Texarkana 1992, no writ); Ochs v. Martinez, 789 S.W.2d 949, 956 (Tex. App.—San Antonio 1990, writ denied).

[99] Riggs v. Sentry Ins., 821 S.W.2d 701, 709 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

[100] Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687, 689 (Tex. 1984).

[101] Borden, Inc. v. De La Rosa, 825 S.W.2d 710, 718 (Tex. App.—Corpus Christi 1991), *vacated by agreement*, 831 S.W.2d 304 (Tex. 1992).

[102] Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619, 623 (8th Cir. 1986); Monsanto Co. v. Johnson, 675 S.W.2d 305, 311 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

HeinOnline -- 46 Baylor L. Rev. 545 1994

3. Scientific, Technical, or Specialized Knowledge

Expert testimony is necessary only if it helps jurors understand the evidence or determine a fact in issue. Often, lawyers call experts not to present technical information but to draw conclusions therefrom. This is fine if expert training is necessary to draw the conclusion, but not otherwise. This error stems from a misconstruction of the rule of *Birchfield v. Texarkana Memorial Hospital*,[103] that allowed experts to give opinions on ultimate issues. In that case, the Texas Supreme Court held that a physician could testify whether the failure of a hospital to purchase certain equipment was negligence or gross negligence.[104] Expert testimony was proper because most jurors have no idea what ordinarily prudent hospitals should do.

But the holding that an expert may give an opinion on an ultimate issue does not mean that it is always necessary or proper to do so. In many instances, jurors can draw their own conclusions, either based on their own knowledge or the facts presented to them. For example, expert testimony is inappropriate on whether driving while intoxicated is gross negligence[105] not because it contains an opinion on an ultimate issue, but because it fails to meet the requirement that scientific knowledge is necessary for the jury to understand the evidence.

Clearly, expert testimony regarding what a reasonable person would do is unnecessary.[106] Jurors are themselves reasonable people, and normally need no help on this question. Careful analysis of what some experts are saying, however, shows that this is precisely the substance of some expert testimony. For example, in *General Chemical Corp. v. De La Lastra*,[107] the families of two deceased shrimp boat workers brought a warnings claim against the manufacturer of a chemical compound used as a preservative. As in all warnings cases, the issue was whether the warning given ("toxic gas") adequately communicated the possible danger (death by asphyxiation). A toxicologist was allowed to give an expert opinion

---

[103] 747 S.W.2d 361 (Tex. 1987).

[104] *Id.* at 365.

[105] *See* Louder v. DeLeon, 754 S.W.2d 148, 149 (Tex. 1988) (per curiam).

[106] *See, e.g.*, Montelongo v. Goodall, 788 S.W.2d 717, 720 (Tex. App.—Austin 1990, no writ) (holding question whether no handrail or a plastic covering on four steps to a trailer house created an unreasonable risk of harm is not expert testimony). However, expert testimony as to what a member of a specialized occupation would think is proper. Riggs v. Sentry Ins., 821 S.W.2d 701, 709 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

[107] 852 S.W.2d 916 (Tex. 1993), *cert. dismissed*, 114 S. Ct. 490 (1993).

HeinOnline -- 46 Baylor L. Rev. 546 1994

that the warning was inadequate.[108] As the warning did not contain particularly technical or specialized language, it is unclear why twelve reasonably prudent jurors needed assistance to look at the warning, look at what happened, and decide whether the former sufficiently communicated the risk of the latter.[109]

To borrow a rule from another context, warnings experts are unnecessary because, unless there are technical terms, the warning "speaks for itself." The flaw is not in the witness, who may very well be a distinguished expert. Nor is it in the form of the question, as experts clearly can give an opinion on the ultimate issue. The flaw is that the particular conclusions being drawn require no scientifiic or technical training to draw them.

This same error appears on occasion with law enforcement experts. In suits against a property owner where a crime has occurred, the issue is whether a reasonable property owner or occupier—not a security expert—should have foreseen criminal acts and taken steps to prevent them.[110] All jurors either own or occupy property, so once they are informed about the neighborhood, they can make up their own minds what a person should foresee and do. In *Havner v. E-Z Mart Stores, Inc.*,[111] the plaintiff's experts testified that a convenience store had several inadequacies, including no alarm system, poor lighting, promotional signs blocking windows, one night clerk instead of two, a telephone that did not allow outgoing calls, and an inoperable drop safe.[112] A strong argument can be made (and obviously was) that these inadequacies create an unsafe place to work, but this conclusion requires no expert training. Four members of the court specifically noted that the testimony of these experts was "marginal"[113] and "superfluous."[114]

Similarly, in *Walkoviak v. Hilton Hotels Corp.*,[115] the court relied upon an expert's opinion that employing a single security guard to look occasionally down the aisles of a large parking lot constituted negligence.[116]

---

[108] General Chem. Corp. v. De La Lastra, 815 S.W.2d 750, 755 (Tex. App.—Corpus Christi 1991), *aff'd in part & rev'd in part*, 852 S.W.2d 916 (Tex. 1993).

[109] *See, e.g.*, Herrera v. FMC, 672 S.W.2d 5, 7 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

[110] Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 550-51 (Tex. 1985).

[111] 825 S.W.2d 456 (Tex. 1992).

[112] *Id.* at 459.

[113] *Id.* at 462 (Phillips, C.J., concurring).

[114] *Id.* at 465 (Cornyn, J., dissenting).

[115] 580 S.W.2d 623 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

[116] *Id.* at 626.

HeinOnline -- 46 Baylor L. Rev. 547 1994

That may be true, but is it something that jurors cannot understand without technical expertise? The future of this practice appears in *Berry Property Management v. Bliskey*,[117] where the security expert testified that leaving marked apartment keys in an unlocked cabinet in the management office (from which a thief stole one) was "unconscionable" and "terrible."[118] True, perhaps, but these are not the terms and conclusions normally used by rocket scientists or any other form of technical expert.

This is not to say that there is never any room for expert testimony in such cases. By way of contrast, one expert in *Havner* cited published studies showing that implementation of certain suggested safety measures reduced injuries to convenience store employees by thirty percent.[119] This would be technical information unknown to most jurors, and if from reliable authorities, should be read to the jury.[120] But the same is not true of expert testimony that merely draws conclusions based on common sense.

When appellate opinions approve such experts, or at most excuse testimony as harmless error, this has a tendency to multiply experts in all similar cases. When the *Havner* majority cited expert opinions as "some evidence"[121] to support the verdict, although the true basis for the holding was the circumstantial evidence itself,[122] litigants in many other cases may be lead to believe that they too must hire an "expert" to draw such conclusions and avoid no evidence finding. This is misleading. An expert's opinion that criminal acts were foreseeable is no evidence of negligence without suspicious occurrences or other circumstantial evidence.[123] More importantly, it will greatly multiply the cost of litigation by multiplying experts. Having decided in one case to "let it all in," courts may have difficulty ever keeping it out again.

4. Mode of Presenting Evidence

A judge's control over the manner used to present evidence may help avoid additional expert fees. While litigants should enjoy broad freedom in deciding how to present their case, the rules limit this discretion when it begins to run into significant expense and delay.

---

[117] 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.).

[118] *Id.* at 654.

[119] *Havner*, 825 S.W.2d at 460 n.3.

[120] TEX. R. CIV. EVID. 803(18).

[121] *Havner*, 825 S.W.2d at 460 n.4.

[122] *Id.* at 456.

[123] Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60, 65 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

HeinOnline -- 46 Baylor L. Rev. 548 1994

There are several routine situations where reasonable control over the mode of presentation should allow exclusion of experts. For example, in proving the probable length of a person's life, life expectancy tables published by government or trade organizations are routinely admissible;[124] hiring experts to prove these figures adds little, but costs a lot. Similarly, reconstructionists in routine auto accident trials usually estimate vehicle speed by looking up skid mark length on charts published by public agencies; they also may testify as to driver reaction times, again reading from government or trade publications. These documents are themselves admissible in evidence.[125] Why should clients have to pay an expert to read an admissible document to the jury? Unless litigants have unlimited funds and the courts have unlimited time, this evidence should go to the jury through exhibits, not expert testimony.

Litigants could avoid paying for trial testimony by economists in many cases by using other methods. Economists most frequently testify concerning the present value of future losses.[126] Usually, this application of math (present value) to the evidence (e.g., lost wages and expected work life) can be done by a $20 calculator rather than a $200 per hour expert witness. At a much lower cost, an economist could prepare a chart showing a range of assumptions as to wage loss, work life, inflation, and discount rates. Admission of this chart (for demonstrative purposes if nothing else)[127] would allow jurors to understand present value without a college course in economics.

Additionally, presentation of an exhibit with a range of assumptions would remove a potential problem of prejudice. Economists who give only a single opinion as to the present value of future losses are making certain assumptions concerning inflation and interest rates. It has not been proven that economists are experts at predicting these rates. In fact, if one could do so with accuracy, there would never be any volatility in the bond markets. The United States Supreme Court has noted that forecasts of inflation are "too unreliable to be useful in many cases," and cautioned

[124] *See, e.g.*, Harwell & Harwell v. Rodriquez, 487 S.W.2d 388, 400 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

[125] TEX. R. CIV. EVID. 803(8), 902(5).

[126] *See, e.g.*, Halliburton Co. v. Olivas, 517 S.W.2d 349, 351-52 (Tex. Civ. App.—El Paso 1974, no writ); Williams v. General Motors Corp., 501 S.W.2d 930, 940 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

[127] *See, e.g.*, Main Bank & Trust v. York, 498 S.W.2d 953, 955 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

HeinOnline -- 46 Baylor L. Rev. 549 1994

against turning trials into seminars on economic forecasting.[128] The Fifth Circuit noted the same problem:

> [T]he battle of economic experts is apt to shift the trial's emphasis from the determination of liability and the estimation of basic damages into the formulation of predictions concerning the national, indeed, global, economic future, including the likelihood of future increases or decreases in oil prices and the stability of foreign governments.[129]

Twelve jurors may estimate these effects just as accurately, keeping in mind that the underlying figures in these verdicts (future work life, expenses, and wages, not to mention pain and suffering) are themselves very rough estimates.

Another area where the mode of presentation to the jury should be controlled has to do with the applicable law. The proper mode for informing jurors on the law is instruction by the judge, not expert testimony. Thus, the courts have excluded expert testimony as to the legal duty of a sign company to repair a sign installed by another,[130] whether coverage exists under an insurance contract,[131] and the law for tracing funds in a community property context.[132] Similarly, there is no expert as to the meaning of a contract.[133]

D. *Depositions, Lies, and Videotape*

The Texas rules governing depositions can save a significant amount of time-and-money without compromising justice. These rules allow liberal use of deposition testimony at trial without regard to the availability of the witness or other hearsay concerns.[134] Using depositions rather than live

[128] Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 548 (1983).

[129] Culver v. Slater Boat Co., 722 F.2d 114, 119 (5th Cir. 1983).

[130] Puente v. A.S.I. Signs, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied).

[131] Cluett v. Medical Protective Co., 829 S.W.2d 822, 827 (Tex. App.—Dallas 1992, writ denied).

[132] Welder v. Welder, 794 S.W.2d 420, 433 (Tex. App.—Corpus Christi 1990, no writ).

[133] United Gas Pipe Line v. Mueller Eng'g Corp., 809 S.W.2d 597, 602 (Tex. App.—Corpus Christi 1991, writ denied).

[134] TEX. R. CIV. EVID. 801(e)(3).

HeinOnline -- 46 Baylor L. Rev. 550 1994

testimony eliminates further witness preparation, scheduling headaches, and other costs and delays associated with bringing busy witnesses like doctors to trial.

Unfortunately, trial depositions also can become cumulative and wasteful. Presenting deposition testimony wastes rather than saves time if the witness will testify in person as well. The deposition and the live testimony always will cover much of the same ground, and anything critical from the deposition certainly will be asked at trial as well. For this reason, there is no error in excluding deposition testimony where the witness testifies live.[135] This does not prohibit using limited portions of a deposition for specific purposes such as impeachment. But confrontation and credibility concerns generally favor live testimony.

Further, depositions result in shorter trials only if they are edited carefully. Often this is not the case. Deposition testimony that once seemed relevant often becomes superfluous as the trial unfolds. If the first few witnesses present the background facts, there is rarely any reason for later deponents to do the same. Before presenting depositions, attorneys should reconsider what the jury still needs to know, and edit accordingly.

Editing is more difficult with videotaped depositions. While editing a deposition transcript requires little more than a stroke of the pen, editing a videotaped deposition requires a significant amount of time and perhaps the services of a video professional. If objections are sustained during the trial, it becomes extremely cumbersome and time-consuming to try to delete a short phrase or attorney colloquy during the video playback. Rather than being mesmerized by the medium, jurors become frustrated with the delay as the video operator cues back and forth trying to skip over words and phrases.

Videotape editing is critical also because of the medium. Many lawyers feel that videotapes are better for communicating with jurors who live in a TV world. Yet most trial videotapes have about as much relationship to modern television as TV sitcoms have to real life. Because seventy-seven percent of Americans get ninety percent of their news from television, they expect to learn what they need to know in action-filled bursts of thirty to ninety seconds.[136] By contrast, the average videotaped deposition consists of a tedious shot of the upper body of the deponent responding to questions from an unseen lawyer. This "talking head" usually goes on for

[135] Mottu v. Navistar Int'l Transp. Corp., 804 S.W.2d 144, 147-48 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

[136] French, *supra* note 13 (citing SONYA HAMLIN, WHAT MAKES JURIES LISTEN 8 (1985)).

HeinOnline -- 46 Baylor L. Rev. 551 1994

hours, unrelieved by any change of position, shot, or background. Large segments consist of the witness staring at the ceiling while the questioner rustles papers in the background, searching for a document or the next question to ask.

If litigants present videotaped depositions like these in order to imitate TV, one has to ask what channel these people are watching. Most jurors do not watch C-SPAN because, although it broadcasts important information, it is boring. Does anyone really think this format captivates jurors? One has to wonder whether videotaped depositions are used as an effective means of presenting evidence to the jury, or merely as a relaxing break for the lawyers while the jurors stare at a screen and daydream. If television producers made video depositions, they would make them much shorter. They would eliminate background information if it is not critical, and use a narrator's initial summary if it is. They would never present the deposition in the order it was taken, and they would be within the rules in doing so.[137] To the extent humanly possible, they would present a witness' entire "story" in twenty minutes.

IV. THE TASK AHEAD

This article seeks to place neither blame nor fault for existing delays and high costs in litigation. Judges, attorneys, litigants, legislators, jurors, and society in general have all contributed to the way trials are conducted today. Reforming the system will require a cooperative effort by all of them as well. Nevertheless, judges and attorneys, who conduct litigation daily, must bear the major responsibility for implementing changes such as those discussed above.

A. *The Role of Attorneys*

Any effort to cut delay and expense in the civil justice system will fail if the individual lawyers who do most of the work resist it. Because the vast majority of cases settle before trial, legislative decrees and court orders will have an insignificant impact if attorneys do not choose to cut costs and delay on their own.

There are several good reasons why attorneys should cooperate with attempts to shorten trials. First and most important, they are spending someone else's money. Every deposition charge, every expert's fee, and

[137] *See* Jones v. Colley, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied).

HeinOnline -- 46 Baylor L. Rev. 552 1994

every day of delay takes money out of the client's pocket. So does every moment in trial. For attorneys paid on an hourly basis, the correlation between length of trial and fee received is direct. For attorneys paid a contingency fee, the correlation still exists, as the time and labor required is one of the considerations in determining whether a contingency fee is reasonable.[138]

Attorneys stand in a fiduciary relationship to their clients.[139] As such, they bear the usual fiduciary duties to deal with their clients in utmost, scrupulous good faith,[140] to render full and fair disclosure,[141] and to deal fairly with their clients' interests and property, especially in areas of potential conflict of interests.[142] No less than other fiduciaries, they cannot use their position to gain personal benefit at the client's expense, and must avoid placing themselves in a conflict of interest with their clients.[143] Additionally, there is the usual presumption of unfairness in financial transactions for the fiduciary's benefit, the attorney bearing the burden of proving the perfect fairness of all contracts and transactions with the client.[144] Accordingly, attorneys need to consider whether the costs they incur because of lengthening trials, especially those that may end up in their own pockets, meet the high standards of a fiduciary.

It is true that from a malpractice perspective, a lawyer who chooses not to do something is at greater risk than one who simply does everything. But again, this is not the way fiduciaries must think. A professional must exercise uncorrupted judgment for the sole benefit of the client.[145] Making clients pay more because their attorney fears malpractice claims is not the way professionals are expected to act.

Secondly, there are strategic reasons for attorneys to shorten the cases they present. In their article *Sponsorship Strategy*,[146] attorneys Paul Colby and Robert Klonoff point out that jurors begin with the perception that attorneys are hired guns acting not as impartial truth seekers but as zealous

[138] TEX. DISCIPLINARY. R. PROF. CONDUCT 1.04 (1989).

[139] Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988).

[140] Henderson v. Shell Oil Co., 208 S.W.2d 863, 866 (Tex. 1948); State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

[141] *Willis*, 760 S.W.2d at 645.

[142] Jinks v. Whitaker, 195 S.W.2d 814, 819 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.).

[143] Slay v. Burnett Trust, 187 S.W.2d 377, 388 (Tex. 1945).

[144] Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); Ginther v. Taub, 570 S.W.2d 516, 525 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

[145] International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 577 (Tex. 1963).

[146] Paul Colby & Robert Klonoff, *Sponsorsip Strategy*, 17 LITIG. 1 (1991).

HeinOnline -- 46 Baylor L. Rev. 553 1994

advocates simply trying to win.[147] Accordingly, jurors are skeptical of evidence presented in support of an attorney's case—they expect no less from them. However, they give a good deal of credence to any evidentiary flaws or admissions by the attorney. Thus, there is limited advantage to positive evidence, and much to be lost by equivocal or negative evidence. The authors conclude by suggesting that trial lawyers present only the critical evidence supporting their case, and nothing more.[148]

A third reason attorneys should attempt to cut the costs and delay of litigation is that the Texas Disciplinary Rules require it. There is a perception that, while judges have a duty to other cases on the docket, lawyers do not. But this view of an attorney's duties is too narrow. The Disciplinary Rules provide that "[i]n the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[149] This duty is not limited to persons involved in that particular case; "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ."[150]

Despite these considerations, some lawyers will resist efforts to shorten trials because of fears that they will lose control. Others may resist because they fear what judges might do. Indeed, abuses can occur in the name of expediency. For example, in *Employers Insurance of Wausau v. Horton*,[151] the trial judge announced at the start of a trial that "we've got to be through by Friday."[152] To meet the deadline, she required the defendant to begin its case at 7:52 p.m., and the jury to retire for deliberations at 10:55 p.m., returning over two hours later with a verdict for the plaintiff. The defendant got sympathy from the appellate court, but not a reversal.[153]

Yet, the possibility that some judges may abuse a practice does not mean it has no merit. Further, the exclusions discussed in this article should not leave dissatisfied litigants without a remedy. By requiring a concise statement of a witness's anticipated testimony at the pretrial conference, a record for appeal is created automatically.[154]

---

[147] *Id.*
[148] *Id.* at 48.
[149] TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 (1989).
[150] *Id.* 4.04.
[151] 797 S.W.2d 677 (Tex. App.—Texarkana 1990, no writ).
[152] *Id.* at 679.
[153] *Id.* at 681-82.
[154] TEX. R. APP. P. 52(b).

HeinOnline -- 46 Baylor L. Rev. 554 1994

B. *The Role of Judges*

Most of the suggestions made throughout this Article require action by trial judges. If judges do nothing to limit costs and delays, they will continue to increase. This is a task that judges must undertake voluntarily. They cannot be made to take such action by mandamus, as the costs and delay inherent in a mandamus proceeding itself would make such efforts self-defeating. Further, most of the rules contemplate an exercise of discretion, rendering mandamus inapplicable.

By virtue of their position, judges are the best qualified to decide what is necessary and what is not at trial. Judges see scores of trials every year, far more than most attorneys, and thus should have a better idea what evidence persuades jurors and what simply wastes time. Judges know the status of their own docket, and can better assess what the costs will be if the next case is delayed by prolonging the current one. They have no stake in the litigation, so their judgment is not clouded by considerations of self-interest or financial gain.

For these reasons, the rules place the burden and discretion for reducing delay largely on judges. As discussed above, many of the Texas rules call for action by judges on their own initiative, without waiting for any party to object. The standards for prompt disposition of cases appear in the rules governing the conduct of judges, not lawyers.[155]

Appellate judges also must bear responsibility for encouraging reasonable limits on trial time. Because admitting cumulative or immaterial evidence is always harmless,[156] trial judges naturally hesitate to exclude evidence if there is any possibility it will result in having to re-try the case. Thus, unless appellate judges make clear that they will not second-guess efforts by trial judges to exclude unnecessary evidence in the interest of efficiency, most trial judges will be inclined to continue "letting it all in,".

Finally, judges must not fear taking steps to shorten trials because of the possibility of mischaracterization of their motives. Judges tend to resist any measures of court activity that might be used unfairly as job performance standards. The number of verdicts received, the number of cases disposed, and similar statistics depend on many factors beyond a trial judge's control. These numbers can be manipulated, and in the wrong hands turn from tools for improvement into notches on a gun or political dynamite.

[155] TEX. R. JUD. ADMIN. 6(b).

[156] Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 230 (Tex. 1990).

HeinOnline -- 46 Baylor L. Rev. 555 1994

Nevertheless, judges must work toward shorter trials for the general good they will do. Several thousand years ago, Jethro rebuked Moses, the only judge in Israel, because the people had to wait from morning until evening to receive judgment.[157] Why, imagine having to wait all day! Judges are right to avoid schemes that are merely popular or politically correct. But at the same time, they should ask themselves, "What would Jethro say if he saw my docket?"

V. CONCLUSION

The public is demanding greater efficiency in the civil justice system. At the same time, the same public is neither funding more courts nor filing fewer claims. The trend of increases in pending caseloads without corresponding increases in the number of judges to try them means that shorter trials are a matter of necessity, not choice. It is true that those demanding quicker trials are usually not the ones who have to live with the verdicts. Nevertheless, when attorneys making $200 per hour resist any suggestion of limiting trial time, there is at least the appearance of a conflict of interest.

Naturally, the process of shortening trials can be carried too far. Judges and attorneys must approach changes to the way trials are conducted warily. Justice is not like widgets—more output is not necessarily better. To some degree, the process by which people receive their day in court is just as important as the outcome.

But at the same time, traditional practices and notions of procedure are hard to defend if they make costs prohibitive and trial dates illusory. The existing Texas rules are neither drastic nor inflexible, barring evidence only if it is "needless,"[158] and requiring dispatch and cost limitation only where it is "practicable."[159] While some evidence bears repeating, surely not every point, and not by endless repetition.

There is no reason to think that cutting improper *voir dire*, cumulative witnesses, ersatz experts, and lengthy depositions will cause unjust verdicts. After all, such practices are by definition improper, cumulative, and unnecessary. Curtailing them, however, will certainly affect how expensive and time-consuming it is to get a verdict. No study has ever shown there will be less justice if a trial lasts one day instead of three. On the

[157] *Exodus* 18:13-27.
[158] TEX. R. CIV. EVID. 403, 611.
[159] TEX. R. CIV. P. 1.

HeinOnline -- 46 Baylor L. Rev. 556 1994

10 of 10 DOCUMENTS

Copyright (c) 1996 American Bar Association
Litigation

Winter, 1996

22 Litigation 48

LENGTH: 5339 words

THE ROCKET DOCKET

by Terence P. Ross

Mr. Ross is a litigation partner in the Washington, D.C., office of Gibson, Dunn & Crutcher.

TEXT:

[*48] In the 1994 box-office smash movie, *Speed*, a mad bomber has wired a Los Angeles City bus with explosives set to detonate if the bus reduces its speed below 50 m.p.h. In order to avoid being blown up, Sandra Bullock must maintain the bus's speed while Keanu Reeves tries to disarm the bomb. To keep the bus above 50 m.p.h., she ignores the rules of the road and all other traffic.

Litigation in "the Rocket Docket," the moniker the U.S. District Court for the Eastern District of Virginia has earned, is a lot like that bus ride. As any regular practitioner before that court will tell you, the normal rules of the road simply do not apply. A comparison of two very similar criminal prosecutions bears this out.

On June 30, 1987, perennial presidential candidate Lyndon H. LaRouche, Jr., along with various associates, was indicted in a Massachusetts federal court on charges of credit card fraud and conspiracy to obstruct justice. Trial began in December 1987, but, after five months and with no end in sight, a mistrial was declared in May 1988 due to the hardship imposed on the jury by the length of the proceedings. In what may have foreshadowed recent events in the O.J. Simpson trial, the defense buried the court with an avalanche of motions and consumed trial time with exhaustive cross-examinations of prosecution witnesses and lengthy evidentiary hearings.

On October 14, 1988, LaRouche again was indicted, this time in the U.S. District Court for the Eastern District of Virginia. He faced similar charges of mail fraud, conspiring to commit mail fraud, and conspiring to defraud the Internal Revenue Service. Notwithstanding the similarity of issues presented and a similar defense strategy, that case went to trial *a mere five weeks after indictment* and resulted in convictions after a trial lasting only four weeks.

How can this difference in both the process and the result in two such similar cases be explained? The answer is the commitment made by the Eastern District of Virginia to speed cases to and through trial.

The U.S. District Court for the Eastern District of Virginia is one of the fastest courts in the nation. This is not by accident or the result of any statistical anomaly. Rather, the court deliberately places an almost overarching emphasis on speed. For example, in the LaRouche trial in Massachusetts, the jury selection process consumed 12 days. In the Eastern District of Virginia, a jury was impaneled in less than two hours. This emphasis on speed -- found in both the court's Local Rules and internal operating procedures -- has earned the Eastern District of Virginia a nationwide reputation as the Rocket Docket, a term of endearment to some, derision to others.

A Varied Docket

Other than the velocity at which it disposes of cases, however, the court is fairly typical of federal district courts across the nation. The Eastern District of Virginia encompasses what has been referred to in Virginia as the "suburban crescent." It includes all of Northern Virginia (essentially, the Washington, D.C. suburbs), continues down the I-95 corridor to the Richmond metropolitan area, then on to the Tidewater cities (Norfolk, Hampton Roads, and Virginia Beach) in the southeastern corner of the state. Thus, the court's geographic scope and population size is neither large nor small. The district includes decaying urban centers such as the City of Richmond, suburban sprawl such as Virginia Beach, and rural areas in the state's Northern Neck. Its caseload over the past quarter century has been consistently above average, with the mix of civil and criminal filings typical of the federal court system nationwide.

The Eastern District of Virginia also has had to confront the same problems that have clogged other federal district courts. It has been plagued by a dramatically increasing drug-prose-cution docket and burdened by a corresponding increase in *pro se* prisoner cases. The court also has had to cope with a number of mass-tort cases, including the A.H. Robins [*49] "Dalkon Shield" litigation and thousands of asbestos-related cases arising out of the Newport News/Norfolk shipbuilding industry. Moreover, during the 1980's and early 1990's, the Eastern District of Virginia experienced the same judicial vacancy problem (actually, the judicial vacancy level in the district was greater than the national average) as many district courts. In short, the Eastern District of Virginia is very much a prototypical federal district court -- except for the blinding speed with which it disposes of cases.

But litigation has not always raced through the Eastern District's docket. Indeed, there was a time when the Eastern District of Virginia did not enjoy its current reputation as the Rocket Docket.

When Judge Walter E. Hoffman was appointed to the Norfolk Division of the court in 1954, more than 1,300 civil cases were pending in the Eastern District -- an extraordinary number in the 1950's, when there were only three judges on the court. By 1962, the backlog had increased so dramatically that the Norfolk Division of the court alone (with only one District Judge) had more than 750 civil pending cases. Judge Hoffman decided that something had to be done.

During his first few years on the court, Judge Hoffman served on a judicial committee chaired by Judge Alfred P. Murrah, then the Chief Judge of the 10th Circuit (the Federal Building in Oklahoma City, bombed on April 19, 1995, was named after Judge Murrah). Judge Murrah was a leading advocate of reforming judicial administration to expedite cases, and Judge Hoffman decided to adapt some of his ideas to the Eastern District of Virginia's practice, in an effort to gain control of that court's burgeoning docket.

Folklore among long-time practitioners before the court holds that in 1962 Judge Hoffman met with Judge John D. Butzner, Jr., of the Richmond Division, and Judge Oren R. Lewis, of the Alexandria Division. The three jurists agreed to commit to the implementation of docket management practices that would accelerate cases to trial. On July 31, 1962, Judge Hoffman wrote the attorneys in practice in his division of the court:

> With an excess of 750 civil and admiralty cases pending on the dockets . . . it is apparent that there must be a dramatic change in procedure relating to the preparation of cases for trial in order to effect a saving in court time, jury expense, last-minute settlement, expenses of expert witnesses, and many other factors.

The next day, Judge Hoffman issued an order that implemented a series of reforms designed to move cases to trial more quickly. With that order, the Rocket Docket was born.

Since 1962, the rules and practices of the Eastern District of Virginia have evolved to accommodate changes in the Federal Rules and the increase in case filings, but their emphasis on moving cases to trial as quickly as possible has remained. The effect on the administration of justice, as revealed by records maintained at the Administrative Office of the U.S. Courts in Washington, D.C., has been dramatic. By 1972, the average backlog of cases for each judge in the District was reduced to just 288 total pending civil and criminal cases. By 1982, this average had been reduced further

In the Alexandria Division, use of a standard scheduling order is the most significant device employed to clear the road to trial in civil cases. Once a case is at issue, the court enters such an order, which, among other things, sets a discovery cutoff approximately 75 days later and a pretrial conference within 90 days. A date certain for trial is set at the pretrial conference, which usually is only four to six weeks -- and no more than eight weeks -- later. Thus, the Alexandria Division's standard scheduling order contemplates that a civil case will go to trial only 5 months after it is at issue.

The Norfolk and Newport News Divisions are operated as one court with separate dockets under a combined administration. They employ a very detailed civil case management system derived from Judge Hoffman's 1962 order. A central feature is the use of a master calendar clerk who, under the direction of the Chief Judge, is responsible for the orderly scheduling of the calendar so that cases move expeditiously to trial.

According to Michael Gunn, who has been master calendar clerk since the late 1960's, two weeks after a civil case is at issue the court sets an initial pretrial conference. At this conference (which is usually conducted by a law clerk under the supervision of the master calendar clerk), a firm trial date is set for four to six months later, depending on the complexity of the issues. A pretrial schedule is then set working backwards from the trial date. A final pretrial conference is set for approximately three weeks before trial, at which all Rule 26(a)(3) disclosures are made, exhibits are marked, and a written stipulation as to uncontested facts is filed. An attorney conference to prepare stipulations and exchange information generally is held two weeks before the final pretrial conference. Unlike the single discovery deadline in the Alexandria Division, the Norfolk/Newport News Divisions use a rolling cutoff scheme, with plaintiff's discovery cutoff usually two months prior to the attorney conference, the defendant's discovery cutoff usually one month prior to the attorney conference, and the cutoff for *de bene esse* depositions one to two weeks prior to the attorney conference. The initial pretrial conference also yields briefing and hearing schedules for all pending or contemplated motions. Under this scheduling system, a civil case generally will reach trial five to six months after it is at issue.

Unlike the Alexandria and Norfolk/Newport News Divisions' master docket systems for case management, the Richmond Division uses an individual docket system. In that Division, each case is assigned at the outset to a particular judge who is responsible for everything that later arises. Notwithstanding this, the Richmond Division also is able to move civil cases quickly to trial, again, by each judge's practice of setting a firm schedule at the outset.

For example, Judge Robert R. Merhige, Jr., holds an initial pretrial conference within two weeks after a case is at issue, at which time he sets a discovery schedule, a final pretrial conference, and a trial date for not more than four months after the initial conference. Judge James R. Spencer sets an initial pretrial conference within 30 days after a case is at issue, at which time he also sets a firm discovery cutoff leading to a trial approximately four months after the initial conference.

Thus, the Local Rules and internal operating procedures in each division in the Eastern District rely on several fairly simple case management techniques to keep traffic moving:

- First and foremost, the judges control their dockets through the early setting of a discovery schedule and a firm trial date.

- Second, once the schedule is set, virtually no continuances -- or even minor delays -- are allowed. "Continuances are few and far between," according to the acting Clerk of the Court, Ray Old. "Our judges take pride in moving cases and aren't going to allow the lawyers to slow things up."

- Third, discovery is limited to the bare necessities, and little tolerance is shown for the type of petty discovery [*51] disputes that have afflicted most federal civil litigation. Discovery disputes are resolved early, and sanctions for abuses are liberally doled out.

- Fourth, motions practice is also expedited. Although various techniques are used, the fundamental principle is that motions do not sit for very long *sub judice*. Decisions are made promptly, usually at the hearing on the motion.

These case management techniques dispose of actions at an unprecedented pace and prevent traffic jams. Why? Because since the time of Judge Hoffman, the Eastern District of Virginia has understood and followed the one immutable rule of civil litigation: The chance of settlement increases geometrically as a case approaches trial. Every litigator knows from experience that the best opportunity to settle a case is on the courthouse steps. The Eastern District of Virginia simply has tried to get the parties more quickly to the courthouse steps.

But these results cannot be achieved solely through adoption of appropriate Local Rules and operating procedures. Experience in the Eastern District of Virginia shows there must be a corresponding commitment on the part of the District Judges to keep their feet on the accelerator. For example, in 1994, the judges in the Eastern District of Virginia tried on average 48 cases (versus a national average of 27). This was the third highest average in the nation last year and is the direct result of the court's efforts to speed cases to trial. Although most cases settle as they approach trial, not all do. Any court adopting a "Rocket-Docket" strategy therefore has to be prepared for an increased number of trials each year.

Moreover, a trial must be a relatively short ride in any Rocket Docket, such as the Eastern District of Virginia, if a 48-trial-per-judge average is to be maintained. Indeed, Hewitt, who has worked in the Alexandria Division for 17 1/2 years, could not recall a single trial during that time that had been allowed to run beyond one month. "It would have to be a really unique case for any of our judges to let it run more than a month," she added.

There also has to be recognition that a Rocket Docket requires the court's administrative staff help the judges keep the pedal to the metal. Indeed, much of the credit for the success of the Eastern District of Virginia's case management system must be attributed to the commitment of the deputy clerks and staff in the Clerk's Office. "When new people come on board [at the Clerk's Office], we train them in the importance the court places on speeding cases to trial," said Old, the acting Clerk of the Court. Without such a commitment from the staff, Old said, adoption of a rocket-docket system simply would be unthinkable.

The adage, "Justice delayed is justice denied," appears often to hold true in the views of many litigants and their lawyers in the Eastern District of Virginia. Indeed, the jurisdiction has become a forum of choice for some.

For example, in early 1994, the American Trucking Association, concerned about new federal regulations mandating alcohol tests for truck drivers -- which would cost the industry millions of dollars -- decided to mount a challenge in federal court. Because the new regulations applied nationwide and would impact companies and drivers in virtually every district in the nation, the Association could have brought the lawsuit in almost any federal district court. After a national search, however, the Association brought the action in the Eastern District of Virginia specifically because it had the fastest civil docket in the nation. For the American Trucking Association, it was critical to obtain legal review of these new regulations as quickly as possible, because each day's delay would cost its members thousands of dollars in compliance expenditures.

Speed can be important for criminal cases too. For example, when William Aramony, former head of the United Way of America, and two associates were indicted on conspiracy, fraud, and tax-evasion charges relating to the misuse of United Way's money, the umbrella charity group suffered a severe blow to its reputation and ability to raise money. United Way officials praised the speed with which the case was brought to trial and was tried in the Eastern District of Virginia (where United Way is headquartered). The quick pace of the proceedings brought to light that the charity was the real victim and allowed it to begin to restore its reputation much sooner than would have otherwise been possible if the proceedings against Aramony had been allowed to drag out.

Criminal Docket Speed

Not surprisingly, however, some criminal defense attorneys believe that the court's emphasis on speed is not always fair to defendants. They do not use the term Rocket Docket affectionately. William B. Moffit, a criminal defense attorney practicing in the Eastern District of Virginia for 20 years, has tried some of the more high-profile cases brought in that court and has been an outspoken critic of its rigid case management system. He defended a LaRouche associate in the 1988 Alexandria trial and represented Aramony at trial last year. "Although the LaRouche case has received the most publicity, it is not the most shocking case," Moffit said. "Most criminal justice [in the Eastern District of Virginia] is dispensed in less than an afternoon, with speed, not fairness, taking precedence." To Moffit, "When speed becomes the most important value in a [court] system, it works a real unfairness to most criminal defendants."

Whether it is popular or unpopular, many courts have taken note of the Eastern District of Virginia's serious commitment to speed cases to and through trial.

[*52] If the Eastern District of Virginia's Rocket Docket case management procedures do become the model for federal district courts across the country and a solution to the "litigation crisis," trial lawyers will face new demands to speed up every phase of litigation. Faced with this likely increase in the pace with which cases move to trial, what steps should a litigator take to meet the demands of a Rocket Docket case management system? Here are a few practice pointers that may help a trial attorney survive the rush-hour commute:

1. Prepare your case before it is filed. With the advent of computers, lawsuits relating to even the most complex commercial transactions can be filed on the very day that a lawyer is first retained. In the securities class action and mass tort fields, stories are legion of such one-day races to the courthouse. Experienced practitioners before the Eastern District of Virginia, however, seldom rush to file suit because the act of filing starts a very short countdown to trial. Before filing suit, they complete all factual investigations and thoroughly research every issue of law that might arise during the course of the case. (One might argue that Rule 11 requires this anyway, though in practice, in many civil cases, investigation and legal research prior to the filing of litigation is relatively limited.) If the case involves a complex or technical business or if scientific evidence will be important, you must master these intricacies before filing suit, not as discovery progresses. If there are third-party witnesses, interview them before filing. Anything you can do before the clock starts will save valuable time later.

2. Rule 1 not only applies to civil plaintiffs and prosecutors, but it also applies equally to civil defendants and criminal defendants. To criminal defense attorneys who learn a client may be indicted: Do not wait for the indictment to be handed down. Seek a preindictment meeting with the U.S. Attorney's Office to determine what the government's case will claim and what evidence it may already have. Then, roll up your sleeves and begin your own investigation to prepare for when the indictment is issued. In addition, it is critical to ask for discovery on the very first date that you are entitled to do so. Similarly, civil defendants frequently are aware that suit against them is imminent, usually because the plaintiff will make a settlement demand prior to filing. Seize upon such a warning to begin the factual and legal research you will need -- and may not have time for -- once litigation commences.

3. If during preparations you decide expert testimony will be useful or essential, interview and retain testifying or consulting experts prior to filing suit. Sometimes it will take months of interviews with dozens of potential experts before you find that one expert with the right blend of expertise in the field and jury appeal. In the Eastern District of Virginia, this is time you do not have after a suit is filed.

4. Based on your prefiling preparation, develop a discovery plan to be implemented as soon as the case is at issue. Keep it simple -- there is no time to spend on marginal depositions or document requests. Litigation in a Rocket Docket requires trial attorneys to focus carefully their limited discovery requests and time on the development of factual evidence that really matters to the outcome of the litigation. In developing your plan, also build in sufficient leeway to allow time to pursue sources of evidence that you

may only unearth during discovery.

5. Work with opposing counsel in a professional and cooperative manner. Like rush-hour commuters, the fast pace of a Rocket Docket subjects trial lawyers to intense pressures that may manifest (particularly for lawyers used to a more leisurely pace) in uncivil conduct. Resist the temptation. By working with opposing counsel to schedule depositions and hearings, you will find it possible to survive even the tight discovery deadlines imposed by the Eastern District of Virginia. For every instance in which opposing counsel needs a scheduling favor, be assured that you will need a reciprocal favor at some point during the litigation. Moreover, the Eastern District of Virginia takes seriously the obligation of attorneys to confer and endeavor to work out discovery disputes; turning to the court to decide such disputes truly is regarded by the bench as a last resort.

6. Hire a competent local counsel who regularly practices before the court, and listen to her advice. If you are from out-of-state and are asked to represent your client in the Eastern District of Virginia or another Rocket Docket, do not view the local counsel requirement merely as an employment guarantee for the local bar. Regardless of how you work with local counsel in other courts, in the Eastern District of Virginia it is critical that local counsel be more than a maildrop for your pleadings or an office at which you can conduct depositions. The District Judges and deputy clerks on the court repeat over and over that [*70] the only lawyers who experience problems with the court's case management system are out-of-state attorneys handling their first matters in the Eastern District of Virginia. As soon as you have the first inkling that you will litigate in the Eastern District of Virginia, retain a trial lawyer with substantial experience in the court's practices, and make her a real part of your trial team. In particular, listen to her advice about how the court will react to your discovery plan, motions practice, and trial strategy. Above all else, when she tells you that you will be in trial six months after the suit is filed or that the court will deny even a joint request for a continuance, believe it!

7. Prepare your client for the hectic pace with which the case will progress. Many clients, particularly sophisticated consumers of legal services such as Fortune 500 companies, are used to the leisurely pace common in other federal and state courts. As a result, they assume that a continuance is always available if they simply cannot get around to gathering documents by the deadline. Such an attitude on the part of a client involved in Eastern District of Virginia litigation will be fatal to its case. Impress upon clients at the outset that the Eastern District of Virginia requires of them an unusual degree of responsiveness and cooperation. If your client is a corporation, it must designate a single internal liaison to assist counsel in gathering evidence and interviewing witnesses. And, because clients must be prepared to respond quickly to requests from counsel for strategic decisions, it is often useful to sit down with the client, immediately after the court enters its scheduling order, to anticipate the types of decisions that may have to be made or actions taken at various points in the schedule.

Is speed the answer to the "litigation crisis" that seems to be gripping the federal court system? In the Eastern District of Virginia, the answer clearly is "yes." The court not only has kept pace with an increased civil and criminal caseload, it has steadily improved its ability to process cases. Although some questions of fairness are raised with respect to criminal defendants, most constituencies using the federal courts in the District appear to be satisfied that justice is being fairly dispensed without undue delay or unnecessary expense.

Could speed be the answer for other courts? The case management techniques utilized by the Eastern District of Virginia theoretically should work in any federal district court. The Eastern District of Virginia is as typical as any federal district court in the nation could be; so no such court should be able to argue that it is more urban or more suburban or more rural or whatever because the Eastern District of Virginia is all of these. Indeed, within the four divisions of the court, both an individual and master calendar docket approach are used, demonstrating that either of the two most common docket administration systems in use in the federal courts could benefit from these case management

techniques. Nor can the other courts argue that they cannot afford these case management techniques because the Eastern District of Virginia uses no automation to implement them; everything is handled manually by a small number of clerks. And, although the Eastern District of Virginia has been fortunate over the last few decades to be the regular recipient of judicial appointees of superb intellect and substantial trial experience, it is not these qualities that have been the linchpin of the District's success. Rather, the court's success at expediting cases reflects the willingness of new appointees to renew the commitment first made by Judge Hoffman in 1962 to maintain judicial control over the docket and to work hard to keep cases moving.

The experience of the Eastern District of Virginia over the past 30 years strongly suggests that the "litigation crisis" does not require a wholesale overhaul of the federal court system or the Federal Rules of Civil and Criminal Procedure; rather, the answer to the problems that do exist may be found in a few old-fashioned concepts that seem to have been lost over the years:

- Judicial control of the court docket;

- Early scheduling of trial;

- Zero tolerance of dilatory tactics;

- Strict attorney compliance with court rules and deadlines; and

- Prompt judicial decisions on motions or other issues presented to the court for resolution.

Following these simple principles in the Eastern District of Virginia has resulted in fair and expeditious resolution of cases filed in that court for several decades.

Therefore, it is likely that the pace of litigation in the Eastern District of Virginia will continue to be faster than the average federal district court. That [*71] means that litigators will not be able to carry on business as usual in the Rocket Docket. Woe be the trial lawyer who takes her foot off the gas pedal while litigating in the Eastern District of Virginia. Chances are -- just like the bus in *Speed* -- she will find her case blowing up in front of her eyes.

Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects

T.S. Ellis, III *

According to the program, my topic today is "Expedited Procedures and Their Effects" in United States patent litigation. I take this topic to raise two questions:

First, how to do it, that is, how can court systems achieve expedited resolution of patent cases? What procedures are required to expedite the resolution of patent cases?

And second, is this a good thing? In other words, is it a good thing to expedite the resolution of patent cases in 6-8 months? Put another way, what justification is there for expediting the resolution of patent cases in 6-8 months?

My answer to the first question is based on my experience of more than a dozen years as a judge in the Eastern District of Virginia, which is famous or infamous, depending on your perspective, for the so-called "Rocket Docket." In the Eastern District of Virginia, all cases, including patent and other intellectual property cases, proceed from birth to death, start to finish, in 6-8 months, regardless of the nature or dimensions of the case and with only the rarest of exceptions. Examples of such exceptions confirm their rarity: they include the Dalkon Shield class action litigation[1] and the asbestos class action litigation.[2]

Before I tell you what I believe are the principal ingredients of an expedited docket system based on my experience in the Eastern District of Virginia, let me offer some prefatory comments and disclaimers:

First, I am not here to boast about something I created; I have no pride of authorship or parenthood with respect to the so-called "Rocket Docket." I

---

* The Honorable T.S. Ellis, III is a United States District Judge for the Eastern District of Virginia.

[1] *See* In re A.H. Robins Co., Inc., "Dalkon Shield" IUD Products Liability Litigation, 610 F. Supp. 1099 (Jud. Pan. Mult. Lit. 1985).

[2] *See* In re Asbestos Products Liability Litigation, 771 F. Supp. 415 (Jud. Pan. Mult. Lit. 1991).

HeinOnline -- 9 Fed. Cir. B.J. 541 1999-2000

did not conceive of it, design it or build it. Instead, it was well-established when I arrived in the Eastern District of Virginia almost 13 years ago. I simply became a small part of an already well-established and well-oiled machine.

And by the way, the term "Rocket Docket" is not a name chosen or adopted by the judges of the Eastern District of Virginia, nor, indeed, do we typically use it.

And most importantly, I am not here today to advertise the "Rocket Docket" to you, or to recommend that other districts or countries adopt it, or to suggest that it is the best or the only way to handle cases. Nor am I here to criticize any other docket systems. I simply am here to discuss with you what I believe to be the chief ingredients of an expedited patent litigation docket and to consider some of the effects of such a system.

Based on my experience in the Eastern District of Virginia, there are four essential ingredients of a docket system that results in expedited, 6 to 8 months, resolution of all civil cases, including patent cases. First, and absolutely vital, is the early setting of a fixed and immutable trial date. This date should be approximately 6-8 months from the date of the filing of the complaint, and I emphasize, it must be carved in stone, unchangeable except in the most exigent circumstances. Can this be done? Absolutely. Continuances in civil cases in the Eastern District of Virginia are as rare as hen's teeth. Remarkably, in more than 12 years on the bench, I cannot recall granting a motion for a continuance in a civil case. More significantly, I can only recall a very small number of such motions being made. This reflects, and is the result of, another important ingredient of an expedited docket system: a hospitable local legal culture, about which I will say more in a moment.

The effect of an early fixed, immutable trial date is dramatic. Its effect is best summed up by Sam Johnson's description of the man about to be hanged. The immediate prospect of the hanging, Johnson said, "concentrates his mind wonderfully."[3] So, too, does the prospect of a fixed, immutable and relatively immediate trial date, wonderfully concentrate the minds of the trial lawyers.

A second ingredient of an expedited docket is a corollary to the first. That is, the discovery period must be set at the outset and limited to no more than 4-5 months.[4] I'm sure many of you doubt that reasonable discovery can be

[3] BARTLETT, FAMILIAR QUOTATIONS 317:1 (16 ed. 1992).

[4] The Federal Rules wisely prescribe no minimum or maximum time for completion of discovery in all cases. Instead, this task is sensibly left to the various district courts across the country, which are in the best position to set time limits that reasonably accommodate their dockets, their local legal cultures and the special needs of specific, unusual cases. Even so,

HeinOnline -- 9 Fed. Cir. B.J. 542 1999-2000

completed in such a short time. Your doubts are understandable; such a limited discovery period is hardly the norm. Yet, there is no doubt that reasonable discovery in a patent case can be accomplished in this period of time. Again, the proof of this is in the pudding: this is precisely what occurs in the numerous patent cases in the Eastern District of Virginia.

Now, to be sure this is not an easy task. It requires discipline, preparation and skill on the part of the lawyers involved and an institutionalized procedure designed to aid the process and ensure prompt resolution of discovery disputes. In the Eastern District of Virginia we ensure that discovery is accomplished in the allotted time by assigning a magistrate judge to monitor discovery in each patent case. Also, a standard discovery order is entered early on, requiring prompt disclosure of many essential facts and contentions, including an identification by the plaintiff of each infringing product, the precise patent claims alleged to be infringed by each product,[5] identification of damage theories and contentions, a list of the prior art references the alleged infringer relies on support of any invalidity challenge,[6] and a schedule for exchanging Rule 26(a)(2) disclosures concerning expert witnesses. This means that plaintiffs filing patent cases in the Eastern District of Virginia must be prepared at the time of filing to make prompt disclosure of all such information. When a discovery dispute arises, the parties may take

however, it is surely implicit in the federal discovery rules that no time limit should be so brief that competent, diligent counsel is precluded from obtaining reasonable discovery. *See, e.g.*, Lawrence v. First Kansas Bank & Trust Co., 169 F.R.D. 657, 662 (D. Kan. 1996) (recognizing that "[t]he Federal Rules of Civil Procedure contemplate a reasonable period of time for reasonable discovery").

[5] One version of the standard order requires prompt production by the plaintiff of a claim chart specifying where and how each element of a claim in issue can be found in each alleged infringing product. This requirement typically plays an important role in early identification of *Markman* issues. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 38 U.S.P.Q.2d 1461 (1996).

[6] Under the standard order, this disclosure occurs long before the minimum period prior to trial required by statute. *See* 35 U.S.C. § 282 (requiring written notice at least thirty days before trial of the prior art references a party asserting invalidity or noninfringement intends to rely on at trial). *See also* Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874, 878-79, 29 U.S.P.Q. 668, 672 (Fed. Cir. 1986) (recognizing that "[t]he objective of section 282's provision for advance notice is to prevent unfair and prejudicial surprise by the production of unexpected and unprepared-for prior art references at trial") (citations omitted).

HeinOnline -- 9 Fed. Cir. B.J. 543 1999-2000

it forthwith to a magistrate judge who must promptly decide the dispute.[7] Appeals of these decisions may be taken to a district judge and those too are heard and resolved promptly.[8] In the Eastern District of Virginia, dispositive and non-dispositive civil motions are heard every Friday and when necessary, arguments on discovery motions or appeals can be specially scheduled.

The third and perhaps most important ingredient, indeed the *sine qua non* of an expedited docket system for all civil cases, including patent cases, is a hospitable local legal culture. By this, I mean a local legal culture that (i) is capable of operating in the expedited docket regime and (ii) accepts the process as fair and practical. Of course, not all legal cultures fit this description. Nor is there any doubt that markedly different local legal cultures exist across the 93 federal judicial districts. Let me briefly illustrate this point. Many of you know that civil procedure across the United States is governed by the Federal Rules of Civil Procedure. Yet, many of you are also aware that patent cases are processed at varying rates among the 93 districts across this country. Some districts, like the Eastern District of Virginia, move cases briskly and others take much longer, sometimes as long as 2-4 years. You may reasonably wonder why the disposition rates vary so widely. There are, to be sure, a number of reasons for these varying rates of case disposition, but in my view the most important contributing factor is the variety of markedly different local legal cultures that exist across this country. Any experienced trial lawyer will tell you that there is a world of difference between trying a case in the Southern District of New York and trying the same case in the District of Delaware. Without doubt, the vital importance of a local legal culture in implementing an expedited docket system for patent cases cannot be underestimated.

A fourth ingredient of an expedited docket system for patent cases is simply that judges must promptly engage and resolve the often difficult and daunting technical issues that arise in patent cases. This is especially true in the wake of *Markman v. Westview Instruments, Inc.*,[9] which was a watershed

---

[7] *See* Fed. R. Civ. P. 72(a) ("A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter.")

[8] *See* Fed. R. Civ. P. 72(a) ("within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order" and "[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.").

[9] 517 U.S. 370, 38 U.S.P.Q.2d 1461 (1996).

HeinOnline -- 9 Fed. Cir. B.J. 544 1999-2000

event in patent litigation. *Markman* compels judges to engage the technical details of the patents presented so that they can rule on the meaning of disputed claim terms and thereby define the boundaries of the patent.[10] In an expedited docket system, judges must be prepared to hold early *Markman* hearings and to decide these matters promptly.

Apart from these four essential ingredients for an expedited docket system, there are various other ingredients which, while not essential, certainly play important facilitating roles. One of these is the use of a master docket for the judges rather than individual dockets. In the Eastern District of Virginia, a master docket guarantees that any time a case comes up for trial some judge will always be available to try it.

A critically important facilitating feature of an expedited docket system is to provide for mediation or settlement conferences to occur in parallel with discovery. In the Eastern District of Virginia, a magistrate judge, who is not assigned to monitor the discovery in a patent case, is assigned the task of conducting the settlement and mediation conferences. The success of the magistrate judges in the Eastern District of Virginia, in this regard, has been quite remarkable.

Time does not permit discussion of other tools or means that might be used to facilitate the expedited resolution of patent cases. Still, I think it is useful to list some of these here as they can play an important role in the prompt disposition of patent cases:

(1) Bifurcation of damages and liability in appropriate cases;[11]

---

[10] For the methodology district courts must follow in performing claim interpretation, *see* Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 39 U.S.P.Q.2d 1573 (Fed. Cir. 1996). For examples of claim interpretation by district courts, see Surety Tech., Inc. v. Entrust Tech., Inc., 74 F.Supp.2d 632 (E.D. Va. 1999); Surety Tech., Inc. v. Entrust Tech., Inc., 71 F.Supp.2d 520 (E.D. Va. 1999); NEC Corp. v. Hyundai Elec. Indus. Co., 30 F.Supp.2d 561 (E.D. Va. 1998); NEC Corp. v. Hyundai Elec. Indus. Co., 30 F.Supp.2d 546 (E.D. Va. 1998); Schering Corp. v. Amgen Inc., 18 F.Supp.2d 372 (D. Del. 1998).

[11] Bifurcation of liability (i.e., validity and infringement) and damages is not uncommon in patent infringement cases. *See, e.g.*, Purdue Pharma, L.P. v. F.H. Faulding and Co., 48 F.Supp.2d 420 (D. Del. 1999); NEC Corp. v. Hyundai Elec. Indus. Co., 30 F.Supp.2d 561 (E.D. Va. 1998); NEC Corp. v. Hyundai Elec. Indus. Co., 30 F.Supp.2d 546 (E.D. Va. 1998); Novopharm Limited v. Torpharm, Inc., 181 F.R.D. 308, 48 U.S.P.Q.2d 1471 (E.D. N.C. 1998). Less common are instances of other types of bifurcations. *See, e.g.*, Allen Organ Co. v. Kimball Int'l, Inc., 839 F.2d 1556, 5 U.S.P.Q.2d 1769 (Fed. Cir. 1988) (recognizing that district court bifurcated issues of patent validity and enforceability from issue of infringement based on agreement of the parties); General Patent Corp v. Microcomputer, 1997 WL 1051899 (C.D. Cal. Oct. 20, 1997) (district court bifurcated issues of patent

HeinOnline -- 9 Fed. Cir. B.J. 545 1999-2000

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

Chambers of
Justice Nathan L. Hecht

September 22, 2006

Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Various Proposed Changes to Rules of Civil and Appellate Procedure
Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on a number of proposed changes to the Rules of Civil Procedure and Rules of Appellate Procedure. These proposals are summarized in two attached appendices. Appendix A contains three proposals submitted to the Court by the State Bar Rules Committee. Appendix B contains proposals submitted to the Court over the past six months or so from various sources: members of the bar, members of the Advisory Committee, and members of the Court or the Court's staff. Although a number of rules proposals received by the Court are not being referred at this time, the Court believes that the proposals discussed in the attached appendices warrant the Committee's evaluation.

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all in October.

Sincerely,

Nathan L. Hecht
Justice

Rule: 199 **(Depositions Upon Oral Examination)**

Text:

199.2 Procedure for Noticing Oral Deposition

(a) *Time to Notice Deposition.* A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken prior to the appearance of all parties only by agreement of the parties or with leave of court. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

Summary of Issue:

The State Bar Rules Committee recommends the above change in response to the observation that there have been times where a party has sought an early deposition prior to appearance of all parties to a lawsuit for strategic purposes only. The SBRC notes that the proposed change would restrict the first deposition to occurring after all parties had appeared unless otherwise agreed or with leave of court.

Rule: TRCP 245 **(Assignment of Cases for Trial)**

Text of Existing Rule:

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. Non-contested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

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

Proposed New Text (proposed additions underlined):

1. The court may set contested cases on written request of any party or on the court's own motion. Unless all parties agree otherwise, the court shall give reasonable notice of the first setting for trial of not less than seventy-five [75] days to the parties who have appeared when notice is given.
2. When a case previously has been set for trial, the court may reset the case to a later date on any reasonable notice to the parties who have appeared or by agreement of those parties. Non-contested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.
3. If a party is joined or appears after a case has been set for trial, the court shall give reasonable notice of the trial setting to that party of not less than seventy-five [75] days after that party has appeared, unless that party agrees otherwise. For good cause, the court has discretion to shorten the notice to the newly joined or appearing party of an existing trial setting; provided, that the court shall grant that party a reasonable period to resolve its pretrial motions and conduct discovery.
4. 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.

Summary of Issue:

The State Bar Rules Committee felt that two matters had rendered the 45-day period under the existing rule insufficient time to prepare for trial. First, the SBRC notes that changes in statutory law and rules of procedure made it difficult to resolve a number of pre-trial motions (including motions for summary judgment, change of venue, and forum non conveniens, and designation of responsible third parties and of experts) before trial if a case is set shortly after it is filed. Second, the rule does not provide a minimum notice period for parties first joined after the case is set for trial.

Rule: TRCP 296 **(Requests for Findings of Fact and Conclusions of Law)**

Text:

In any case tried in the district or county court without a jury, or in any matter where findings are required or permitted, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a. The findings of fact shall only include the elements of each ground of recovery or defense.

Comment: The trial court is not required to support its findings of fact with recitals of the evidence.

Summary of Issue:

The State Bar Rules Committee observes that many courts and practitioners feel compelled to make or propose voluminous and detailed findings of fact, out of fear that omitting a single key fact may undermine the validity of a subsequent judgment or broaden the basis for appeal. This is said to be time-consuming and a waste of both judicial economy and the litigants' resources.

The SBRC proposes that a solution to this problem may lie in a combination of the proposed additional language to Rule 296 and the comment that follows. The proposed comment and rule text would clarify that while the elements of each ground of recovery or defense must be contained in findings of fact, a trial court would not be required to support its findings with recitals of the evidence on which its findings are based, or to make findings on every controverted fact.

Rule: TRCP 306a (**Periods to Run From Signing of Judgment**)

Current text:

1. **Beginning of Periods.** The date of 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.

***

4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) [the trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment or order] shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

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.

Summary of Issue:

TRAP 4.2 generally mirrors TRCP 306a by granting additional time to file post-judgment pleadings when a party did not receive notice of judgment within 20 days after it was signed. The main difference is that TRCP 306a addresses pleadings governed by the rules of civil procedure (such as a motion for new trial), whereas TRAP 4.2 addresses pleadings governed by the rules of appellate procedure (such as a notice of appeal). However, unlike TRCP 306a, TRAP 4.2(c) also

specifically requires the trial court to "sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed." The issue for the Committee's study is whether this or similar language should be added to TRCP 306a(5) to require the trial court to specify the date a party received late notice of judgment. See *In re The Lynd Co.*, No. 05-0432 (holding that TRAP 4.2(c)'s required finding stating the date of late notice cannot be implicitly read into TRCP 306a, and disapproving court of appeals decisions holding otherwise).

Rule: TRAP 13 (**Court Reporters and Court Recorders**)

Current text:

13.2 Additional Duties of Court Recorder

The official court recorder must also:

(a) ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made;

(b) make a detailed, legible log of all proceedings being recorded, showing:

(1) the number and style of the case before the court;
(2) the name of each person speaking;
(3) the event being recorded such as the voir dire, the opening statement, direct and cross-examinations, and bench conferences;
(4) each exhibit offered, admitted, or excluded;
(5) the time of day of each event; and
(6) the index number on the recording device showing where each event is recorded;

(c) after a proceeding ends, file with the clerk the original log;

(d) have the original recording stored to ensure that it is preserved and is accessible; and

(e) ensure that no one gains access to the original recording without the court's written order.

Summary of Issue:

This proposal was submitted to the Court by Justice David Gaultney. He notes that TRAP 13 currently places no duty on the court recorder to transcribe the electronic recording of the trial. He further observes that parties to appeals often must request extensions of time because the electronic recordings of the trial have not been transcribed at the time the parties file them with the court of appeals, which is the event that triggers the countdown for filing briefs (assuming the clerk's record has already been filed), and that needless delay results while the parties obtain a transcription. He proposes to amend TRAP 13.2 to address the duty of transcribing electronic recordings by expressly assigning that duty to the recorder, or, in the alternative, by allowing parties to prepare transcriptions from a certified copy of the recording provided by the recorder.

Rule: TRAP 20.1 **(When Party Is Indigent)**

Current text:

20.1 Civil Cases

(a) *Establishing Indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule.

****

(c) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

Summary of Issue:

The rule requires an indigent appellant to file an affidavit "in the trial court with or before the notice of appeal." TRAP 20.1(c)(1). Although indigence affidavits previously submitted for trial purposes are literally filed "before the notice of appeal," several courts of appeals have held that such trial affidavits do not satisfy the affidavit requirement of TRAP 20.1(c)(1). *See In re J.B.*, 2003 WL 1922835 at *1 n.1 (Tex. App.—Tyler 2003, no pet.); *Holt v. F.F. Enters.*, 990 S.W.2d 756, 758 (Tex. App.—Amarillo 1998, pet. denied). The Committee is asked to consider whether TRAP 20.1 should be amended to clarify that an affidavit of indigence filed at trial does not satisfy TRAP 20.1.

Proponents would argue that the rule should be clarified to remove any ambiguity suggesting that prior trial affidavits can satisfy the appellate requirement. Pro se litigants are generally held to the standard of an attorney responsible for following the rules of procedure; however, pro se and other litigants may find it difficult to perceive from the rule itself the necessity of a new affidavit at the time appeal is perfected. Proponents would argue that, while it is reasonable to require indigents to file a new affidavit at the time appeal is perfected, even if they had previously filed one for trial purposes, the rule should be amended to clarify that the trial affidavit does not satisfy the requirement of TRAP 20.1.

The Court recently issued a *per curiam* opinion in *Higgins v. Randall County Sheriff's Office*, No. 05-0095, holding that because the indigence-affidavit requirement on appeal is not jurisdictional, courts of appeals must allow a reasonable time to cure the defect. 2006 WL 1450042, at *1. To the extent that non-compliance results from the failure of pro se litigants and others to look beyond the text of TRAP 20.1, the *Higgins* decision may not resolve the ambiguity concern described above. However, the decision arguably makes the perceived need for clarification less urgent, as it clarifies that the initial failure to file an appeal affidavit will not result in immediate dismissal.

Rule: TRAP 24 (**Suspension of Enforcement of Judgment Pending Appeal in Civil Cases**)

Current text:

24.2. Amount of Bond, Deposit or Security

****

(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

24.4 Appellate Review

(a) *Motions; review.* On a party's motion to the appellate court, that court may review:

(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

(5) the trial court's exercise of discretion under 24.3(a).

Summary of Issues:

(1) TRAP 24.2(c) does not presently address the situation in which the judgment debtor files a net worth affidavit that is either facially defective (*i.e.*, it fails to state "complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained"), or is facially sufficient in that respect but is found not to be credible. An example of the latter situation was presented in *In re Smith*, No. 06-0107, and *In re Main Place Homes*, No. 06-0108, which were decided in a per curiam opinion of the Supreme Court issued May 5, 2006. In those cases, which involved separate mandamus petitions arising from the same trial, the judgment debtor submitted a net worth affidavit supported by an accounting statement, but the trial court's finding of an alter ego led the court to attribute to the debtor a significantly higher net worth than the debtor claimed.

The present rule notes that "[t]he judgment debtor has the burden of proving net worth," and it requires the trial court to make a net worth finding that "states with particularity the factual basis for that determination." TRAP 24.2(c)(3). However, it is arguably unclear whether a net worth affidavit that is deficient or is found to lack credibility serves to supersede the judgment pending appeal—particularly where the judgment creditor did not provide competing financial data sufficient to let the trial court make a net worth finding supported by detailed evidence, as required by the rule. Accordingly, the Committee is requested to consider:

- whether Rule 24 should be amended to state that a judgment is not superseded when the judgment debtor fails to obtain a net worth finding in line with his net worth affidavit; and

- whether Rule 24 should be amended to explicitly allow a judgment creditor to file a motion to strike a net worth affidavit for facial deficiencies, providing for a hearing on the motion within a relatively short time, and providing that the judgment is no longer superseded if the trial court grants the motion to strike.

(2) TRAP 24.4(a) provides that, "[o]n a party's motion to the appellate court, that court may review" various aspects of a trial court's supersedeas rulings. The 1990 amendment to former TRAP 49, which changed "court of appeals" to "appellate court," introduced uncertainty in at least two respects. First, it is unclear whether the current rule gives either a court of appeals or the Supreme Court jurisdiction over a supersedeas ruling when there is no appeal of the underlying case yet pending before the court. Second, if the rule authorizes an appellate court to review supersedeas rulings when the underlying case is not before it, the rule does not specify by what procedural vehicle supersedeas issues should be presented to the Supreme Court, *i.e.*, whether by motion or by mandamus. (The Supreme Court is an "appellate court" as defined by TRAP 3.1(b)). The Court addressed this issue in *Smith/Main Place Homes* by treating the "Tex. R. App. P. 24.4 Motion" as a mandamus petition. *In re*

Smith, 2006 WL 1195327, at *3 (Tex. May 5, 2006). The Committee is further asked to address whether Rule 24 should be amended to address either of the above issues.

Rule: TRAP 41 (**Panel and En Banc Decision**)

Current text (with potential revisions shown):

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the assignment of a qualified ~~retired or former~~ justice or judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a qualified ~~retired or former~~ justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

Summary of Issue:

In 2003, Section 74.003 of the Government Code, which delineates the qualifications of a justice or judge serving on assignment in the appellate courts, was amended to add subsection (h):

> Notwithstanding any other provision of law, an active district court judge may be assigned to hear a matter pending in an appellate court.

This new provision permitted the Chief Justice of the Supreme Court, for the first time, to use active district court judges for assignments in the intermediate appellate courts. Many appellate courts prefer using active district judges to avoid using visiting judge funds. The Committee is asked to consider whether the limitation on the qualifications of assigned judges contained in the TRAP 41.1 should be revised in light of the statutory amendment, perhaps by replacing the term "retired or former justice or judge" with "qualified justice or judge," as suggested above.

Rule: TRAP 49 (**Motion and Further Motion for Rehearing**)

Current text:

49.7 En Banc Reconsideration.

While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

Summary of Issue:

TRAP 49.7 provides that a majority of an en banc court of appeals may, "with or without a motion," order en banc reconsideration at any time "[w]hile the court of appeals has plenary jurisdiction." Although Rule 49 contemplates the filing of en banc motions, it does not specify a deadline for filing them—only that the court of appeals can consider them within its plenary jurisdiction. The court of appeals's plenary power expires "30 days after the court overrules all timely filed motions for rehearing, including motions for en banc reconsideration of a panel's decision under Rule 49.7...." TRAP 19.1. Thus, under the current rules, an en banc motion would presumably have to be filed within 30 days after the overruling of a motion for rehearing; if so, the appellate court's plenary power extends until 30 days after it overrules the en banc motion. The Court's recent decision in *City of San Antonio v. Hartman*, No. 05-0147, holds that an en banc motion counts as a motion for rehearing for purposes of the 45-day rule in TRAP 53.7. In light of that decision, the Committee is asked to consider whether TRAP 49 should be amended to provide specific procedural guidelines governing motions for en banc reconsideration, such as:

- whether to clarify or shorten the existing deadline for when such motions must be filed;
- whether they should be subject to the 15-day extension rule in TRAP 49.8;
- the page limit applicable to such motions;
- whether the rule should specify procedures for responses, as in TRAP 49.2;
- whether an en banc motion can be filed in the same motion with a motion for panel rehearing, or whether separate motions can simultaneously be filed, or whether a party can or must wait to file an en banc motion until after its motion for panel rehearing is denied;
- whether, as in Fifth Circuit practice, the en banc motion is initially to be treated as a motion for rehearing by the panel if no motion for rehearing was previously filed (See "Handling of Petition by the Judges" following Fifth Circuit local rule 35.6);
- when it is appropriate to seek en banc reconsideration, *compare* FRAP 35(b)(1) (requiring statement that panel decision either (1) conflicts with precedent from the U.S. Supreme Court or the court to which the en banc motion is addressed, or (2) involves questions of exceptional importance), *with* TRAP 41.2(c) (noting that "en banc consideration is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc reconsideration").

- whether the TRAP rule should specify the availability of sanctions, to discourage frivolous en banc motions. *See* Fed. Local R. App. P. 35.1 (noting that court is "fully justified in imposing sanctions on its own initiative . . . for manifest abuse of the procedure").

Rule: TRAP 52 (**Original Proceedings**)

Current text:

Rule 52.3 Original Proceedings; Form and Content of Petition
All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated. [Remainder of paragraph omitted]

Summary of Issues:

Some appellate practitioners have asked the Court to modify TRAP 52 to account for situations in which the Relator's attorney cannot verify, based on personal knowledge, that all facts stated in the mandamus petition are true and correct. These proponents argue that the purpose of Rule 52's verification requirement would be satisfied by including in the mandamus record a copy of the witness's sworn affidavit, and they suggest amending TRAP 52 to allow sworn testimony or affidavits in the record to satisfy the verification requirement.

In practice, an attorney will often lack the personal knowledge of the facts demanded by the verification requirement, unless the facts relevant to the mandamus concern events witnessed by the attorney at trial. Thus, to comply with the requirement, it may be necessary to obtain sworn statements from witnesses or others with personal knowledge of the facts. However, mandamus petitions often must be prepared and filed on little notice due to circumstances beyond the attorney's control. Thus, the Committee is asked to consider whether a central purpose of the verification requirement—to avoid factual disputes in mandamus proceedings—might be achieved in a manner that is less burdensome to practitioners. *See Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1958, no writ) (noting that verification must constitute a positive statement of factual knowledge as to support a charge of perjury if the facts were found to be untrue); *see also Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991) (appellate courts may not deal with disputed factual matters in mandamus proceedings).

Several other issues are raised when the facts pertinent to the mandamus are neither within the attorney's personal knowledge nor the personal knowledge of any single witness. Must the petition be verified by multiple affiants? If so, how should their verifications reflect those facts to which each respective affiant is competent to swear? The Committee is further asked to consider whether TRAP 52.3 should be amended to address these issues.

Rule: none

Current text: none

Summary of Issue:

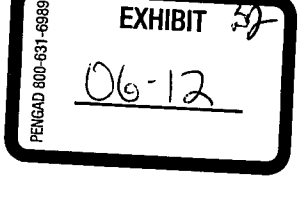
Government Code §22.010 states: "The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." Pursuant to that statutory requirement, the Court in 1990 promulgated TRCP 76a, which governs sealing records in trial courts. However, there is no comparable TRAP rule that governs requests to seal records in the appellate courts. Accordingly, the Committee is asked to consider whether the Appellate Rules should contain a provision that governs requests to seal records in the appellate courts.

Report of SCAC Subcommittee on TRCP 216-299a

1) Rule 226a Jury Instructions

By a 12-10 vote at the October SCAC meeting, the full committee endorsed David Beck's suggestion to amend Rule 226a and include language in jury instructions describing the role of counsel. After further study, the subcommittee suggests the addition of the following language to Rule 226a:

> "Before the attorneys begin their questioning, you need to be aware that our judicial system is an adversary system. This is a system where the interested parties participate in the decisional process by presenting evidence of their claims or defenses through their attorneys, who are their advocates. This procedure enables the jurors to have before them the relevant admissible evidence from each party so that the jury can determine the true facts and arrive at a just verdict based on such evidence.
>
> Under the rules of our adversary system, each attorney, owes entire devotion to the interest of the client and is to zealously, vigorously and using the attorney's utmost skill and ability, present the client's claims or defenses, which the attorney believes there is a basis for so doing that is not frivolous. The attorney acts for and seeks for the client, every remedy and defense that is authorized by law. Our system has served us well for over 200 years, and trial attorneys have been and continue to be a critical part of the adversary process."
>
> Query: Whether Rule 226a should be reviewed in its entirety and modified in light of plain English principles?



2) **Findings of Fact and Conclusions of Law**. The subcommittee was asked to consider the following issues:

Should Rule 296 include a statement as to when findings of fact are required and when findings are discretionary?

Should findings of fact be mandated in broad form when feasible- i.e parallel the jury charge rules? The current situation encourages voluminous and unnecessary evidentiary findings. (Some statutes and rules require particularized findings.)

Should the timing of requests for findings of fact be modified? Is the federal approach desirable allowing (or requiring) the trial judge to make findings at the conclusion of the case, rather than weeks or months later? Should the federal clearly erroneous standard apply?

The subcommittee recommendations are as follows:

The subcommittee does not recommend amending Rule 296 to include a statement as to when findings of fact are required and when findings are discretionary as the Texas Supreme Court's decision in *IKB Industries v. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997) sets forth the law on the subject.

The subcommittee does not support mandating broad form findings of fact but does endorse amending Rule 296 to make clear the trial court has discretion to make broad form findings of fact.

The subcommittee does not endorse a requirement that a trial judge make findings of fact in every case. Federal courts have much lighter dockets and have law clerks to assist the court in achieving such a task. However, the subcommittee does endorse an amendment of the rule to allow trial court discretion to make oral findings on the record at the conclusion of the case, provided the trial court has an opportunity to later amend or make additional findings of fact.

The subcommittee does not support the inclusion in the rules of a clearly erroneous appellate standard to review findings of fact.

The subcommittee considered addition of the following language, but ultimately voted not to include a statement in the rules as to when findings of fact are required or discretionary. The following proposal was rejected:

"Following a conventional trial on the merits ~~In~~ in any case tried in district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law....." In all other instances unless otherwise provided by law, the trial court may, but is not required to, make findings of fact and conclusions of law in support of a judgment based in any part on an evidentiary hearing.

Recommended Rule Changes:

The subcommittee recommends the following amendments:

Rule 296

If findings are properly requested, the judge shall state findings of fact on each ground of recovery or defense raised by the pleadings and evidence. Unless otherwise required by law, the trial court's findings of fact may be in broad form." ....

A minority view would require a certain level of specificity in findings of fact. Under that proposal, the following additional sentence would be added to Rule 296:

"The trial courts findings are to include only as much of the evidentiary facts as is necessary to disclose the basis for the court's ultimate conclusion."

Comment to Rule 296: Unnecessary and voluminous evidentiary findings are not to be included in the court's findings of fact and conclusions of law.

To effectuate the subcommittee's recommendation, additional rule changes would be required as follows:

Add to Rule 297:

The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. However, it will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court in the presence of counsel, following the close of the evidence. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

Amend Rule 298:

After the court makes ~~files~~ original finding of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusion. The request for these findings shall be made within ten days after the filing or oral pronouncement of the original findings and conclusions by the court in accordance with Rule 297. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.....

Amend Rule 299a:

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment. However, original findings of fact stated orally and recorded in open court following the close of the evidence shall

satisfy this requirement. Any additional or amended findings of fact and conclusions of law must be in writing and filed with the clerk.

Professor Elaine A. Carlson
South Texas College of Law
1303 San Jacinto St., Suite 755
Houston, Tx 77002
281 364 1412
ecarlson@stcl.edu

October 16, 2006

SUBCOMMITTEE REPORT: TRCP 216-299a

In response to Justice Hecht's letter of September 22 and David Beck's correspondence dated June 15, 2006, the Subcommittee met and considered proposed changes to TRCP 245, 296 and 226a. The subcommittee's recommendations are as follows:

TRCP 245

Proposal: The State Bar Rules Committee proposed modifications to TRCP 245 that would enlarge the notice of a first trial setting from 45 days to 75 days. In addition, Rule 245 would be amended under that proposal to clarify that a party joined or who appears after a case has been set for trial, is entitled to that same notice, with the trial court having the discretion to shorten that period for good cause.

Recommendation: The subcommittee does not recommend the adoption of this proposal for several reasons. First, the subcommittee is unaware of any compelling problems with the current operation of the rule. Second, in many cases a docket control order will set a deadline for adding parties as well as a trial setting and thus there is not an opportunity for unfair surprise. Finally, the subcommittee questioned whether the proposed enlargement of time for notice of a trial setting is desirable, especially when attempting to obtain a hearing in a case seeking injunctive relief or a declaratory judgment.

The subcommittee also discussed whether current Rule 245 is sufficiently clear as to the right of a party added after a case is set for trial to the same notice of an initial trial setting as to originally named parties. Some members of the subcommittee were concefrned the current rule is silent as to this specific matter, and the subcommittee would recommend a clarifying amendment. Changing "with reasonable notice of not less than forty-five days to the parties of a first setting for trial" to "with reasonable notice of not less than forty-five days to all ~~[the]~~ parties of a first trial setting...." may be sufficient to address this concern.

TRCP 296

Proposal: The State Bar Rules Committee proposed the following addition to TRCP 296, which addresses findings of fact in bench trials: "The findings of fact shall only include the elements of each ground of recovery or defense." Under this proposal, the following comment would be added as well: "The trial court is not required to support its findings of fact with recitals of the evidence."

Recommendation: The subcommittee does not recommend the adoption of this proposal. Appellate court decisions support that the trial court may make broad form findings of fact, so it is not accurate to state that the trial court is required to make findings as to each element of grounds raised by the pleadings and the proof, although the trial court may do so. The Committee also expressed concern that in some instances, statutory provisions require findings of fact that may include evidentiary support.

TRCP 226a

David Beck, in his capacity as President of the American College of Trial Lawyers, has recommended a change to Rule 226a. Specifically, he suggests an addition to the instructions given by the trial court to venirepersons before voir dire, to clarify the role of trial counsel in an effort to combat the negative images of trial lawyers held by the public at large. The subcommittee shares this concern and endorses the addition of the following language to the admonitory instructions mandated by TRCP 226a:

> Those of you who will be chosen as jurors for this case will be performing a very important service, guaranteed by both the United Sates and Texas Constitutions. Our founding fathers believed it was essential that the right to trial by jury-and the right to serve on a jury-be conferred upon all of our citizens, including you. Your presence here today is a tribute to their beliefs and the importance of the jury system to our democratic form of government.
>
> Before the attorneys begin their questioning, you need to be aware that our judicial system is an adversary system. ~~, which means that during the trial the parties will seek to present their respective cases in the best light possible. Attorneys in general, and trial attorneys in particular, are frequently criticized. That criticism often results from a basic understanding of our adversary system, in which the attorneys act as advocates for the competing parties.~~ As an advocate, an attorney is ethically obligated to zealously assert his or her client's position under the rules of our adversary system. By presenting the best case possible on behalf of their clients, the attorneys enable the jurors to weigh the applicable facts, to determine truth, and to arrive at a just verdict based on

the evidence. Our system has served us well for over 200 years and trial attorneys have been, and continue to be, a critical part of that process.

The attorneys will now proceed with their examination.

MEMORANDUM

To: SCAC Members

From: Bill Dorsaneo

cc: Jody Hughes

Date: December 6, 2006

Re: Nathan Hecht Letter 9/22/06

Here are the proposed revisions discussed and voted on at our October meeting with the exception of proposed revisions to 24.2 and 40.2, which are new. In addition, proposed revisions to 20.1 and 40.1 need additional discussion. Proposed revisions to 52.3, including the alternative version previously emailed to all SCAC members, will need to be revisited. The alternative is attached.

13.2 Additional Duties of Court Recorder. The official court recorder must also:

(a)

(b)

(c)

(d)

(e)

(f) if requested by any party to the appeal, prepare and file a transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2).

19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion

for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.

(b) 30 days afer the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.7, and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under Rule 49.8.

20.1 Civil Cases

(a) *Establishing indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in a compliance with this rule.

(b) *Contents of affidavit.*

(c) *IOLTA Certificate.* If the party was represented by an attorney in the trial court who provided free legal services, without contingency, because of the party's indigency and the attorney provided services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program and the attorney filed an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines, the attorney may file an additional IOLTA certificate confirming that the IOLTA-funded program rescreened the party for income eligibility under the IOLTA income guidelines after entry of the trial court's judgment. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

(d) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Civil Procedure Rule 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost. . . must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

(3) Extension of time. The appellate court ~~may extend the time to file and affidavit if, within 15 days after the deadline for filing the~~

~~affidavit, the party files in the appellate court a motion complying with Rule 10.5(b)~~ must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit of indigence or the appellant's failure to file a sufficient affidavit of indigence before dismissing the appeal or affirming or reversing the trial court's judgment, as provided in Rule 44.3.

See Higgins v. Randall County Sheriff's Office 49 Tex. Sup. Ct. J. 645 (Tex. 2006).

24.2 Amount of Bond, Deposit or Security

(c) *Determination of Net Worth*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. ~~The affidavit is prima facie evidence of the debtor's net worth.~~ A trial court clerk must receive and file a net worth affidavit tendered for filing by a judgment debtor. A net worth affidavit filed with the trial court clerk is prima facie evidence of the debtor's net worth for the purpose of establishing the amount of the bond, deposit or security required to suspend enforcement of the judgment.

(2) ~~Contest; Discovery~~ *Motion to Strike Insufficient Affidavit*. A judgment creditor may move to strike a net worth affidavit that does not [state the debtor's net worth or that does not state complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained] *or* [comply with Rule 24.2(c)(1)]. If the trial court determines that the affidavit is deficient, the court must inform the judgment debtor why the affidavit is deficient and afford the judgment debtor a reasonable opportunity to comply with Rule 24.2(c)(1). If an affidavit conforming with the trial court's order is not filed in accordance with the court's order, the trial court may order that enforcement of the judgment is no longer suspended as to that judgment debtor.

(3) Contest; Discovery; Hearing. A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be

sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

The trial court must hear a judgment creditor's contest of discovery has been complete. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for twenty days after the trial court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

24.4 Appellate Review

(a) Motions; Review. On a party's motion to the appellate court, that court may review:

(1) the trial court's ruling on a rule 24.2(c)(2) motion to strike a net worth affidavit; (~~1~~2) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);

(~~2~~3) the sureties on any bond;

(~~3~~4) the type of security;

(45) the determination whether to permit suspension of enforcement; and

(~~5~~6) the trial court's exercise of discretion under 24.3(a).

(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) *Temporary Orders.* The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) *Appellate Court.* A motion filed under subsection (a) should be filed in the court of appeals having potential appellate jurisdiction over the underlying judgment. The court of appeals ruling is subject to review on motion to the Texas Supreme Court.

(~~d~~e) *Action by Appellate Court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The

appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(ef) *Effect of Ruling.* If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

34.6 Reporter's Record.

(1)

(a) *Contents*

(1) Stenographic recording.

. . .

(2) Electronic recording.

. . .

(b) *Request for preparation.*

(1) Request to court reporter or court recorder. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the reporter's record. The request must designate the exhibits to be included. A request ~~to the court reporter but not the court recorder~~ must also designate the portions of the proceedings to be included.

35.3 Responsibility for Filing Record

(b) *Reporter's record.* The official or deputy court reporter or court recorder is responsible for preparing, certifying and timely filing the reporter's record if:

(1) a notice of appeal has been filed;

(2) the appellant has requested the reporter's record be prepared; and

(3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's or the recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without paying the fee.

38.5 *Appendix for cases recorded electronically.* In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

(1) In general. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. A transcription prepared and filed by the court recorder at the request of a party pursuant to Rules 13.2(f) and 34.6(b)(1) satisfies this requirement. Unless another party objects, the transcription will be presumed accurate.

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, "request the temporary assignment by the Chief Justice of the Supreme Court of a[n active court of appeals] justice from another court of appeals, a qualified retired or former [appellate] justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief may then temporarily assign a justice of another court of appeals or a [qualified] retired or former appellate justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.2 Decision by En Banc Court

(a) [No change]

(b) When en banc court cannot agree on judgment. If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a qualified retired or former [appellate] justice or appellate judge [ ] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals judgment or order is rendered. Alternatively a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's timely filed motion for rehearing or further motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision . . .

49.8 Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing or a motion for en banc reconsideration if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.9 Not Required for Review. A motion for rehearing is not a prerequisite to filing a motion for en banc reconsideration as provided by Rule 49.7 or a petition for review in the Supreme Court or a petition for discretionary review in the court of Criminal Appeals nor is it required to preserve error.

52.3 Original Proceedings; Form and Content of Petition. All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify to the matters stated. . .

53.7 Time and Place of Filing.

(a) *Petition.* The petition must be filed with the Supreme Court within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

Marilyn Galloway

From: Jody Hughes
Sent: Thursday, December 07, 2006 1:09 PM
To: Marilyn Galloway
Subject: FW: Proposed Amendment to TRAP 41.1

From: Alan Bennett
Sent: Thursday, December 07, 2006 10:39 AM
To: Jody Hughes
Subject: Proposed Amendment to TRAP 41.1

Jody,

I am a staff attorney at the Waco Court of Appeals. I read with interest the current proposals regarding amendments to TRAP 41.1. It appears that these amendments are intended to clarify what justices or judges are eligible for temporary assignment to a court of appeals. Perhaps you are aware that there is currently some disagreement at the Waco Court about whether, if 1 justice does not participate, the remaining 2 may issue a decision without the need to assign a new justice/judge, particularly in cases submitted without argument. *See, e.g., Pac. Employers Ins. Co. v. Mathison*, 2005 WL 2665454 (Tex. App.—Waco 2005, pet. denied) (Vance, J., concurring); *Krumnow v. Krumnow*, 174 S.W.3d 820, 830 (Tex. App.—Waco 2005, pet. denied) (Gray, C.J., special note).

I do not know if the Rules Advisory Committee has considered amendments to address this issue, but if the Committee has not already concluded that such amendments would be ill-advised, please forward the following proposals to the Committee for its consideration. (Perhaps these could be known as the Waco amendments).

41.1(a) would be amended as follows:

(a) Constitution of Panel. Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. Except as provided by subsection (c), if the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

41.1(c) would be amended as follows (including current Dorsaneo proposal):

(c) When Court Cannot Agree on Judgment. After submission ~~argument~~, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a [qualified] retired or former appellate justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

Sincerely,

Alan Bennett

ORGAIN, BELL & TUCKER,
L.L.P.
ATTORNEYS AT LAW
P. O. BOX 1751
BEAUMONT, TEXAS 77704-1751
470 ORLEANS BUILDING, FOURTH FLOOR 77701
TELEPHONE (409) 838-6412
FAX (409) 838-6959
www.obt.com

OTHER OFFIC
HOUSTON - THE WOC
AUSTIN
SILSBEE

October 23, 2006

Mr. W. Bruce Williams
Cotton, Bledsoe, Tighe & Dawson, P.C.
P. O. Box 2776
Midland, TX 79702-2776

Dear Bruce:

I am enclosing herein copy of letter that I sent to Jody Hughes, Rules Attorney for the Texas Supreme Court. I sent the recommendations of your committee to the court, so that they can have that before them, and if they choose, they can adopt the amendment that your committee recommended.

With reference to Rule 904, there were quite a number of comments. One comment was the change in the number of days from that in the statute. Another concern is whether this would be considered a substantive law that the Supreme Court could not amend. There was also comment that we had gotten away from the language of the statute more than we had to deviate. There was further comment about credit being given where insurance pays part of the medical bills and no one had any definite recommendation on that. Further, I think we need to have a definite statement and make it clear that nothing in the affidavit can be used to prove that the expenses were caused by a particular thing or by a particular event or accident.

Lastly, they asked if I would invite you to our next Supreme Court Advisory meeting which will be held in Austin at the State Bar Headquarters on Friday, December 8, and Saturday, December 9. If you will tell me what your availability is, I will see that they get to you, so that you don't have to sit around and listen to a lot of other stuff.

Bruce, please express my appreciation to your committee for their hard work. I look forward to hearing from you.

Sincerely,

Buddy Low

BL:cc

ORGAIN, BELL & TUCKER, L.L.P.
ATTORNEYS AT LAW
P. O. BOX 1751
BEAUMONT, TEXAS 77704-1751
470 ORLEANS BUILDING, FOURTH FLOOR 77701
TELEPHONE (409) 838-6412
FAX (409) 838-6959
www.obt.com

OTHER OFFICES
HOUSTON - THE WOODLANDS
AUSTIN
SILSBEE

October 23, 2006

Mr. Jody Hughes, Rules Attorney
Texas Supreme Court
P. O. Box 12248
Austin, TX 78711

Dear Jody:

I am enclosing herein Chart Showing Action Taken by Supreme Court Advisory Committee at the Meeting of October 20-21, 2006. You will note that I am attaching thereto the amendment to Rules 606 and 609 that was recommended by the State Bar Committee. This will give the court a chance to review their recommendation, along with the recommendation of the full Supreme Court Advisory Committee.

Rule 904 (new) was referred back for further study as indicated on the Chart.

Thank you very much.

Sincerely,

Buddy

Buddy Low

BL:cc

Enclosures

cc: Mr. Charles L. Babcock
Jackson & Walker L.L.P.
1401 McKinney, Suite 1900
Houston, Texas 77010

CHART SHOWING ACTION TAKEN
BY SUPREME COURT ADVISORY COMMITTEE
AT MEETING OF OCTOBER 20-21, 2006

RULE NO.	ACTION TAKEN BY SUPREME COURT ADVISORY COMMITTEE
904 (New)	It was recommended that members of the full Supreme Court Advisory Committee study the proposed rule and mail to Buddy Low any comments that they have. Thereafter, the rule will be discussed at the December meeting at which time Bruce Williams, Chairman of SBOT Administration of Rules of Evidence Committee will be invited to attend.
606	It was voted that no amendment be made to this rule. The amendment that was voted on, and submitted by SBOT Administration of Rules of Evidence Committee is attached hereto so the court can see the recommendation of that committee.
609	It was voted that no amendment be made to this rule. The amendment that was voted on, and submitted by SBOT Administration of Rules of Evidence Committee is attached hereto so the court can see the recommendation of that committee.

Affdt or ctr doesn't keep cases pg from bringing live wits to trial unless Δ fails to file ctr-affdvt

RULE 904. AFFIDAVIT OF COST AND NECESSITY OF SERVICES

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

(b) An affidavit that the amount a service provider charged for a service was reasonable at the time and place that the service was provided and that the service was necessary under the circumstances for which the service was performed is admissible in evidence and is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(1) An affidavit must:

(A) be taken before an officer with authority to administer oaths;
(B) be made by the person who provided the service or the custodian of records showing the service provided and charge made;
(C) include an itemized statement that clearly identifies the date and description of the service and charge; and
(D) contain the address and telephone number of the affiant who is the provider who rendered the service.

(1) Filing and service of affidavit: The affidavit must be filed with the clerk of the court and a copy of the affidavit must be served on each party at least 60 days before the day on which evidence is first presented at the trial of the case. statute says 30 days

(3) A person signing an Affidavit of Cost and Necessity, other than a custodian of records, must be timely disclosed in response to a proper discovery request.

(a) A counter-affidavit stating that the amount a person charged for a service was not reasonable at the time and place that the service was provided or that the service was not necessary under the circumstances for which the service was performed is admissible in evidence to support a finding of fact by judge or jury that the amount charged was not reasonable or that the service was not necessary. A counter-affidavit may not assert that an affiant, who is a custodian of records, testifying under section (b) is not qualified by knowledge, skill, experience, training, education, or other expertise to attest to the matters set forth in an affidavit.

(1) A counter-affidavit must:

(A) be taken before an officer with authority to administer oaths;
(B) specifically set forth the factual basis for controverting any of the contested matters contained in the affidavit;
(C) 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 affidavit; and
(D) include or attach the curriculum vitae or facts to support section (c)(1)(C) of the counter-affiant, which must include the address and telephone number of the counter-affiant.

the discovery period. Thus it doesn't meet part (1), but part (2) could be utilized to still obtain discovery of the affiant or counter-affiant.

In the counter-affidavit, that affiant should briefly state in the blank after the word "because" why the affiant is qualified; e.g., "I am a medical doctor who performs similar services to which I have taken exception."

was a resident at the time the cause of action accrued but has subsequently moved.

(c) Service of process under this section shall be made in the manner provided by this chapter for substituted service on nonresident motor vehicle operators, except that a copy of the process must be mailed by certified mail.

(d) Service under this section is in addition to procedures provided by Rule 117a of the Texas Rules of Civil Procedure and has the same effect as personal service.

(e) Service of process on the secretary of state under this section must be accompanied by the fee provided by Section 405.031(a), Government Code, for the maintenance by the secretary of state of a record of the service of process.

History of CPRC §17.091: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 384, §14, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., 2nd C.S., ch. 6, §60, eff. Sept. 1, 1991; Acts 1995, 74th Leg., ch. 579, §1, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 948, §5, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 1430, §34, eff. Sept. 1, 2001.

See also *O'Connor's Texas Rules*, "Serving the Defendant with Suit," ch. 2-H.

CPRC §17.092. SERVICE ON NONRESIDENT UTILITY SUPPLIER

A nonresident individual or partnership that supplies gas, water, electricity, or other public utility service to a city, town, or village in this state may be served citation by serving the local agent, representative, superintendent, or person in charge of the nonresident's business.

History of CPRC §17.092: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CPRC §17.093. SERVICE ON FOREIGN RAILWAY

In addition to other methods of service provided by law, process may be served on a foreign railway by serving:

(1) a train conductor who:

(A) handles trains for two or more railway corporations, at least one of which is the foreign corporation and at least one of which is a domestic corporation; and

(B) handles trains for the railway corporations over tracks that cross the state's boundary and on tracks of a domestic corporation within this state; or

(2) an agent who:

(A) has an office in this state; and

(B) sells tickets or makes contracts for the transportation of passengers or property over all or part of the line of the foreign railway.

History of CPRC §17.093: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CHAPTER 18. EVIDENCE

SUBCHAPTER A. DOCUMENTARY EVIDENCE

CPRC §18.001. AFFIDAVIT CONCERNING COST & NECESSITY OF SERVICES

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

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

(c) The affidavit must:

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

(2) be made by:

(A) the person who provided the service; or

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

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

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

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

(1) not later than:

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

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

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

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

History of CPRC §18.001: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, §3.04(a), eff. Sept. 1, 1987.

See also TRE 902(10), Business Records Accompanied by Affidavit.

Jackson v. Gutierrez, 77 S.W.3d 898, 902 (Tex. App.—Houston [14th Dist.] 2002, n.p.h.). "A plaintiff may prove medical expenses are reasonable and necessary either by presenting expert testimony, or by submitting affidavits in compliance with §18.001...." *See also* ***Rodriguez-Narrera v. Ridinger***, 19 S.W.3d 531, 532 (Tex.App.—Fort Worth 2000, no pet.).

Turner v. Peril, 50 S.W.3d 742, 747 (Tex.App.—Dallas 2001, pet. denied). "Significantly, while §18.001(c)(2)(B) permits charges to be proved by a non-expert custodian, §18.001(f) requires a counter affidavit to give reasonable notice of the basis on which the party filing it intends to controvert the claim reflected by the initial affidavit *and* be made by a person qualified to testify in contravention about matters contained in the initial affidavit. [S]ection 18.001 places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings. [¶] An affidavit ... is insufficient unless its allegations are direct and unequivocal and perjury can be assigned to it."

City of El Paso v. PUC, 916 S.W.2d 515, 524 (Tex. App.—Austin 1995, writ dism'd). "Section 18.001 does not address the *admissibility* of an affidavit concerning cost and necessity of services but only the *sufficiency* of the affidavit to support a finding of fact that a charge was reasonable or a service was necessary. [¶] Section 18.001 makes no reference to requirements for admissibility of affidavits."

Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex.App.—Eastland 1995, no writ). CPRC "§18.001 is an evidentiary statute which accomplishes 3 things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit. ... The statute does not provide that the evidence is conclusive, nor does it address the issue of causation." *See also* ***Sloan v. Molandes***, 32 S.W.3d 745, 752 (Tex.App.—Beaumont 2000, no pet.).

CPRC §18.002. FORM OF AFFIDAVIT

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

No. _____

John Doe	§	In the _____
(Name of Plaintiff)	§	Court in & for
v.	§	_____ County,
John Roe	§	Texas
(Name of Defendant)	§	

AFFIDAVIT

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

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

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

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

_____
Affiant

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

My commission expires:

_____

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

_____

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

No. _____

John Doe	§	In the _____
(Name of Plaintiff)	§	Court in & for
v.	§	_____ County,
John Roe	§	Texas
(Name of Defendant)	§	

AFFIDAVIT

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

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

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

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

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

_____
Affiant

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

My commission expires:

_____

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

_____

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

History of CPRC §18.002: Acts 1993, 73rd Leg., ch. 348, §1, eff. Aug. 30, 1993.

See also TRE 902(10), Business Records Accompanied by Affidavit.

Sections 18.003-18.030 reserved for expansion

SUBCHAPTER B. PRESUMPTIONS

CPRC §18.031. FOREIGN INTEREST RATE

Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in this state and interest at that rate may be recovered without allegation or proof.

History of CPRC §18.031: Acts 1985, 69th Leg., ch. 959, §1, eff. Sept. 1, 1985.

CPRC §18.032. TRAFFIC CONTROL DEVICE PRESUMED TO BE LAWFUL

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

(b) Proof of the existence of a one-way street sign is prima facie proof that the public thoroughfare on or alongside which the sign is placed was designated by proper and competent authority to be a one-way thoroughfare allowing traffic to go only in the direction indicated by the sign.

(c) In this section, "traffic control device" includes a control light, stop sign, and one-way street sign.

(d) Any party may rebut the prima facie proof established under this section.

History of CPRC §18.032: Acts 1995, 74th Leg., ch. 165, §2, eff. Sept. 1, 1995.

COTTON
BLEDSOE
TIGHE &
DAWSON, PC
Attorneys at Law

Post Office Box 2776
Midland, Texas 79702-2776
500 West Illinois, Suite 300
Midland, Texas 79701
(432) 684-5782
(432) 684-3173 Fax
www.cbtd.com

415 Louisiana, Suite 2100
Houston, Texas 77002
(713) 759-0281
(713) 759-0458 Fax

W. Bruce Williams • Shareholder • Board Certified in Civil Trial & Personal Injury Trial Law
(432) 685-8578 Direct • (432) 684-3173 Direct Fax • bwilliams@cbtd.com

February 21, 2006

Mr. Buddy Low
Supreme Court Advisory Committee
Orgain, Bell & Tucker, LLP
P. O. Box 1751
Beaumont, Texas 77704-1751

re: Re-submission of TRE 904 with proposed revisions

Dear Buddy:

Enclosed please find proposed TRE 904 which addresses reasonableness of costs and necessity of services currently governed under CPRC 18.001-.002. On behalf of the Administration of Rules of Evidence Committee, we earnestly recommend to the Supreme Court Advisory Committee that it endorse our proposed TRE 904 and recommend it to the Supreme Court for adoption. In the above referenced matter I have attached proposed Rule 904 (revised from previous submitted versions in 2003 and 2005) which currently includes proposed forms of affidavit and counter-affidavit with comments. This latest edit of Rule 904 is the culmination of years of work by the Administration of Rules of Evidence Committee and *such revisions were passed **unanimously** by the Committee at large.*

The fact that the changes were passed unanimously in my opinion is nothing less than miraculous. AREC's initial work on this Rule was difficult, with leanings coinciding with committee member's practices on the plaintiff or on the defense side of the bar. In my opinion, AREC's unanimous recommendation of TRE 904 as revised is due to two things: 1) the stellar makeup of the sub-committee and its commitment to devising an equitable rule and 2) the blatant gamesmanship that members of the committee have observed in practice by both sides of the bar in utilizing the current CPRC 18.001 - .002 as a sword or a shield. Further, these changes are needed in light of recent opinions by Courts of Appeal that there are no forms given for counter affidavits thus adding to uncertainty and gamesmanship. ***Turner v. Peril***, 50 SW3d 742, 747 (Tex. App. - Dallas, 2001, pet. den.) Accordingly, even though the intent of CRPC 18.001 - .002 is to reduce the costs to litigants, that purpose is frustrated in multiple ways under the current Rule.

Courts of Appeal have also recognized that CPRC, Sec. "18.001 is an evidentiary statute, [*see* ***Beauchamp v. Hambric***, 901 SW2d 747, 749 (Tex. App. - Eastland, 1995, no writ)] and yet there is no Texas rule of evidence. The Texas Supreme Court, has rule making authority under Tex. Gov. Code § 22.004 that repeals all conflicting laws and parts of laws governing civil actions.

Gamesmanship under the current CPRC 18.001 - 18.002 includes, but is not limited to:

1. Parties filing multiple affidavits and slipping into the affidavit, causation language, not contemplated by the statute [***Beauchamp v. Hambric***, 901 SW2d 747, 279 (Tex. App. - Eastland, 1995, no writ); *see* also ***Sloan v. Molandes***, 32 SW3d 745, 752 (Tex. App. - Beaumont, 2000, no pet)] such as "the service I provided was necessary *due to the accident of 12/01/04* and the amount that I charged for the service was reasonable at the time and place the service was provided." In filing this language among other affidavits it may be hoped that the defendant does not catch the added causation statement or file a counter affidavit and that at trial such may be surreptitiously used to imply to the jury a health care providers' opinion on included causation.

2. The current practices of many insurance providers is to obtain a counter-affidavit on every conceivable basis, thus knocking out the affidavit and therefore evidence of costs and putting the plaintiff to the expense of bringing a witness at trial.

3. Parties may include in the bills, particularly in cases with multiple health care billers, costs of incidental health care that had nothing to do with an accident, such as visits or charges for flu, cold, pap smear and costs of other doctor's visits that are not relevant to the incident. It then becomes incumbent upon the defendant to catch these non-related charges and then hire an expert to fill out an affidavit to controvert same. Failure to controvert may have a consequence submission of non-related medical charges to the jury without ability to contest same at trial.

4. Accordingly, the cost to defendants is largely having to hire an expert to controvert and then to appear at trial based on relatively inconsequential, but wrongfully included charges. The cost to plaintiff comes in having their affidavits nullified routinely, followed by the specter of incurring the costs of having to bring someone to trial to testify as to reasonableness and necessity. Under the current Rule and practices occurring thereunder there is no certainty on either side of the docket as to admissibility of evidence and costs are magnified.

The attached proposed version of Rule 904 is an effort to bring such expensive and time consuming gamesmanship to an end and to instill some measure of certainty as to admissibility at trial. Under these proposed revisions and the comments, the plaintiff may file his reasonableness and necessity affidavit as is the current practice. Likewise, the defendant may file a counter-affidavit by a qualified person as is the current practice. However, a counter-affidavit does <u>not</u> nullify the plaintiff's original

reasonableness and necessity affidavit. Rather, both conforming affidavits are given to the jury and weighed as to their credibility. Further, if the language of the affidavits wanders into areas such as *causation* apart from reasonableness of costs and necessity of services, then the comment directs the Court to merely strike that portion of the affidavit that is beyond the scope of the rule, rather than to strike the entire affidavit. If a counter-affidavit is filed, the parties may also address reasonableness and necessity by bringing live witnesses as is also allowed under the current rule. *See* ***Jackson v. Gutierrez***, 77 SW3d 898, 902 (Tex. App. - Houston [14th Dist.] 2002, no pet.); *see* also ***Rodriguez-Narrera v. Ridinger***, 19 SW3d 531, 532 (Tex. App. - Ft. Worth, 2000, no pet.).

As was stated above the AREC unanimously recommends proposed Rule 904 as revised. If you have any questions with regard to this matter please feel free to call me.

Very truly yours,

W. Bruce Williams

WBW:ljj
enclosure