SCAC Meeting
April 27, 2007
Index

1. Agenda

   Filed Bills in 80th Legislature Concerning Supreme Court Rulemaking

2. Rocket Docket interim report (4/26/07)

3. Hecht letter of 9/22/06;

   Hecht letter of 2/5/07;

   Dorsaneo memo (4/25/07)

4. Hecht letter of 3/8/06;

   Gilstrap letter (4/19/07) on proposal to amend garnishment rules;

   Ron Hickman memo titled Service of Writs of Garnishment by Private Process;

   Carl Weeks email and attachment

5. Revised 226a proposal

6. Buddy Low memo on TRE 904, Affidavit Concerning Cost and Necessity of Services

Filed Bills in 80th Legislature Concerning Supreme Court Rulemaking

Updated: 4/26/2007

Bill	Author/Sponsor	Subject	Notes
SB 237	Shapiro	would require SCT to adopt rules relating to e-filing in JP courts	engrossed 3/14; to House local & uncontested 4/19
SB 785	Shapiro et al	would require SCT to adopt rules re: the collection of statistical info relating to applications and appeals in judicial bypass cases by 12/1/07.	Referred to State Affairs 3/6/07; **engrossed 4/26**
SB 1204	Duncan	judicial restructuring; would require SCT to write procedural rules for small claims courts by 7/1/08; rules on additional resources by 1/1/08	reported favorably as substituted 4/25/07
SB 1300	Wentworth	require SCT to promulgate rules on juror note-taking, questions, discussion of case, jury selection, etc.	scheduled for 4th public hearing in Jurisprudence 5/2
SB 1305	Wentworth	various process service provisions; would allow SCT to collect fees from certified process servers; reimbursement of PSRB members travel expense	substitute recommended for local & uncontested 4/23
SB 1645	Van de Putte	elimination of service of process by state-certified process servers Process Server Review Board; prohibit SCT from promulgating contrary rules	referred to Sen. Jurisprudence 3/21
HB 335	Hartnett	Would amend Gov't Code ch. 52 to require court reporters to file transcript w/in 120 days after request; inconsistent with TRAP 35?	Passed House 3/12; referred to Sen. Jurisprudence 4/13
HB 813	Dutton	Would require SCT to make rules allowing claimant to obtain discovery relating to jurisdiction upon defendant's filing of plea to jurisdiction	pending in Civil Practices after hearing 4/25/07
HB 1055	Talton	Would require SCT to make rules allowing certain lawyers with correspondence law degrees in other states to sit for Texas bar	referred to Licensing & Admin Procedures 2/12/07
HB 1131	Zedler/Anderson	Comm substitute would require SCT to make rules regarding reporting of statistics on parental notification bypasses and appeals granted	Committee substitute favorably reported 4/25/07
HB 1572	Wooley	would require SCT to make rules for an exception from discovery in civil cases for nonparty law enforcement agencies	Placed on General State Calendar 4/30/07
~~HB 1750~~	~~Morrison~~	identical companion to SB 785	**rejected in committee 4/18**
HB 3077	Villareal	Would allow SCT to write rules for confidential docketing of parental notification bypass upon consent of parental substitute	pending in State Affairs 4/2
HB 3474	Delisi	Would require SCT to promulgate rules related to advanced medical directives in accordance with statutory changes by 11/1/07	pending in Public Health following hearing 4/25/07
HB 3095	Van Arsdale	would make it state policy for SCT and CCA to rule on causes w/in 1 year of grant date, rule on PFRs/PDRs and mandamus petitions w/in 6 mos; COAs would have 18 mos to decide cases.	Referred to House Judiciary 3/19/07; scheduled for public hearing 4/30/07
HB 3679	Dutton	adds Gov't Code 81.116 to make new lawyers undergo a 2-year internship before first-chairing a civil trial; SCT to promulgate rules by 9/1/07.	Referred to Licensing & Admin. Procedures 3/22/07
HB 3690	Coleman	SCT to promulgate rules and forms re advanced med directives by 11/1/07	public hearing 4/25/07

Texas Supreme Court Advisory Committee

SCAC Subcommittee on Legislative Mandates:
"Rocket Dockets" and "Fast Track" Proceedings
Interim Report – April 26, 2007

I.
SUBCOMMITTEE'S CHARGE

1. To explore, evaluate, and advise the SCAC on whether and how the implementation of a "rocket docket" or "fast track" proceeding could reduce costs and delays within the Texas state court system.
2. To make recommendations to the SCAC on how a "rocket docket" or "fast track" proceeding could be implemented within the Texas state court system, and how it would work.
3. To explore and advise the SCAC on the benefits and liabilities of the implementation of such a system.

NOTE: Focuses on delay & cost; omits any connection to "vanishing trials" issue.

QUERY: Inclusion of appellate courts within the charge.

II.
ISSUES & TASKS

A. Gather data regarding delay/costs in Texas state trial courts

1. Purpose: Gather data regarding the number/percentage of cases resolved, the time from filing to resolution, and the costs of resolution to courts and litigants, by: (1) manner of resolution (voluntary dismissal, involuntary dismissal, summary judgment, bench trial, jury trial); (2) type of court (justice, county, probate, district); (3) type of case (criminal, civil, family; tort, contract, UDJA, statutory enforcement, etc.); (4) location (region, county, district); (5) discovery level.

2. Report on Data from the Office of Court Administration (OCA)

Members of the Subcommittee met with and obtained data from the OCA, which reports to the Judicial Commission, to see what light their data shed on issues which might or might not be problems and for which a rocket docket might or might not be a solution. One problem that might or might not exist in the judicial system, for which a rocket docket might or might not be a solution, is delay. The OCA collects data in the form of monthly reports from the district court that shed some light on this question. We reviewed OCA data on the age of cases at final disposition, both statewide and in the 10 counties with the highest volume of cases.

We also reviewed Justice Hecht's analysis of similar data in his 2005 S. Tex. L. Rev. article.

Statewide: The data show no clear trends, but indicate a general reduction in lengthy delays. OCA's statewide data on dispositions of civil cases in district courts show reductions over time in the subcategories of the cases taking the longest to resolve. For example, for the period from 1993-2006, the data show decreasing percentages of district court civil cases that took more than 18 months to dispose of (from 23% to 20%) and in those taking 12 -18 months (from 12% to 9%), with corresponding increases in the percentage of cases resolved in 3 months or less. See attached **Exhibit A**. Going farther back, the reductions are even greater. In 1986, for example, 32% of the cases took more than 18 months to resolve.

County Level: Delays vary by county. Similar OCA data on district court civil cases is available on a county-by-county basis back to 1993. This data reveals significant differences from one county to another. See attached **Exhibit B**. Some counties (Harris, Dallas, Travis, El Paso, Hidalgo, Collin) generally show a decrease, over time, in the percentage of cases taking more than 18 months to resolve. Others (Bexar?) appear to show an increase, and others (Tarrant, Denton, Ft. Bend) show fluctuations that reflect no specific trend.

Federal court data do not indicate a significant difference. For purposes of comparison, the United States District Court, Eastern District of Texas, reports that the average time from filing to final disposition of cases in that court was 15.9 months in 2001, 14.0 months in 2002, 17.0 months in 2003, 15.4 months in 2004, 15.9 months in 2005, and 17.7 months in 2006.

The data do not reflect reasons for the changes or variances. The OCA data do not shed light on the reasons for changes in the time to disposition from year to year, or the differences from county to county. Anecdotes and common knowledge suggest various possibilities, but the OCA data do not provide any objective confirmation. For example:

- Did the 1989 reform of workers' compensation remove cases that were more likely to be tried and more likely to take more than 18 months to dispose of than the remaining cases?

- Has an increased use of contractual arbitration clauses removed from the court system disputes that would otherwise have tended to take longer to dispose of than the remaining cases?

- Has an increase in mandatory or nearly mandatory ADR removed cases that would otherwise have tended to take longer to dispose of than the remaining cases?

- Do reductions in delays in specific counties reflect county-specific management changes (such as the mass torts panel in Harris County)?

- Do reductions in delays in specific counties reflect unique caseloads affected by substantive or procedural changes in statewide law (such as asbestos cases in Harris County)?

- Do higher delay percentages in specific counties reflect unique caseloads in those counties (such as administrative appeals in Travis County)?

- Do the puzzling variations from year to year in specific counties reflect mass settlements following bellwether cases, data reporting anomalies, or some other unique circumstances?

Unfortunately, the data do not answer these questions.

Similarly, the data do not address whether or how the type of case affects the length to disposition. The attached data relates to all civil cases in district courts, combined. (OCA has similar data for all criminal cases in district courts, for all county court at law civil cases, and for all county court at law criminal cases.) This civil case data includes family law cases (the largest single subcategory of civil district court cases), as well as tort cases, consumer cases, and business cases. The OCA does collect data on categories of cases. See attached **Exhibit C**. But the age-to-disposition data is not reported separately by type of cases.

Therefore, there could be trends of increasing delays in specific subcategories that are offset by improvements in other subcategories for which a rocket docket would not be appropriate. The OCA data do not allow one to determine whether or not this is happening.

The OCA data provide only limited guidance on the need for, purpose of, or ideal structure of a Rocket Docket. The OCA data appear to be the most data available on the issues we are exploring; but it is of only limited value for our focus on the need for or purpose of a Rocket Docket. The first concern is that the OCA does not track changes in time to disposition for specific subcategories of civil cases (such as mass torts, or business litigation) that may account for large numbers of cases and/or be the focus of concerns about delays for which a Rocket Docket might or might not be a solution. A second focus of concern for which the rocket

docket might or might not be a suitable response is litigation costs. There is no OCA data on litigation costs. A third focus of concern that may lead to private decisions to take potential disputes out of the court system, which the rocket docket might (or might not) encourage people to reconsider, is the perceived arbitrariness of court outcomes, especially in jury trials, either in general or in certain venues. There is no OCA data on this factor.

In summary, the OCA data mean only that we don't know whether there is a delay problem in Texas courts or not, and that we don't know, if there is a delay problem, where and what it is. They don't mean a rocket docket is a bad idea; they just don't by themselves shed any light on delay as a problem for which a rocket docket might (or might not) be an answer. And they don't provide any information on the extent to which costs are a problem that a Rocket Docket could address.

NOTE: Next month, OCA plans to submit proposals to the Judicial Council for rulemaking to improve its collection of data from the courts. No changes have been made in 25 years, and OCA staff would appreciate our suggestions on how to improve the data and collection process.

QUERY: Should SCAC appoint members to work with OCA on this process?

B. Gather information regarding other jurisdictions with "rocket dockets" and "fast track" systems.

1. Purpose: Obtain information to identify: (a) courts in the U.S. that have implemented a "rocket docket" system, (b) rules, procedures, and other features of these "rocket docket" systems, (c) other factors inherent in successful implementation and operation of "rocket dockets," (d) the impact of these systems on number/percentage of cases resolved, time from filing to resolution, and the cost of resolution to courts and litigants, and (e) perceived pros/cons of the "rocket docket" system.

2. Report on review of articles addressing Rocket Docket systems.

Members of the Subcommittee reviewed 24 law review and journal articles, published between 1981 and 2007, that address rockets dockets within US jurisdictions.

Jurisdictions addressed. These articles discussed delay reduction programs implemented in state courts in San Diego, Ca., Providence, R.I., Detroit, Mi., Las Vegas, Nv., Dayton, Oh., Phoenix, Az., and Vermont (appellate courts), and federal district courts Arkansas (W.D.), California (N.D. and S.D.), Maine, Oklahoma (E.D. and W.D.), Pennsylvania (W.D.), Virginia (E.D.), and Wisconsin (W.D.). Most, but not all, of the

jurisdictions were described as having "troubled" court systems prior to implementation of the fast-track system, lacking significant case management, and often with over-crowded dockets, resulting in lengthy delays.

Rules and Procedures. The various courts adopted a wide variety of rules and procedures intended to move cases to a quicker resolution and reduce the delays and costs of litigation, including:

1. Status conferences required early in the case.
2 Early setting of fixed and immutable trial date.
3. Short discovery period that begins soon after filing of answer(s).
4. Reduced numbers of discovery requests and depositions.
5. Shortened deadlines for discovery responses/objections.
6. Shortened periods for pleading amendments and dispositive motions.
7. Limits on motion practice.
8. Rulings required within short time after hearing/submission
9. No continuances permitted (with rare exceptions) ("short of bleeding to death in the courtroom, you are not going to get a continuance")
10. Routine penalties/sanctions for delay tactics.
11. Interim scheduling conference(s) during pretrial period.
12. Mediation/settlement conferences occur in parallel with discovery and pretrial.
13. "Short and sweet" trials (chess clock control, strict prohibition of cumulative evidence, stipulations, documentary summaries of evidence like expert qualifications).

Factors that promote successful implementation and operation of Rocket Dockets. Many of the articles focused on the structural, attitudinal, and less tangible factors that are necessary to make a Rocket Docket work, such as:

1. Overarching emphasis on speed of resolution
2. Judges committed to the process and willing to work hard.
3. Focused training required for judges and court staff.
4. Adequate court staffing and resources (judges; magistrate or pro tem judges; Rocket Docket administrators; calendar clerks).
5. Improved case management procedures ("backlog reduction programs").

6. Oversight to monitor progress of cases and work habits of judges and court staff.
7. Coercion/persuasion from higher courts.
8. Central docket to replace individual dockets.
9. Individual calendars to replace a central docket.
10. Clear communication between court users and judges.
11. Acceptance and commitment by the bar.
12. Leaders (among bench and bar) who promote the concept.
13. Lack of opposition to the concept.
14. Available only upon voluntary and mutual agreement.
15. Implemented through incremental changes.
16. Political support of the program (in jurisdictions with elected judges).

Impact of the Rocket Docket systems. Some of the articles discussed improvements seen in most cases, but often not as much as anticipated.

The early pilot of the project in San Diego courts, for example, saw a substantial improvement in disposition times, disposing of 80% of cases within 18 months, but had hoped to meet an ABA goal of disposing of 90% of cases within 12 months. But the percentage of cases tried within 1 year of filing increased from 19% to 68%, and 97% of the cases were tried within 2 years.

In Maricopa County, Arizona, implementation of a Rocket Docket reduced the median time from filing to disposition from 32.7 months to 20 months.

The E.D. of Virginia faced a backlog of over 750 cases per judge when it implemented a Rocket Docket in 1962, and the average backlog was reduced to 288 case per judge by 1972, and 279 cases per judge by 1982. The median time to trial in 1965 in civil cases was 10 months, and that was reduced to 7 months by 1975, and 5 months by 1981. It has remained relatively constant since then.

Perceived pros/cons of the "rocket docket" system. Several of the articles discussed various reactions regarding the pros and cons of a Rocket Docket system, including:

PROS:

1. Limits time required to resolve disputes.
2. Reduces backlog of cases.
3. Reduces time spent on discovery disputes.
4. Increases overall efficiency.
5. Reduces costs of litigation (?).

CONS:

1. Speed trumps over fairness.
2. Tends to favor the (well-prepared) plaintiff.
3. Deadlines apply well to the average case, but not well at all to some other cases.
4. Expense of litigation goes up because the fast track procedure requires more court appearances to establish and enforce deadlines.

PRO or CON?

1. Requires local counsel experienced with that "rocket docket."

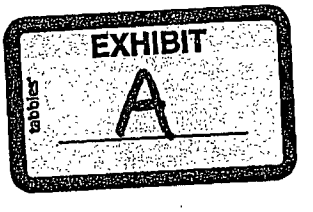
C. Make recommendation for implementation of a Rocket Docket in Texas.

The subcommittee has postponed addressing this task until it completes the prior two. At that time, the subcommittee will discuss and make recommendations to the SCAC on such issues as:

1. In which courts should a Rocket Docket be available (JP, county, probate, district, appellate)?
2. In which types of cases should it be available (criminal, civil, family, juvenile; tort, contract, UDJA, statutory enforcement, etc.)?
3. Should it be posed statewide, or left to local option?
4. Should it be mandatory or optional?
   a. Mandatory for all cases (or certain types of 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 shown
   f. Available if court orders based on specified objective criteria
5. What rules and procedures should it include?
6. How should it involve e-filing and e-service?
7. What current rules must be amended or adopted?
8. Should pattern written discovery requests be included?
9. What additional staffing and resources will the courts require?
10. How should it be implemented (transitional steps), i.e.
    a. Develop support from bench/bar leadership
    b. Publish proposed rules for comments
    c. Implement in test courts or counties first
    d. Implement as optional procedure
11. What pros/cons could be expected?

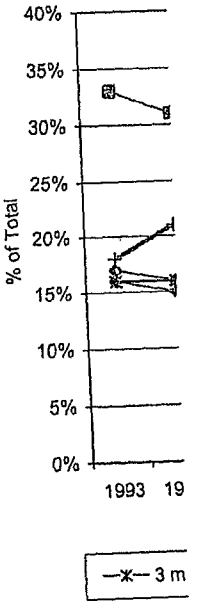
Age of Civil Cases Disposed
District Courts Statewide

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	27%	20%	18%	12%	23%	100%
1994	27%	20%	19%	11%	23%	100%
1995	27%	21%	18%	10%	24%	100%
1996	26%	19%	19%	12%	24%	100%
1997	27%	20%	19%	11%	23%	100%
1998	28%	20%	20%	11%	22%	101%
1999	27%	20%	20%	10%	23%	100%
2000	27%	19%	20%	10%	23%	99%
2001	28%	19%	21%	10%	22%	100%
2002	29%	19%	22%	10%	20%	100%
2003	31%	19%	21%	11%	19%	101%
2004	31%	19%	21%	10%	19%	100%
2005	33%	19%	20%	9%	19%	100%
2006	32%	19%	21%	9%	20%	101%
Average	29%	20%	20%	10%	22%	100%



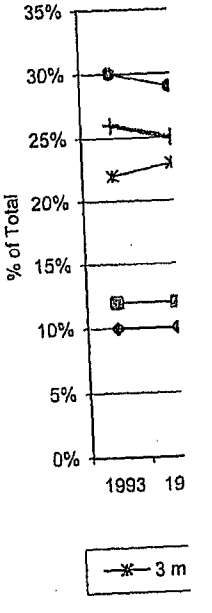
Harris County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	16%	16%	18%	17%	33%	100%
1994	16%	15%	21%	16%	31%	99%
1995	16%	16%	20%	14%	34%	100%
1996	16%	14%	24%	18%	27%	99%
1997	20%	21%	28%	15%	16%	100%
1998	20%	21%	29%	17%	14%	101%
1999	20%	23%	30%	14%	13%	100%
2000	18%	22%	30%	17%	13%	100%
2001	19%	22%	32%	16%	11%	100%
2002	21%	20%	34%	15%	10%	100%
2003	22%	18%	33%	17%	10%	100%
2004	21%	19%	33%	18%	9%	100%
2005	22%	23%	31%	12%	12%	100%
2006	21%	22%	32%	12%	13%	100%
Average	19%	19%	28%	16%	18%	100%



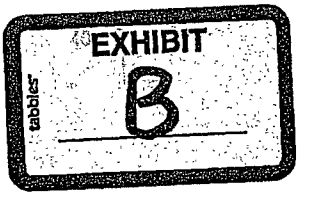
Dallas County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	22%	30%	26%	10%	12%	100%
1994	23%	29%	25%	10%	12%	99%
1995	22%	29%	24%	10%	15%	100%
1996	21%	28%	25%	11%	15%	100%
1997	18%	26%	26%	12%	18%	100%
1998	18%	24%	26%	12%	21%	101%
1999	17%	24%	25%	11%	23%	100%
2000	18%	25%	28%	12%	17%	100%
2001	19%	24%	28%	12%	17%	100%
2002	19%	22%	29%	12%	18%	100%
2003	18%	22%	29%	14%	17%	100%
2004	20%	23%	28%	12%	17%	100%
2005	20%	24%	29%	12%	15%	100%
2006	29%	21%	30%	10%	10%	100%
Average	20%	25%	27%	11%	16%	100%

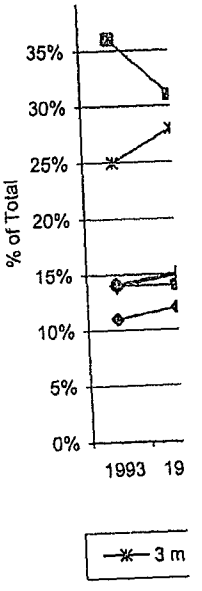


Tarrant County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	25%	14%	14%	11%	36%	100%
1994	28%	14%	15%	12%	31%	100%

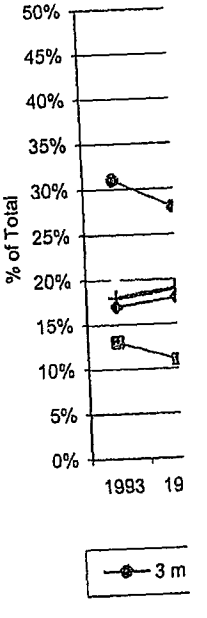


1995	27%	16%	16%	10%	32%	101%
1996	26%	16%	18%	10%	29%	99%
1997	24%	15%	17%	9%	35%	100%
1998	26%	15%	17%	10%	33%	101%
1999	25%	16%	18%	10%	32%	101%
2000	27%	16%	19%	10%	29%	101%
2001	26%	15%	20%	9%	30%	100%
2002	28%	14%	20%	9%	29%	100%
2003	29%	14%	20%	9%	28%	100%
2004	29%	15%	19%	9%	27%	99%
2005	28%	14%	19%	9%	29%	99%
2006	21%	22%	32%	12%	13%	100%
Average	26%	15%	19%	10%	30%	100%



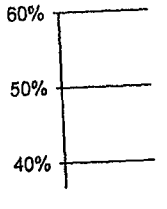
Bexar County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	31%	18%	17%	13%	20%	99%
1994	28%	19%	18%	11%	24%	100%
1995	24%	17%	14%	12%	34%	101%
1996	24%	16%	16%	11%	33%	100%
1997	36%	18%	15%	9%	21%	99%
1998	40%	17%	16%	9%	17%	99%
1999	33%	16%	15%	5%	30%	99%
2000	25%	12%	15%	4%	44%	100%
2001	25%	14%	17%	6%	38%	100%
2002	28%	14%	16%	6%	36%	100%
2003	32%	15%	16%	6%	32%	101%
2004	35%	14%	17%	5%	30%	101%
2005	36%	13%	18%	5%	28%	100%
2006	31%	12%	16%	6%	35%	100%
Average	31%	15%	16%	8%	30%	100%

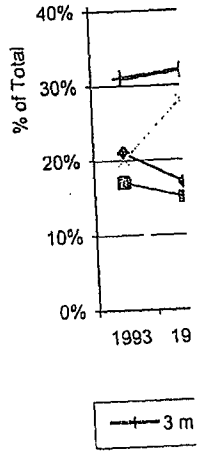


Travis County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	31%	21%	17%	11%	20%	100%
1994	32%	17%	15%	8%	28%	100%
1995	32%	17%	16%	9%	26%	100%
1996	30%	17%	17%	9%	27%	100%
1997	22%	12%	11%	6%	49%	100%
1998	25%	13%	13%	8%	40%	99%
1999	30%	15%	14%	7%	34%	100%
2000	30%	14%	13%	7%	37%	101%

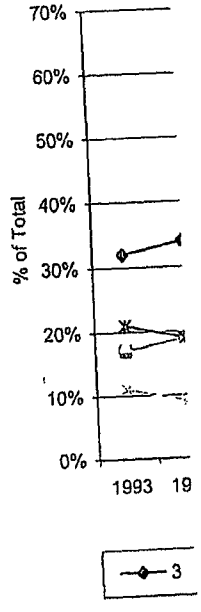


2001	29%	14%	13%	6%	37%	99%
2002	30%	17%	14%	7%	33%	101%
2003	31%	17%	16%	9%	27%	100%
2004	28%	14%	17%	9%	32%	100%
2005	34%	17%	15%	8%	26%	100%
2006	37%	18%	17%	7%	21%	100%
Average	30%	16%	15%	8%	31%	100%



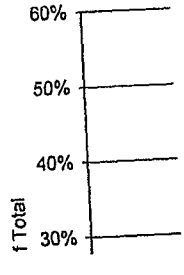
El Paso County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	32%	17%	18%	11%	21%	99%
1994	34%	19%	19%	9%	19%	100%
1995	36%	18%	17%	10%	21%	102%
1996	35%	15%	15%	11%	25%	101%
1997	33%	14%	17%	12%	24%	100%
1998	50%	12%	13%	8%	17%	100%
1999						0% No data
2000	29%	25%	11%	8%	27%	100%
2001	40%	19%	18%	10%	13%	100%
2002	40%	21%	19%	8%	11%	99%
2003	41%	20%	18%	8%	12%	99%
2004	34%	22%	22%	11%	11%	100%
2005	55%	19%	13%	6%	7%	100%
2006	65%	23%	11%	1%	0%	100%
Average	40%	19%	16%	9%	16%	100%

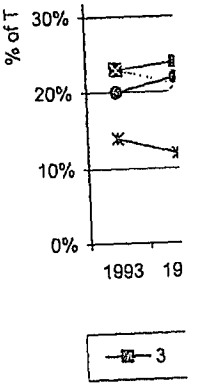


Hidalgo County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	23%	19%	23%	14%	20%	99%
1994	24%	20%	21%	12%	22%	99%
1995	25%	25%	19%	11%	20%	100%
1996	22%	24%	18%	13%	23%	100%
1997	20%	25%	22%	10%	22%	99%
1998	18%	23%	28%	12%	19%	100%
1999	17%	21%	24%	11%	27%	100%
2000	18%	19%	25%	9%	29%	100%
2001	19%	20%	28%	13%	21%	101%
2002	20%	16%	26%	12%	26%	100%
2003	32%	22%	19%	10%	17%	100%
2004	40%	25%	29%	6%	1%	101%
2005	42%	22%	20%	8%	8%	100%
2006	48%	20%	16%	6%	10%	100%

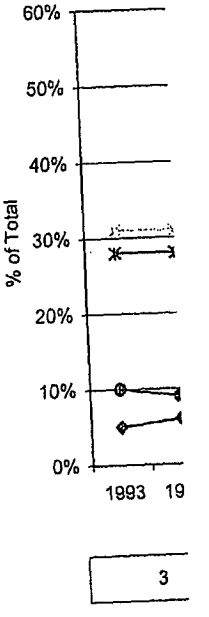


Average	26%	22%	23%	11%	19%	100%



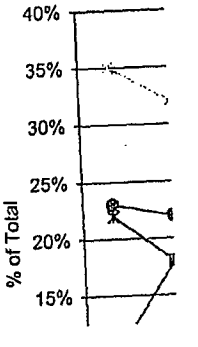
Collin County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	27%	31%	28%	10%	5%	101%
1994	26%	31%	28%	9%	6%	100%
1995	29%	30%	27%	9%	5%	100%
1996	29%	29%	28%	8%	6%	100%
1997	29%	27%	27%	10%	6%	99%
1998	28%	24%	29%	12%	7%	100%
1999	30%	29%	27%	9%	6%	101%
2000	32%	28%	26%	9%	5%	100%
2001	33%	28%	26%	8%	5%	100%
2002	35%	27%	25%	9%	4%	100%
2003	40%	24%	23%	8%	5%	100%
2004	48%	20%	22%	6%	4%	100%
2005	49%	21%	19%	7%	4%	100%
2006	49%	21%	20%	7%	3%	100%
Average	35%	26%	25%	9%	5%	100%



Denton County

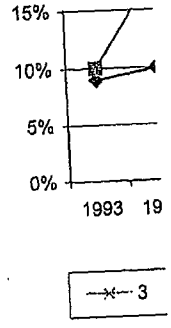
Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	35%	22%	23%	9%	10%	99%
1994	32%	18%	22%	10%	18%	100%
1995	27%	16%	17%	12%	28%	100%
1996	31%	19%	21%	11%	19%	101%
1997	31%	20%	24%	14%	11%	100%
1998	30%	21%	25%	12%	11%	99%
1999	29%	19%	20%	11%	21%	100%
2000	32%	19%	19%	9%	20%	99%
2001	34%	23%	24%	10%	9%	100%
2002	36%	21%	24%	10%	9%	100%
2003	35%	22%	25%	10%	8%	100%
2004	38%	21%	23%	10%	9%	101%
2005	38%	19%	22%	10%	11%	100%
2006	35%	19%	21%	11%	13%	99%
Average	33%	20%	22%	11%	14%	100%

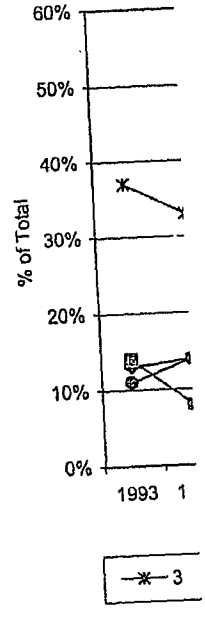


Fort Bend County

Year	3 mo or <	3-6 mos	6-12 mos	12-18 mos	>18 mos	Total
1993	37%	11%	13%	14%	25%	100%

1994	33%	14%	14%	8%	31%	100%
1995	49%	17%	15%	9%	11%	101%
1996	36%	15%	13%	10%	25%	99%
1997	35%	14%	16%	12%	23%	100%
1998	39%	18%	20%	9%	14%	100%
1999	34%	16%	18%	13%	19%	100%
2000	38%	16%	17%	13%	17%	101%
2001	33%	15%	14%	12%	26%	100%
2002	31%	13%	13%	10%	33%	100%
2003	35%	14%	14%	8%	29%	100%
2004	32%	15%	14%	6%	33%	100%
2005	33%	13%	12%	8%	34%	100%
2006	28%	12%	12%	8%	40%	100%
Average	35%	15%	15%	10%	26%	100%





District Courts

Activity Summary by Case Type from September 1, 2005 to August 31, 2006

CIVIL CASES

Cases on Docket:	Injury or Damage Involving Motor Vehicles	Injury or Damage Other than Motor	Workers' Compensation	Tax Cases	Condemnation	Accounts, Contracts and Notes	Recip. rocals (URSA)	Divorce	All Other Family Law Matters	Other Civil Cases	Total Cases
Cases Pending 9/01/2005	25,027	36,283	1,958	132,485	476	47,102	5,009	90,637	208,294	118,594	665,864
Docket Adjustments	(382)	(499)	(30)	(3,746)	(25)	(736)	(129)	(2,904)	(893)	(27,851)	(37,145)
New Cases Filed	15,069	14,167	451	57,612	296	41,149	2,687	116,478	13,100	64,596	325,605
Other Cases Reaching Docket:											
Show Causes Added	0	0	0	0	0	0	0	0	121,953	0	121,953
Other Cases Added	509	2,048	52	5,761	7	981	150	3,926	67,215	3,256	83,905
Total Cases on Docket:	40,273	51,999	2,431	192,112	749	88,496	7,717	208,137	527,670	158,595	1,278,179
Dispositions:											
Change of Venue Transfers	1,100	770	62	21	0	269	20	287	1,147	475	3,995
Default Judgments	286	337	3	11,045	10	9,750	197	8,731	17,488	6,606	44,567
Agreed Judgments	2,417	2,029	18	1,379	5	3,015	363	34,742	25,572	8,910	78,505
Summary Judgments	184	543	30	224	21	1,306	7	100	25,015	3,080	30,510
Final Judgments:											
After Trial - No Jury	1,571	1,101	45	12,302	64	2,963	219	45,779	97,688	11,306	173,442
By Jury Verdicts	439	329	19	56	6	143	16	124	107	248	1,474
By Directed Verdicts	8	12	0	24	0	20	1	60	2,207	106	2,448
Dismissed for Want of	1,996	2,205	69	5,801	6	5,843	3,135	16,490	12,685	6,061	51,469
Dismissed by Plaintiff	6,728	5,910	136	27,109	54	11,763	504	5,377	20,116	13,310	91,007
Show Causes Disposed	0	0	0	0	0	0	0	0	116,518	0	116,518
Other Dispositions	1,245	2,250	46	5,311	218	3,404	245	3,802	15,420	9,655	41,396
Total Dispositions	15,074	15,486	417	63,272	414	38,476	4,706	115,492	257,063	59,757	547,813
Cases Pending 8/31/2006	25,199	36,513	2,014	128,840	558	50,020	3,132	92,645	290,607	98,838	730,366

Court Jury Activity:

Jury Fee Paid/Oath	23,497
Jury Panel Examined	1,634
Jury Sworn Evid. Presented	1,617

Age of Cases Disposed:	3 Months or Less	Over 3 to 6 Months	Over 6 to 12 Months	Over 12 to 18 Months	Over 18 Months	TOTAL
Number of Cases	177,288	101,769	113,815	47,710	107,231	547,813

JUVENILE DOCKET

Cases on Docket:	CINS	Delin	Total
Cases Pending 9/01/2005	452	17,948	18,400
Docket Adjustments	5	91	96
New Petitions Filed	679	29,862	30,541
Motion to Revoke Probation Filed	119	5,310	5,429
Other Cases Added	11	4,485	4,496
Total on Docket	1,266	57,696	58,962
Dispositions:			
Finding of Delinquent Conduct/CINS:			
Trials by Judge	286	19,932	20,218
Trials by Jury	1	44	45
Finding of No Delinquent Conduct/CINS:			
Trials by Judge	0	251	251
Trials by Jury	0	14	14
Directed Verdicts	0	7	7
Probation Revoked	3	2,267	2,270
Continue on Probation	44	1,858	1,902
Change of Venue Transfer	2	159	161
Dismissed & Other Dispositions	418	12,788	13,206
Total	754	37,320	38,074
Cases Pending 8/31/2006	512	20,376	20,888

Findings of Delinquent Conduct or CINS:	CINS	Delin	Total
Placed on Probation:			
Under Parental Care	293	15,812	16,105
Under Foster Care	0	151	151
Residential Facility	41	5,063	5,104
Committed to TYC	0	2,453	2,453
Final Judgment Without Disp.	9	633	642
Total	343	24,112	24,455
Other Juvenile Court Activity:			
Detention Hearings	931	23,518	24,449
Hearing to Modify Order	21	812	833
Child Certified for Adult Crim. Court	0	251	251
Attorneys Appointed	503	19,252	19,755

OTHER PROCEEDINGS

	Post-Conviction Writs of Habeas Corpus	Other Writs of Habeas Corpus	Contempt, Extradition and Other Separately Docketed Proceedings	Bond Forfeiture Proceedings
Pending 9/01/2005	12,181	3,165	2,880	34,518
Docket Adjustments	183	269	19	1,298
Total Added	4,559	13,813	6,153	8,748
Total Disposed	3,901	13,278	4,421	8,281
Pending 8/31/2006	13,022	3,969	4,631	36,283

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District Courts

Activity Summary by Case Type from September 1, 2005 to August 31, 2006

CRIMINAL CASES

Cases on Docket:	Capital Murder	Murder	Assault or Attempted Murder	Sexual Assault of Adult	Indecency with or Sexual Assault of Child	Robbery	Burglary	Theft	Auto Theft	Arson	Drug Sale or Manufacture	Drug Possession	Felony D.W.I.	Other Felony	All Misdemeanors	Total Cases
Cases Pending 9/01/2005	845	2,752	18,841	2,592	10,901	7,386	18,609	25,658	5,806	1,109	18,674	47,567	12,568	49,505	6,141	228,954
Docket Adjustments	(53)	12	(660)	(59)	(185)	(168)	(599)	(373)	(166)	(21)	(1,129)	(317)	(174)	73	559	(3,260)
Cases Filed by Indictment	486	1,158	17,072	1,300	5,773	6,695	13,053	16,026	4,266	625	15,266	36,097	9,628	43,822	1,006	172,273
Cases Filed by Information	10	32	1,944	80	1,230	470	2,262	3,007	1,190	93	3,388	14,195	992	6,430	3,993	38,316
Other Cases Reaching Docket:																
Motions to Revoke Probation Filed	19	134	4,615	292	1,434	1,680	5,960	4,436	1,290	297	4,357	15,145	3,211	11,616	747	55,233
Shock Probation Returned from TDCJ/ID	0	3	65	6	25	69	130	39	4	9	139	143	132	118	19	801
Transfers from Other Counties	0	1	[illegible]	1	3	0	0	0	0	0	2	3	1	8	0	20
All Other Cases	43	120	823	81	95	355	465	551	102	57	821	436	201	3,038	359	7,223
Total Cases on Docket:	1,350	4,212	42,701	4,293	18,276	16,487	39,880	49,344	12,492	2,169	41,518	113,269	26,459	114,610	12,500	499,560
Dispositions:																
Convictions:																
Guilty Pleas or Nolo Contendere	142	490	8,364	398	2,013	4,037	8,330	10,222	3,995	317	10,906	28,320	7,750	24,756	2,369	111,809
Not Guilty Plea - No Jury	1	17	55	7	87	20	69	61	24	4	59	120	72	138	27	711
Guilty Plea - Jury Verdict	3	49	176	11	196	88	27	17	6	3	47	60	30	134	4	651
Not Guilty Plea - Jury Verdict	98	201	289	73	873	251	102	71	18	10	188	235	91	414	16	2,425
Total Convictions	244	757	8,784	489	2,519	4,396	8,528	10,371	4,038	334	11,200	28,735	7,943	25,442	2,416	115,596
Placed on Deferred Adjudication	11	43	4,623	246	1,189	1,026	1,561	3,968	759	194	4,099	11,646	144	10,676	726	43,111
Acquittals:																
Non - Jury Trial	1	7	40	5	6	14	16	26	10	1	14	52	17	100	7	316
Jury Verdict	7	32	92	30	119	34	26	25	3	6	21	73	26	120	24	638
Directed Verdict or JNOV	1	0	0	1	2	2	1	3	0	1	3	5	2	9	1	31
Total Acquittals	9	39	132	36	127	50	43	54	13	8	38	130	45	229	32	985
Dismissals:																
Insufficient Evidence	2	7	201	44	115	69	157	198	75	10	169	815	63	741	115	2,777
Conviction in Another Case	32	30	987	120	457	356	703	717	306	30	715	2,038	21	3,326	408	10,438
Speedy Trial Act Limitation	0	0	7	1	1	0	4	4	9	0	3	4	5	26	1	59
Case Refiled	45	64	356	68	160	136	169	190	24	12	186	360	129	648	29	2,576
Defendant Unapprehended	0	1	19	1	5	11	24	45	6	0	24	134	19	85	1	375
Defendant Granted Immunity	0	0	1	0	1	2	6	3	1	0	4	6	4	4	5	37
Other Dismissals	46	131	2,377	283	789	575	1,445	2,096	544	82	1,127	4,201	533	5,857	1,922	22,008
Total Dismissals	125	233	3,950	517	1,528	1,149	2,508	3,253	959	134	2,222	7,558	966	10,687	2,481	38,270
Transfers:																
On Change of Venue	0	1	1	0	3	0	0	0	0	0	1	6	4	7	16	39
To County Court	1	0	80	6	8	14	37	69	18	1	2	44	74	241	329	920
Other Dispositions:																
Placed on Shock Probation	0	8	75	11	26	69	145	40	157	4	150	145	43	155	2	880
Motion to Revoke Granted	16	49	2,463	173	690	957	3,553	2,420	881	147	2,944	7,910	1,587	6,450	414	30,654
Motion to Revoke Denied	70	37	1,555	100	502	574	1,738	1,503	308	136	1,060	5,051	997	3,810	204	17,575
All Other Dispositions	45	137	1,134	102	178	447	865	847	191	62	1,062	1,397	403	4,045	46	10,961
Total Other Dispositions	131	231	5,227	386	1,396	2,047	6,301	4,810	1,387	349	5,216	14,503	3,030	14,460	666	60,070
Total Dispositions	451	1,304	22,797	1,680	6,770	8,682	20,978	22,525	6,570	1,020	22,778	62,622	12,406	61,742	6,666	258,991
Cases Pending 8/31/2006	899	2,908	19,904	2,613	11,506	7,805	18,902	26,819	5,922	1,149	18,740	50,647	14,053	52,868	5,834	240,569
Sentencing Information:																
Death Sentence	14	0	0	0	0	0	0	0	0	0	0	0	0	0	0	14
Life Sentence	89	52	25	21	62	34	75	1	0	0	6	4	1	25	0	337
Lesser Offense Convictions	86	98	3,246	94	380	1,225	1,290	1,482	161	79	1,507	3,202	671	4,028	192	17,721

Cases - Unapprehended Defendants 69,025

Additional Court Activity:

Jury Panels Examined	3,913
Jury Sworn & Evidence Presented	3,484
Cases in Which Attorney Appointed	169,998

Age of Cases Disposed:	60 Days or Less	61 to 90 Days	91 to 120 Days	Over 120 Days	TOTAL
Number of Cases	84,410	25,972	22,791	125,818	258,991

County-Level Courts
Activity Summary by Case Type
September 1, 2005 to August 31, 2006

CIVIL CASES

Cases on Docket:	Injury or Damage Involving Motor Vehicle	Injury or Damage Other than Motor Vehicle	Tax Cases	Suits on Debt	Divorce	All Other Family Law Matters	Other Civil Cases	Total Cases
Cases Pending 9/01/2005	28,712	7,452	2,172	70,496	9,323	16,182	70,222	199,559
Docket Adjustments	(584)	(106)	77	(2,388)	(619)	(326)	(2,517)	(5,913)
New Cases Filed	13,420	3,211	691	70,751	11,291	10,492	51,412	161,268
Cases Appealed From Lower Courts	26	91	0	337	0	0	2,806	3,261
Show Cause Motions Filed	0	0	0	0	0	8,800	0	8,800
Other Cases Added	467	64	2	1,371	892	1,469	640	4,905
Total Cases on Docket	37,086	10,712	2,942	140,567	21,187	36,617	122,769	371,880
Dispositions:								
Default Judgments	1,447	271	59	21,885	5,124	639	5,125	29,936
Agreed Judgments	1,107	252	67	3,406	2,951	1,347	6,208	15,305
Judg. After Trial - No Jury	1,293	338	29	4,078	6,262	4,410	7,373	24,013
Judg. by Jury Verdicts	289	33	1	94	193	253	104	917
Dismissed for Want of Prosecution or by Plantiff	8,400	1,751	519	26,358	14,480	2,512	10,960	51,780
Show Causes Disposed	0	0	0	0	0	9,491	0	9,491
Other Dispositions	571	617	24	3,700	296	1,929	14,868	23,006
Total Dispositions	14,165	3,262	729	59,521	11,694	20,581	44,496	154,448
Cases Pending 8/31/2006	22,921	7,450	2,213	81,046	9,493	16,036	78,273	217,432

Age of Cases Disposed	3 Months or Less	Over 3 to 6 Months	Over 6 to 12 Months	Over 12 to 18 Months	Over 18 Months	TOTAL
Number of Cases	49,472	37,918	36,512	13,014	17,532	154,448

JUVENILE CASES

Cases on Docket:	CINS	Delin	Total
Cases Pending 9/01/2005	1,077	4,380	5,457
Docket Adjustments	1,124	(242)	882
New Petitions Filed	810	7,190	8,000
Motions to Revoke Filed	11	563	574
Other Cases Added	20	317	337
Total on Docket	3,042	12,208	15,250
Dispositions:			
Find Delin Cond/CINS			
Trials by Judge	555	4,946	5,501
Trials by Jury	1	43	44
Find No Delin Cond/CINS			
Trials by Judge	13	14	27
Trials by Jury	0	16	16
Directed Verdicts	0	1	1
Probation Revoked	2	250	252
Continue on Probation	8	127	135
Change of Venue Transfer	37	80	117
Dismissed & Other Disp.	232	2,310	2,542
Total Dispositions	848	7,787	8,635
Cases Pending 8/31/2006	2,194	4,421	6,615

Findings of Delinquent Conduct or CINS:	CINS	Delin	Total
Placed on Probation			
Under Parental Care	541	4,042	4,583
Under Foster Care	0	19	19
Residential Facility	19	601	620
Committed to TYC	0	464	464
Judgment No Disp.	6	240	246
Total	566	5,366	5,932
Other Juvenile Court Activity:			
Detention Hearings	786	9,420	10,206
Hearing to Modify Order	34	1,010	1,044
Child Cert. as Adult	0	42	42
Attorneys Appointed	702	5,713	6,415

County-Level Courts
Activity Summary by Case Type
September 1, 2005 to August 31, 2006

CRIMINAL CASES

Cases on Docket:	DWI or DUI	Theft or Worthless Check	Drug Offenses	Assault	Traffic	Other Criminal Cases	Total Cases
Cases Pending 9/01/2005	18,867	256,078	50,806	55,616	54,777	138,648	674,792
Docket Adjustments	(826)	(1,009)	(1,060)	(480)	60	99	(3,216)
New Cases Filed	87,418	108,659	73,629	52,595	62,581	172,362	557,594
Cases Appealed From Lower Courts	0	204	110	109	26,802	2,699	29,924
Other Cases Reaching Docket:							
Motions to Revoke Filed	12,915	9,896	9,551	6,420	3,356	12,245	54,383
All Other Cases Reaching Docket	509	844	1,589	985	517	1,215	5,659
Total Cases on Docket	218,880	374,672	134,475	115,245	148,243	327,268	1,318,783
Dispositions:							
Convictions:							
Guilty Pleas or Nolo Contendere	54,765	39,185	35,489	22,230	30,265	94,905	286,839
Not Guilty Plea - No Jury	289	177	271	111	111	237	1,196
Guilty Plea - Jury Verdict	142	52	52	61	11	128	446
Not Guilty Plea - Jury Verdict	861	44	90	197	59	241	1,492
Total Convictions	66,009	39,458	35,634	22,599	30,446	95,511	289,697
Placed on Deferred Adjudication	698	15,347	14,705	7,330	22,514	19,178	79,772
Acquittals:							
Non - Jury Trial	274	47	46	195	50	177	791
Jury Verdict	624	37	28	252	118	189	1,148
Directed Verdict or JNOV	224	6	3	9	1	12	57
Total Acquittals	1,022	90	107	456	169	378	1,996
Dismissals:							
Insufficient Evidence	978	943	689	953	2,062	1,922	7,547
Speedy Trial Act Limitation	4,030	1,368	759	715	634	1,318	8,824
Other Dismissals	44,481	53,302	16,910	18,595	22,971	47,344	173,603
Total Dismissals	49,489	55,613	18,358	20,263	25,667	50,584	189,974
Other Dispositions:							
Motion to Revoke Granted	9,437	5,331	5,744	3,626	2,010	6,869	33,017
Motion to Revoke Denied	3,620	2,091	1,367	1,084	491	2,163	10,816
All Other Dispositions	27,559	2,553	2,421	1,801	3,469	4,889	42,692
Total Other Dispositions	40,616	9,975	9,532	6,511	5,970	13,921	86,525
Total Dispositions	96,735	120,483	78,624	57,159	84,289	179,572	616,862
Cases Pending 8/31/2006	122,145	254,189	55,851	58,086	63,954	147,696	701,921
Cases - Unapprehended Defendants							271,023
Cases Where Attorney Appointed as Counsel							139,601

Age of Cases Disposed	30 Days or Less	31 to 60 Days	61 to 90 Days	Over 90 Days	TOTAL
Number of Cases	150,408	73,653	57,933	334,868	616,862

PROBATE AND MENTAL HEALTH CASES

	Cases Filed	Hearings Held
Probate	58,943	77,182
Mental Health	32,849	33,837

The Supreme Court of Texas

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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.

The Supreme Court of Texas

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Chambers of
Justice Nathan L. Hecht

February 5, 2007

Mr. 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 Proposed Changes to Rules of Appellate Procedure
via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several potential changes to the Rules of Appellate Procedure, in addition to Justice Bland's proposal regarding oral-argument statements that was recently referred to the Committee. These additional potential amendments are summarized in the attached appendix. The first concerns whether the Appellate Rules should include a provision that requires parties in parental-rights-termination cases to identify minor children only by their initials, and that would allow courts to strike any appendices or exhibits containing minors' names. The second issue concerns the timing of filing a petition for review when a motion for rehearing or en banc reconsideration remains pending before the court of appeals. The third involves whether the rules should permit a longer page limit for mandamus replies filed in the court of appeals than in the Supreme Court (the default limit for both is eight pages).

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 on February 16th.

Sincerely,

Nathan L. Hecht
Justice

Rule: **none**

Current text: none

Summary of Issue:

It has been suggested that the Appellate Rules be amended to require litigants in parental-rights termination cases to refer to minor children only by their initials, for the protection of minors' privacy. Family Code §109.002(d) allows the appellate court, in an opinion in a SAPCR appeal, to identify the parties by their initials or by a fictitious name, but it appears to be discretionary and applies only to courts, not to parties. ("On the motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by their initials only."). If the Committee believes such a requirement is advisable, the Court would request that it also consider whether other changes are necessary to prohibit the inclusion of materials in exhibits or appendices identifying minors; and, if so, how to accommodate judgments, orders, and similar items that are required to be included with appellate briefs but may contain the names of minors. *See, e.g.*, Tex. R. App. P. 53.2(k)(1)(A) (requiring inclusion, in appendix to petition for review, of trial-court judgment); *id.* R. 38.1(j)(1)(A) (same requirement in appendix to appellant's brief in court of appeals).

Rule: **Tex. R. App. P. 53.7(b)**

Current text:

Premature filing. A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals. A petition filed before the last ruling on all timely filed motions for rehearing is treated as having been filed on the date of, but after, the last ruling on any such motion.

Summary of Issue:

On at least several occasions in recent memory, a petition for review has been filed while the same party's motion for rehearing was still pending in the court of appeals. Unless the clerk of the supreme court is notified that the motion remains pending below, this could lead to a situation in which the Court denies the petition before the court of appeals has ruled on the motion for rehearing.

The existing Appellate Rules address the simultaneous jurisdiction problem in several places. In addition to Rule 53.7(b) shown above, Rule 19.2 provides:

> *Plenary Power Continues After Petition Filed.* In a civil case, the court of appeals retains plenary power to vacate or modify its judgment during the periods prescribed in 19.1 even if a party has filed a petition for review in the Supreme Court.

While Rule 53.7(a) requires the petition to be filed within 45 days after the court of appeals either renders judgment or overrules the last of all timely motions for rehearing, it is perhaps not immediately clear that the rule prohibits a party from filing a petition before the court of appeals has ruled on all timely filed rehearing motions. A petition filed after a motion for rehearing is filed but while the motion for rehearing is still pending, while likely premature in the legal sense pursuant to Rule 53.7(a), is clearly premature in the practical sense that the supreme court presumably will prefer to delay ruling on the petition until after the court of appeals rules on the motion for rehearing. However, Rule 53.7(b) only prohibits a party from filing a motion for rehearing after filing a petition; it does not prohibit filing a petition while a rehearing motion remains pending. Also, while the rest of 53.7(b) likewise addresses the situation where a motion for rehearing is filed after the filing of the petition for review, the last sentence also applies to a petition filed after the motion for rehearing is filed but before the motion is ruled on, treating the petition as having been filed on the date of (but after) the motion for rehearing is ruled on.

Existing Rule 53.7(b) requires the petitioner to notify the Supreme Court of a pending motion for rehearing, but only when the petition was filed before the motion for rehearing was filed.

Although a petitioner in the petition-filed-while-motion for rehearing-pending situation might elect, on his own initiative, to keep the Court updated, Rule 53.7(b) doesn't require it as it does for petitions filed before rehearing motions. Thus, the last sentence of 53.7(b) creates the potential for a situation where a petition is denied before the date it is considered filed.

There appear to be at least two (and probably more) potential solutions to this problem:

1) Prohibit premature petition filing more clearly. Amend 53.7(a) to more clearly provide that, once a party has filed a motion for rehearing or en banc motion, it may not file a petition until after the court of appeals has disposed of the motion; or

2) Require Notice to Clerk's Office. Amend 53.7(b) to address the situation where the petition is filed while the motion for rehearing is pending by requiring such parties to notify the Court of the pending motion for rehearing when the petition is filed and of the court of appeals' subsequent ruling thereon.

Rule: 52.6

Current text:

Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 8 pages, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Summary of Issue:

Some practitioners have complained that the default page limit for a reply to a response to a mandamus petition filed in the court of appeals is too short, and that 8 pages, while commensurate with the 15-page default limit for a mandamus response in the Supreme Court, is too short for mandamus replies in the courts of appeals, where the default limit for both petitions and responses is 50 pages. One practitioner has suggested a 25-page limit for mandamus replies in the court of appeals, corresponding to the 25-page limit for replies in merits briefs under Rule 38.4, which also sets a 50-page default limit for opening briefs and responses.

MEMORANDUM

To: Supreme Court Rules Advisory Committee

From: Bill Dorsaneo

cc: Jody Hughes

Date: April 25, 2007

Re: Nathan Hecht Letter 9/22/06

This is an updated version of the 1/8/2007 memo addressing the proposed revisions discussed and voted on at our October 2006 and February 2007 meetings. The proposed revisions to 20.1, 41, and 49 have been discussed by the subcommittee and are ready for discussion by the full Committee. The modifications to 20.1 are based on the changes discussed at the February meeting, along with some additional changes I believe are needed based on a comparison with TRCP 145. Rule 24 below incorporates Elaine's latest thoughts and notes based on the February meeting but requires further discussion by the subcommittee. Rule 41 suggests some new alternative language but does not undertake to substantively rewrite the rule. As to Rule 49, this version includes the recommended amendments previously approved by the full committee as well as a few new ones; on further reflection, I believe some additional amendments are needed for clarification, as shown and discussed below.

Rule 13. Court Reporters and Court Recorders

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

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(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).

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

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 after 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.

Rule 20. When Party is Indigent

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.

(2) the claim of indigence is not contested, is not contestible, or if contested, the contest is not sustained by written order; and

(3) the party timely files a notice of appeal.

(b) *Contents of affidavit.* The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

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(12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

(c) *IOLTA Certificate.* If the appellant proceeded in the trial court without payment of fees pursuant to an IOLTA certificate, an additional IOLTA certificate may be filed in the appellate court confirming that the IOLTA funded program rescreened the party for income eligibility under 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.

~~(c)~~(d) *When and Where Affidavit Filed.*

(1) Appeals. Except as provided in paragraph (3), a~~A~~n 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 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.

(2) Other proceedings. [no change]

(3) Extension of time. The appellate court may extend the time to file an affidavit of indigence 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). But the appellate court may not dismiss the appeal on the ground that the appellant has failed to file [an affidavit or] a sufficient affidavit of indigence without providing the appellant a reasonable time to do so after notice from the court.

OR

(3) Extension of time. The appellate court may extend the time to file an affidavit of indigence 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). The appellate court must notify the appellant of the appellant's failure to file a sufficient affidavit of indigence and must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit of indigence or a sufficient affidavit of indigence before dismissing the appeal or affirming the trial court's judgment due to the appellant's failure to comply with paragraph (1).

~~(d)~~(e) *Duty of Clerk.* [no change]

~~(e)~~(f) *Contest to affidavit.* The clerk, the court reporter, [the court recorder,?] or any party may challenge ~~the claim of indigence~~ an affidavit that is not accompanied by an IOLTA certificate by filing—in the court in which the affidavit was filed—a contest to the affidavit of indigence.

~~(f)~~(g) *No contest filed.* [no change]

~~(g)~~(h) *Burden of proof.* [no change]

~~(h)~~(i) *Decision in appellate court.* [no change]

~~(i)~~(j) *Hearing and decision in the trial court.* [no change]

~~(j)~~(k) *Record to be prepared without payment.* [no change]

~~(k)~~(l) *Partial payment of costs.* [no change]

~~(l)~~(m) *Later ability to pay.* [no change]

~~(m)~~(n) *Costs defined.* [no change]

See Higgins v. Randall County Sheriff's Office, 193 S.W.3d 898 (Tex. 2006).

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

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.

Bill,

The proposed changes to (c)(1) have not been presented to the committee. Our subcommittee discussion focused upon the reality that clerks have struggled with the responsibility of determining the sufficiency of a net worth affidavit. [My conversation with the clerks revealed in some counties they don't even try and simply tell the parties to get a court

order. Other clerks I spoke with advised they don't have the financial acumen to assess the affidavit, so they always accept the affidavit (thereby suspending enforcement of the judgment) and leave it the judgment creditor to file a contest.] Thus, the subcommittee agreed the better practice is to relieve the trial court clerks of that responsibility and simply direct the clerks to accept the affidavit. The filed affidavit would operate to suspend judgment enforcement unless and until a contest is filed and sustained and the judgment debtor fails to provide the additional security ordered within 20 days of the order.

The trial court always has the authority pursuant to TRAP 24.2 (d) to enjoin the judgment debtor from dissipating or transferring assets outside the normal course of business. Further, TRAP 24.1(e) empowers the court to "make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause."

-Elaine

(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.~~

[Note: the SCAC voted 15-9, 2/16/07 at 15515, against a section providing for a motion to strike a deficient net worth affidavit. -jdh]

(2) 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 the claimed net worth of the judgment debtor 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. 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.

Bill- the discussion at the February SCAC meeting focused upon the requirement that the trial judge make a finding as to net worth in the situation where the proof is insufficient to allow such a finding. It was suggested that language be added after the word "determination" as follows to address this concern: "or why the proof of claimed net worth is insufficient to allow the court to make a net worth finding". The opponents to the suggestion opined that adding that language would emasculate the rule and flies in the face of legislative intent. I agree with the latter position and do not favor the proposed amendment. My experience at these net worth hearings is that the judgment creditor, having conducted discovery, puts on evidence of the judgment debtor's net worth as well. No formal vote was taken of (c)(2).

It is imperative that parties know whether judgment enforcement is suspended or not. The last two proposed sentences were included to provide a date certain for a judgment debtor to comply with a trial court order of additional security (following a net worth contest).

-Elaine

[note: the SCAC debated whether the trial court should be able to simply deny a judgment debtor's 50% net worth bond on the basis that the debtor had not sufficiently established his net worth; Carlson to work on new language? 2/16/07 at 15528. -jdh].

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;~~ [originally proposed as added language; now shown as deleted to correspond with SCAC vote against including provision governing motions to strike, noted above]

(~~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;

(~~4~~5) the determination whether to permit suspension of enforcement; and

(~~5~~6) the trial court's exercise of discretion under Rule 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 paragraph (a) should be filed in the court of appeals having appropriate appellate jurisdiction over the underlying judgment. The court of appeals ruling is subject to review on motion to the Texas Supreme Court.

[note: the Committee voted 22-2 to approve this language, substituting "appropriate" for the previously suggested "potential," 2/16/07 at 15574. jdh]

(~~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.

(~~e~~f) *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.

[Note: Prof. Carlson will address at the April 2007 meeting whether the judgment is superseded if debtor fails to obtain a finding in line with the debtor's net worth affidavit, 2/16/07 at 15575. jdh]

Rule 34. Appellate Record

34.6 Reporter's Record

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(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.

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

35.3 Responsibility for Filing Record

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(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.

Rule 38. Requisites of Briefs

38.1 Appellant's Brief

The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of Parties and Counsel* [no change]

(b) *Table of Contents.* [no change]

(c) *Index of Authorities.* [no change]

(d) *Statement of the Case*

(e) *Request for Oral Argument.* The brief must state on its front cover whether oral argument is requested or waived. A statement explaining why oral argument should, or should not, be permitted may also be included in the brief. The statement should state how the court's decisional process would, or would not, be aided by oral argument. Any such statement shall not exceed one page.

OR

(e) *Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should, or should not, be permitted. The statement should address how the court's decisional process would, or would not, be aided

by oral argument. Any such statement must not exceed one page. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of its brief.

(ef) *Issues Presented.* [no change]

(fg) *Statement of Facts.* [no change]

(gh) *Summary of the Argument.* [no change]

(hi) *Argument.* [no change]

(ij) *Prayer.* [no change]

(jk) *Appendix in Civil Cases.* [no change]

38.4 Length of Briefs
An appellant's brief or appellee's brief must be no longer than 50 pages, exclusive of the pages containing the identity of parties and counsel, any statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix.

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.

Rule 39. Oral Argument; Decision Without Argument

Existing text:

39.1 Right to Oral Argument. Except as provided in 39.8, any party who has filed a brief and who has timely requested oral argument may argue the case to the court when the case is called for argument.

39.8 Cases Advanced Without Oral Argument. In its discretion, the court of appeals may decide a case without oral argument if argument would not

significantly aid the court in determining the legal and factual issues presented in the appeal.

Proposed to be replaced as follows:

39.1 Right to Oral Argument

(a) *In General.* Except as provided ~~in 39.8~~ in paragraph (b), any party who has filed a brief and who has timely requested oral argument may argue the case. ~~to the court when the case is called for argument.~~

(b) *Standards.* If requested by any party, oral argument must be allowed in the case unless a panel of three judges who have examined the briefs unanimously agrees that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided;

(3) the facts and legal arguments are adequately presented in the briefs and record; or

(4) the decisional process would not be significantly aided by oral argument.

~~**39.8 Cases Advanced Without Oral Argument.** In its discretion, the court of appeals may decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.~~

39.9~~8~~ Clerk's Notice. [no change]

Rule 41. Panel and En Banc Decision

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 an active court of appeals justice from another court of appeals, a qualified retired or former appellate justice or appellate judge, or a qualified 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.

OR

(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 an active court of appeals justice from another court of appeals, a retired or former appellate justice or appellate judge, or an active district court judge to sit on the panel to consider the case as provided in chapters 74 and 75 of the Government Code, 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 appellate justice or appellate judge, or a qualified active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

OR

(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 appellate justice or appellate judge, or an active district court judge to sit with the court of appeals to consider the case as provided in chapters 74 and 75 of the Government Code. 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.

OR

(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 as provided in chapters 74 and 75 of the Government Code. The reconstituted court may order the case reargued.

[Note: the Appellate Subcommittee was invited to suggest new language if it believes a broad change is needed to the current procedure of requiring an initial assignment of three judges to hear cases submitted after oral argument. 2/16/07 at 15600. The above draft reflects two changes from previous drafts. First, the two alternatives are split into separate paragraphs, instead of brackets as previously shown. Also, the second alternative has been slightly revised to ensure that the language regarding Gov't Code chap. 74-75 clearly applies to assigned district-court judges as well. -jdh 3/28/07]

Rule 49. Motion and Further Motion for Rehearing and Motion for En Banc Reconsideration

49.1 **Motion for Rehearing.** A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing. After a motion for rehearing is decided, another ~~a further~~ motion for rehearing may be filed within 15 days of the court's action if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues an opinion in overruling a motion for rehearing.

49.2 **Response.** No response to a motion for rehearing need be filed unless the court so requests. A motion will not be granted unless a response has been filed or requested by the court. [no change]

49.3 **Decision on Motion.** A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument. [no change]

49.4 **Accelerated Appeals.** In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion. [no change]

~~49.5 **Further Motion for Rehearing.** After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:~~

~~(a) modifies its judgment;~~

~~(b) vacates its judgment and renders a new judgment; or~~

~~(c) issues an opinion in overruling a motion for rehearing.~~

49.65 **Amendments.** A motion for rehearing or a motion for en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

[Note: the proposed changes to the title of Rule 49 and to 49.1, former 49.5, and proposed new 49.5 (currently 49.6, Amendments) above have not been considered by the full SCAC. The other changes to Rule 49 below generally remain in the same form as approved by the full SCAC at the 10/21/06 meeting, except (1) the reference to further motion for rehearing in renumbered 49.7 (extension of time) has been deleted for consistency with the proposed merging of 49.1 and 49.5, and (2) the highlighted portion of the second sentence of renumbered 49.6 below, which as approved by the full SCAC on 10/20/06 previously read "the same party's timely filed motion for rehearing or further motion for rehearing," has been rephrased. The changes to renumbered 49.6 are to clarify that an en banc motion may be filed within 15 days after denial of a properly filed second motion for rehearing, *i.e.*, the en banc motion need not be filed within 15 days after the denial of the initial panel motion, and (in both 49.6 and 49.7) to eliminate the now-redundant reference to "further" MFRs. Also, the subcommittee proposes adding a new Rule 49.10 to relocate portions of existing 53.7(b) addressing motions for rehearing; see the note below proposed new 49.10, below, and proposed new changes to 52.3 and 53.7(b), below. I have also included below the text of the unaltered provisions of Rule 49 for the convenience of viewing the whole rule as proposed to be amended. -jdh]

49.~~7~~6 **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 last timely filed 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 . . .

49.87 Extension of Time
A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing 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.

49.98 Not Required for Review. A motion for rehearing is not required to preserve error and is not a prerequisite to filing:
(a) a motion for en banc reconsideration as provided by Rule 49.6; ~~or~~
(b) a petition for review in the Supreme Court; or
(c) a petition for discretionary review in the court of Criminal Appeals. ~~nor is it required to preserve error.~~

49.~~10~~9 Length of Motion and Response. A motion or response must be no longer than 15 pages. [no change]

49.10 Relationship to Petition for Review. A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.

[Note: proposed new 49.10 consists of text moved verbatim from 53.7(b), except for the title, which is new. In its 4/18/07 conference, the subcommittee concluded that the portions of 53.7(b) addressing motions for rehearing in the court of appeals should be relocated to Rule 49. In response to Justice Hecht's letter of 2/5/07, the subcommittee proposes corresponding amendments to Rule 53.7 and additional changes to Rule 53.2, as shown below.]

Rule 52. Original Proceedings

52.3 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 . . .

[Note: the above language was initially approved by a 13-7 vote at the 10/21/06 meeting. At the same meeting, Justice Bland, Justice Duncan, Judge Christopher, and Pam Baron suggested the below changes to subsections (g) and (j) as an alternative to the above language. That alternative was approved by an 18-4 vote at the February 2007 meeting; however, the Committee subsequently voted 11-8 vote to keep Rule 52 as it is currently written. 2/16/07 at 15625-6. -jdh]

(g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in ~~The statement must be supported by references to~~ the appendix or record.

***

(j) *Verification.* The person filing the petition must verify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(~~j~~)(k) *Appendix.* [no change]

Rule 53. Petition for Review

53.2 Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

***

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

***

(9) the disposition of the case by the court of appeals, including the court's disposition of any motions for rehearing or motions for en banc reconsideration. If any motions for rehearing or motions for en banc reconsideration are pending in the court of appeals at the time the petition for review is filed, that information also must be included in the statement of the case.

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.

(b) *Premature filing.* ~~A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals.~~ A petition filed before the last ruling on all timely filed motions for rehearing and motions for en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or motion for en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review, as required by Rule 53.2(d)(9).

[Note: The subcommittee proposes relocating the first three sentences from existing Rule 53.7(b) to new Rule 49.10, with the fourth sentence remaining largely unchanged, as reflected above. And as discussed in the newly added final sentence, changes to Rule 53.2(d)(9) are proposed to address the concerns raised in Justice Hecht's letter of February 5.]

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

March 8, 2007

Mr. 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 Proposed Changes to Rules of Civil Procedure and Judicial Administration

Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several changes to the Rules of Civil Procedure and the Rules of Judicial Administration proposed by members of the bar and others. These proposals are summarized in the attached appendices A and B respectively.

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 on April 27th.

Sincerely,

Nathan L. Hecht
Justice

RULES OF CIVIL PROCEDURE

Rule: none

Current Text: none

Summary of Proposal:

Gene Storie proposes adding a rule for the automatic substitution of current state officers as successors in suits where the original state officer no longer holds office. He suggests modifying the text of TRAP 7.2, perhaps modeled on the federal rule of civil procedure providing for automatic substitution of public officers. *See* Fed. R. Civ. P. 25(d) ("When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party."). The Court seeks the Committee's recommendation on this proposal.

Rule 103. Who May Serve

Current Text:

Process – including citation and other notices, writs, orders, and other papers issued by the court – may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court. Service by registered or certified mail and citation by publication must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process in that suit, and, unless otherwise authorized by a written court order, only a sheriff or constable may serve a citation in an action of forcible entry and detainer, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action be physically enforced by the person delivering the process. The order authorizing a person to serve process may be made without written motion and no fee may be imposed for issuance of such order.

Summary of Proposal:

Carl Weeks, Chair of the Process Server Review Board, cites confusion among process servers, attorneys, and judges over an apparent conflict between Rule 103 (and its similarly-worded counterpart applicable to justice courts, Rule 536(a)), and Rule 663, which governs execution and return of a writ of garnishment. Rules 103 and 536(a), as amended in 2005, allow private process servers generally to serve most types of process except certain types involving physical possession of property. Although writs of garnishment do not appear to be included among the categories of process from which private servers are generally excluded, Rule 663 contemplates execution of such a writ only by a sheriff or constable. *See* TRCP 663 ("The sheriff or constable receiving the writ of garnishment shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof as of other citations."); *see also Jamison v. Nat'l Loan*

Investors, L.P., 4 S.W.3d 465, 468 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) ("The Rules of Civil Procedure provide that only a sheriff or constable may deliver the writ to the garnishee."). Mr. Weeks states that lawyers, judges, and process servers have sought clarification as to whether private process servers may serve writs of garnishment, as there do not appear to be any post-2005 appellate decisions addressing this issue. The Committee is asked to consider whether and how the apparent conflict between the two rules (103/536 and 663) should be resolved.

other rules / writs

(1) what can PPS serve? See 103

(2) what can PPS not serve? " "

all writs of possession (Tex. Prop Code)

(3) Unclear

writs of garnishment & injunction

R. 15 - all writs *process shall be directed

writ of garnishment - served on Sh

notice of writ (citation) served on Δ; this can clearly be served by PPS

663/3 - talks in terms of sheriff/constable

injunction - similar issue

writ result in immediate taking of property

688, 689

Language conflicts

15 vs. 103

Rule 13.6. Proceedings in Pretrial Court

Current text:

(a) *Judges Who May Preside.* The MDL Panel may assign as judge of the pretrial court any active district judge, or any former or retired district or appellate judge who is approved by the Chief Justice of the Supreme Court of Texas. An assignment under this rule is not subject to objection under chapter 74 of the Government Code. The judge assigned as judge of the pretrial court has exclusive jurisdiction over each related case transferred pursuant to this rule unless a case is retransferred by the MDL Panel or is finally resolved or remanded to the trial court for trial.

(b) *Authority of Pretrial Court.* The pretrial court has the authority to decide, in place of the trial court, all pretrial matters in all related cases transferred to the court. Those matters include, for example, jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement). The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer over which the trial court's plenary power would not have expired had the case not been transferred.

Summary of Proposal:

At an interim meeting of the House Civil Practices Committee last summer, a suggestion was made to amend Rule 13.6 to expressly permit a pretrial judge to use a special master, on the theory that special masters might be particularly helpful on smaller discovery and evidentiary rulings. The Court seeks the Committee's recommendation on this proposal.

Rule 13.7. Remand to Trial Court

Current text:

(a) *No Remand if Final Disposition by Pretrial Court.* A case in which the pretrial court has rendered a final and appealable judgment will not be remanded to the trial court.

(b) *Remand.* The pretrial court may order remand of one or more cases, or separable triable portions of cases, when pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled or no longer apply.

(c) *Transfer of Files.* When a case is remanded to the trial court, the clerk of the pretrial court will send the case file to the trial court without retaining a copy unless otherwise ordered. The parties may file in the remanded case copies of any pleadings or orders from the pretrial court's master file. The clerk of the trial court will reopen the trial court file under the cause number of the trial court, without a new filing fee.

Summary of Proposal:

Judge Mark Davidson, whom the MDL Panel assigned as pretrial judge in the asbestos MDL cases, has suggested that the Court consider amending this rule to allow a pretrial judge to remand a case to a particular court in those counties that use a central docket system to assign cases. Judge Davidson indicates that it could be difficult to set a trial date under Rule 13.6(d) that works for a particular trial judge if the pretrial judge doesn't know which trial judge will hear the case. The Court seeks the Committee's recommendation on this proposal.

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FORT WORTH, TEXAS 76102
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April 19, 2007

Hon. Tom Lawrence
Justice of the Peace
Precinct 4, Place 2
7900 Will Clayton Parkway
Humble, Texas 77338

Re: Proposal to amend garnishment rules

Dear Judge Lawrence:

I am enclosing a copy of Justice Hecht's March 8, 2000, letter to Chip Babcock, which you and I discussed by phone yesterday. In this letter, Justice Hecht is asking the full committee to consider a proposal, originating with Carl Weeks, chair of the Process Server Review Board, to allow private process servers to serve writs of garnishment.

As you know, Rules 103 and 536(a) were amended in 2005 to permit private service of process by certified private process servers, except that

> only a sheriff or constable may serve a citation in an action of forcible entry and detainer, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action be physically enforced by the person serving the process.

No such changes, however, were made in part VI of the rules, which relates to "Ancillary Proceedings."

Specifically, Rule 663 still requires the sheriff or constable "to execute the [writ] by delivering a copy thereof to the garnishee," while Rule 663a allow the defendant to be "served in any manner prescribed for service of citation." Despite the difference in terminology, there appears to be no difference between serving the garnishee and serving the defendant. Moreover, as I understand, garnishment does not involve seizing property.[1] Thus, the proposal to allow a private process server to serve writs of garnishment would seem to be in accord with the recent amendment to Rule 103.

Justice Hecht's memo discussed this proposal under Rule 103, and as I understand, Chip Babcock forwarded this proposal on to Richard Orsinger, who chairs the Rules 15-165a subcommittee, and that subcommittee conferred by e-mail. While participation was not large, we concluded that this matter was non-controversial and should be sent on to the full committee. Because Richard had a prior seminar obligation, he asked me to make any required presentation, and I am prepared to do so.

But in looking at this matter further, I realize that this matter might more properly belong to the Rules 523-734 subcommittee, which you chair. While it might be possible to amend Rule 103 to expressly override the garnishment rule, it makes more sense to change the garnishment rules themselves. Accordingly, I would appreciate your thoughts as to how best to proceed, if this matter comes up on the April 27 meeting.

Thank you for your cooperation.

Very truly yours,

Frank Gilstrap

FG/ar

c. Hon. Nathan Hecht
Chip Babcock
Richard Orsinger

[1] *But see* TEX.CIV.PRAC. & REM. CODE § 63.003(a) ("After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to defendant.") (emphasis added).

Service of Writs of Garnishment by Private Process

Rules affecting service of Writs of Garnishment:

Rule 15 – All writs are to be directed to Sheriff or Constable

Rule 103 – Persons Who May Serve restricts service of writs affecting taking of person property of thing or requiring enforcement action by the person serving the writ.

Rule 536 - Persons Who May Serve restricts service of writs affecting taking of person property of thing or requiring enforcement action by the person serving the writ.

Rule 662 – The writ shall be dated and tested as other writs, and may be delivered to the sheriff or constable by the officer who issued it, or he may deliver it to the plaintiff, his agent of attorney, for that purpose.

Rule 663 – The sheriff or constable receiving shall immediately proceed to execute the same by delivering a copy to the garnishee and shall make return thereof as of other citations.

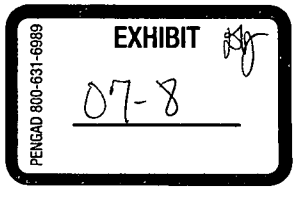
Rule 664 – At any time before judgment.... The defendant may replevy the same .... by giving bond with sufficient sureties as provided by statute, to be approved by the officer who levied the writ.

Rule 670 – Refusal to deliver effects – Should the garnishee adjudged to have the effects of the defendant in his possession, as provided in the preceding rule, fail or refusal to deliver them to the sheriff or constable on such demand, the officer shall immediately make return of such failure or refusal, whereupon motion of the plaintiff, the garnishee shall be cited for contempt of court for such failure or refusal, he shall be fined for contempt and imprisoned until he shall deliver such effects.

While the delivery of the writ of garnishment is considered by some as simply the delivery of a notice, considering service of this process by private process servers has ramifications well beyond the immediate physical delivery of the notice.

It would seem there are significant rules that would have to be changed or modified to permit this process to be accomplished by private process servers. Rule 15 calls for all writs to be directed to a sheriff or constable. Undoubtedly the language developed for this segment of process was done to limit delivery of court papers that impact possession of property, persons, or assets. In so delivering notice of the garnishment, the defendant is in effect deprived of access or possession of the property identified in the garnishment.

In situations where a defendant is to be served separately from the financial institution, the potential exists for the property to be disposed of prior to the garnishment being served on the financial institution. Should the defendant's service be accomplished prior



to the service on the bank, they would have that opportunity. In cases where a sheriff or constable is serving such separate notices some type of coordination is routine.

A defendant may replevy the property or assets by filing a bond to be approved by the officer who served, or "levied" the writ under rule 664, which would preclude the process server having the authority to serve such a writ. Should the writ be served by a private process server, who would authorize and file such bond? How would a defendant be able to file his replevy bond and obtain his property? The writ of garnishment is issued by the court as a means to ensure that due process is provided for both the plaintiff and the defendant until a final determination is made by the court on rightful possession. After judicial review, the court may modify the requirements of the "officer" in the writ of garnishment.

Also in Rule 670 the implications of the impact of failing or refusing to comply with the demands set forth in the writ of garnishment require the "officer", who is identified as the sheriff or constable to take direct enforcement action and report to the court by return the failure or refusal to deliver. The court's action following this notice is a contempt action with potential imprisonment for the failure or refusal. The severity of these potential actions would seem to require greater authority be present to serve such writs.

Not all writs of garnishment are simple notice delivery items. In some cases, we have seen where a writ of garnishment is issued to a business or financial institution that is in possession of property or assets of a third party. A writ may contain language in the order commanding the "officer" to seize and take possession of specified property.

Remedy for defects in service or actions by a process server may leave a plaintiff and defendant unprotected when a liability exits. Sheriff's and Constables are backed by the liability of their official bond and the county for which they work. A process server company can go bankrupt and leave the parties hanging. Section 7.001, Civil Practice and Remedies Code makes the officer liable for refusal or neglect. An infrastructure of law is already in place to protect the parties for service provided by sheriffs and constables as officers of the court. No such protection for the parties is provided by process servers who aren't even required to be insured.

Notwithstanding any specific statutory requirements in the Tax Code, Finance Code, Property or Tax Codes, the obligations on Sheriffs and Constables as officers of the court in serving these writs would seem to preclude service by process servers being good public policy.

From: Carl Weeks [cw@carlweeks.com]
Sent: Wednesday, April 25, 2007 5:02 PM
To: Jody Hughes
Subject: Re: Changes to Rules 662 and 663

Attachments: plaintiff's motion to set aside judgment.pdf; order on def's motion.pdf

Jody
I have reviewed the documents attached and will respond to each question individually:
1. No, that position is not consistent with what TPSA currently teaches. Since the amended order was issued, authority for private service of all writs is presented by TPSA as basically:
"read the writ" to determine whether private process may deliver the writ. If the Writ of Garnishment (or any writ for that matter) requires the actual "taking of a person, property or thing" a private process server may not serve the writ. If the writ of garnishment is drafted as a simple notice to a party, (such as a bank) it may be served by a private process server provided of course that it requires no enforcement or other action on the part of the server delivering the document.
2. No, I do not agree with Ron's position on writs of garnishment and cite the following:
Prescott Interest vs. Alliance Life Insurance, Dallas County Court at Law, (attached)
See attached Plaintiff(s) Prescott's Opposition to Motion to Set aside Default Judgment attached herewith, specifically pages 3-12 (Factual Background) and noted Exhibit "B" RAC discussion (emphasis added) of this very issue- plead as (The Minutes). The movant in this case pleads "RAC discussion" the amended order and prevailed as evidenced by the attached order. While of course not an appeal, this case demonstrates the courts reliance on previous RAC discussion and position on this very issue as that is has already debated, interpreted and as an already established position.
Moreover....it should be noted
a. Rule 633 is simply archaic language that has never been amended to recognize amendments to Rule 103- effective Jan,1 1988 or July 1, 2005
b. TRCP 633 was adopted effective Sept 1, 1941 even prior to courts having been granted authority to authorize private process in any circumstance.
Since TRCP 103 was amended more recently authorizing private process servers to serve writs and not specifying any particular writ, the more recent amendments to rule 103 should prevail over the archaic language of Rule 633 and private process servers are thereby authorized to deliver writs of garnishment among others that don't require the "taking of a person, property or thing"
Hope this is what your looking for from me, if not, please let me know.
Carl
----- Original Message -----
From: Jody Hughes
To: cw@carlweeks.com
Sent: Wednesday, April 25, 2007 9:35 AM
Subject: FW: Changes to Rules 662 and 663

Carl-

See below and attached regarding correspondence between the Supreme Court Rules Advisory Committee and Ron Hickman. "This response" is apparently the first document attached above. Is this consistent with what the TPSA teaches? Do you agree with what appears to be Ron's conclusion that private process servers can't serve writs of garnishment? For further reference I'm attaching a copy of Justice Hecht's recent letter referring this issue to the SCAC; we referenced you therein as the source of the inquiry on this issue.

From: Lawrence, Judge Tom (JP) [mailto:Tom_Lawrence@jp.hctx.net]
Sent: Wednesday, April 25, 2007 9:01 AM
To: SCAC subcommittee members
Subject: RE: Changes to Rules 662 and 663

Members,

I just received this response from Constable Ron Hickman, who is the incoming President of the Justice of the Peace and Constable

Association of Texas. He was actually at a constable civil process school when I contacted him so this represents a wealth of experience. See you in Austin on Friday.

Tom Lawrence

NO. CC-0608747-D

PRESCOTT INTERESTS, L.L.C.,	§	IN THE COUNTY COURT
	§	
Plaintiff,	§	
	§	
v.	§	AT LAW NUMBER FOUR
	§	
ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,	§	
	§	
	§	
Defendant.	§	DALLAS COUNTY, TEXAS

PLAINTIFF PRESCOTT INTERESTS, L.L.C.'S
OPPOSITION TO DEFENDANT'S MOTION TO SET
ASIDE DEFAULT JUDGMENT AND MOTION FOR NEW TRIAL

Plaintiff Prescott Interests, L.L.C. ("**Prescott**" or "**Plaintiff**") files its Opposition to Defendant's Motion to Set Aside Default Judgment and Motion for New Trial (the "**Motion for New Trial**") and shows the Court as follows:

I.

PRELIMINARY STATEMENT

Defendant Allianz Life Insurance Company of North America ("**Defendant**" or "**Allianz**") asserts the following three grounds in its request to set aside the default judgment and for a new trial: (1) that service of the writ of garnishment is invalid because it was served by a private process server; (2) that Defendant did not receive a copy of the writ prior to the Court's entry of the final judgment; and (3) that Defendant owed no debt to the judgment debtor which was subject to the writ of garnishment. Defendant seeks to set aside the default judgment in favor of Prescott despite the fact that Defendant paid monies to the judgment debtor which was prohibited by the writ of garnishment and resulting in direct injury to Prescott. As shown below, none of these

claims support setting aside the default judgment or granting a new trial to Defendant. Accordingly, the Motion should be denied in its entirety.

II.

OBJECTIONS TO DEFENDANT'S EVIDENCE IN SUPPORT OF MOTION FOR NEW TRIAL

Prescott objects to the Affidavits of Melissa A. O'Donnell and Gregory M. Sudbury filed by Defendant in its Motion for New Trial for the reasons stated below.

1. Prescott objects to portions of the Affidavit of Gregory M. Sudbury (the "**Sudbury Affidavit**"), on the following grounds:

a. Prescott objects to the statements made in Paragraph 3 of the Sudbury Affidavit concerning alleged conversations between Sudbury and the Dallas County Constable's Office. Those statements, and the paragraph as a whole, are hearsay, are not competent evidence and should be stricken and not considered by the Court.

b. Prescott objects to Paragraph 4 of the Sudbury Affidavit concerning alleged conversations between Sudbury and the Dallas County Sheriff's Department. Those statements are hearsay, are not competent evidence and should be stricken and not considered by the Court.

2. Prescott objects to the Affidavit of Melissa A. O'Donnell (the "**O'Donnell Affidavit**"), on the following grounds:

a. Prescott objects to Paragraph 3 of the O'Donnell Affidavit where it makes statements concerning the content of alleged correspondence between Defendant and CT Corporation System. Those statements violate the best evidence rule, are

hearsay, are not competent evidence and should be stricken and not considered by the Court.

b. Prescott objects to Paragraph 4 of the O'Donnell Affidavit in its entirety where it makes conclusions concerning the "knowledge" of Defendant and the content of documents received by Defendant. Those statements are hearsay, conclusions, violate the best evidence rule, are not competent evidence and should be stricken and not considered by the Court.

c. Prescott objects to Paragraph 5 of the O'Donnell Affidavit in its entirety where it makes conclusions concerning the unintentional nature of Defendant's behavior and the lack of conscious indifference of Defendant. Those statements and the paragraph as a whole are hearsay, are not competent evidence, are legal opinions and conclusions and should be stricken and not considered by the Court.

III.
FACTUAL BACKGROUND

On April 3, 1996, in the County Court at Law Number Four of Dallas County, Texas in Cause Number 94-8271-d, Prescott obtained a final judgment against Grace T. Barnard (**"Barnard"**) in the original amount of $33,123.23 plus attorney's fees and interest. As of June 3, 2006, the balance due under the judgment including all accrued interest was $92,722.23.

On June 15, 2006, Prescott filed its Application for Writ of Garnishment (the **"Application"**) seeking to garnish funds held by Defendant and owed to Barnard. On June 16, 2006, this Court issued the Writ of Garnishment requested by Prescott in the

Application (the **"Writ"**). The Writ was properly served on Defendant on June 20, 2006 by serving Defendant's registered agent, CT Corporation System, at 350 North St. Paul Street, Dallas, Texas 75201. A copy of the executed Writ was filed with the Office of the Dallas County Clerk on June 23, 2006 and is attached hereto as **Exhibit "A"** and incorporated herein by reference. Defendant wholly failed to respond to the Writ and this Court entered a default judgment against Defendant on July 25, 2006 in the principal amount of $92,722.23 plus attorney's fees and post-judgment interest (the **"Final Judgment"**).

Defendant filed its Motion for New Trial on August 18, 2006 asserting that the Writ was invalid due to improper service, Defendant did not receive the Writ (although it does not dispute timely service and receipt of the Application) and the Writ did not attach to or reach funds owed by Defendant to Barnard.

IV.
ARGUMENT AND AUTHORITIES

Defendant's Motion for New Trial should be denied in its entirety because (1) private process servers may serve writs of garnishment in Texas under Rule 103 of the Texas Rules of Civil Procedure; (2) Defendant was properly served with the Writ by serving its designated registered agent as shown in the records of the Office of the Secretary of State of Texas; and (3) the evidence shows that Defendant paid funds to Barnard in violation of the Writ and applicable law.

A. Private Process Servers May Serve Writs of Garnishment of the Type Served on Defendant.

Rule 103 of the Texas Rules of Civil Procedure provides:

Rule 103. Who May Serve

"Process--including citation and other notices, writs, orders, and other papers issued by the court--may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court. Service by registered or certified mail and citation by publication must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process in that suit, and, unless otherwise authorized by a written court order, only a sheriff or constable may serve a citation in an action of forcible entry and detainer, a writ that requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action by physically enforced by the person delivering the process. The order authorizing a person to serve process may be made without written motion and no fee may be imposed for issuance of such order." *(emphasis added)*

Prior to the Texas Supreme Court's Order amending Rule 103 effective July 1, 2005[1], Rule 103 read as follows:

"Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order."

[1] T.R.C.P. 103; Texas Supreme Court Order, Misc. Docket No. 05-9121, June 29, 2005.

It is clear that Rule 103 was amended to permit private process servers to serve "other notices, *writs*, orders, and other papers issued by the Court..." *(emphasis added)* including the Writ which was served on Defendant in this case. Following the 2005 amendment to Rule 103, private process servers are authorized to serve any writ unless the writ "requires the actual taking of possession of a person, property or thing, or process requiring that an enforcement action be physically enforced by the person delivering the process." Id.

In fact, the minutes of the Supreme Court Advisory Committee ("**SCAC**") clearly support Prescott's assertion that service of the Writ is valid. Excerpts from those minutes during which the proposed amendment to Rule 103 was extensively discussed are attached hereto as **Exhibit "B"** and incorporated herein by reference (the "**Minutes**")[2]. The SCAC considered deleting any reference to "writs" but expressly rejected deletion unless the writ involves using the force of law against someone against their will. See **Exhibit "B"** at 12142-12144.

The SCAC acknowledged that other Texas Rules of Civil Procedure referred to "sheriff or constable" or "officer" and decided in the final version of Rule 103 that a private process server could serve writs but private process servers would not be authorized to actually take possession of a person, property or thing or serve process requiring that an enforcement action by physically enforced by the person delivering the process. See **Exhibit "B"** at pp. 12142 - 12144 and Rule 103.

[2] The complete minutes total 199 pages and are available upon the Court's request.

In approving the amendments to Rule 103 permitting process servers to serve writs, the SCAC noted the difficulty in getting a constable or sheriff to "sit outside for hours and hours waiting on them. It is convenient to use a process server in that circumstance." See Exhibit B at 12148. Defendant's own counsel's affidavit confirms this admitted problem where it states: "I then called the Sheriff's Department for Dallas County, Texas and I was informed that the Dallas Sheriff's Department ***did not serve writs of garnishment,*** which were instead handled by the appropriate Constable's Office." (*emphasis added*). See Paragraph 4 of the Sudbury Affidavit. According to the Sudbury Affidavit, the Dallas County Sheriff's Office does not serve writs of garnishment notwithstanding Rule 663 of the Texas Rules of Civil Procedure. Prescott submits this is precisely the type of practical problem the Texas Supreme Court intended to solve by the 2005 amendments to Rule 103.

In this case, the private process server served the Writ by delivering the Writ to Defendant's registered agent. The Writ did not direct the process server to take possession of a person, property or thing or require that an enforcement action by physically enforced by the process server. Further, Defendant has not alleged that its failure to appear was due to service of the Writ by a private process server as opposed to a sheriff or constable. Despite service and receipt of the Writ and the Application, Defendant simply ignored the service of process during the period between the date of service (i.e. June 20, 2005) and the date of the Final Judgment (July 25, 2005).

Prescott's service of the Writ on Defendant by a private process server is valid under the plain language of Rule 103. The authorities cited by Defendant

in the Motion for New Trial were decided prior to the 2005 amendment to Rule 103 and are now inapplicable to this case as a result of the 2005 amendments to Rule 103 which allows private process servers to serve this type of writ.

Service of the Writ upon Defendant was valid under Texas law and the Final Judgment is valid and enforceable. Accordingly, the Motion for New Trial on these grounds should be denied in its entirety.

B. Defendant has Failed to Satisfy the Craddock Test.

Alternatively, Plaintiff seeks a new trial under the *Craddock* standard. For the following reasons, that argument might also fail.

1. Craddock Test.

The *Craddock* holding defines this Court's discretion to grant Defendant's Motion for New Trial of the default judgment. *Craddock v. Sunshine Bus Lines*, 133 S.W. 2d 124 (Tex. 1939) (*Craddock*). The *Craddock* test requires Defendant to show that: (a) Defendant's failure to answer before judgment was not intentional or the result of conscious indifference; (b) Defendant's Motion for New Trial sets up a meritorious defense; and (c) Defendant's Motion for New Trial was filed at a time when its granting would not delay or otherwise injure Prescott.

The Motion for New Trial and its supporting affidavits demonstrate that Defendant fails to satisfy any of the three elements of the Craddock test.

2. No Showing That Failure to Answer Was Not the Result of Conscious Indifference.

a. The Affidavit of Melissa A. O'Donnell attached to the Motion for New Trial (the **"O'Donnell Affidavit"**) conclusively establishes that Defendant's failure to timely appear in this lawsuit was the result of conscious indifference and not an accident or mistake. O' Donnell is a "principal paralegal" in the Law Department of Defendant. See Paragraph 1 of the O'Donnell Affidavit. O'Donnell also admits that CT Corporation System is Defendant's registered agent in Texas. See Paragraph 2 of the O'Donnell Affidavit. O'Donnell admits that she received the Application on June 22, 2006. Despite receipt of the Application, O'Donnell apparently ignored the Application and undertook no investigation or other action whatsoever in response to the receipt of the Application such as consulting an attorney or other legal professional in Defendant's Law Department. O'Donnell apparently made the decision that no action whatsoever by Defendant was necessary. This does not meet the conscious indifference prong of the Craddock test.

Even assuming that CT Corporate System failed to forward the Writ, Defendant failed to seek advice or make inquiry about the importance of the court papers forwarded to it by CT Corporation System. Defendant did ***nothing*** after receiving the court papers until it received notice of the default judgment. It is inconceivable that Defendant's Law Department in Minnesota would not inquire into the significance of being served with the Application for Writ of Garnishment even if the Writ wasn't attached --- which Prescott does not believe or concede is true. Texas law provides that where a defendant makes no inquiry or seeks no help or advice regarding the importance of being served with court papers, such acts constitute

conscious indifference and, accordingly, does not satisfy the first prong of the *Craddock* test. *Prince v. Prince*, 912 S.W.2d 367 (Tex. App. - Houston [14th Dist.] 1995, no writ).

In her affidavit, Ms. O'Donnell makes the unsupported self-serving and conclusory statement that "[T]here was no writ of garnishment among the papers delivered to Allianz by CT Corporation System". See Paragraph 2 of the O'Donnell Affidavit. The return of the executed Writ with the Application attached thereto was served on Defendant's registered agent on June 20, 2006. See Exhibit "A" attached hereto. Service on the Defendant's registered agent effected service on the Defendant. There is no evidence showing that CT Corporation System failed to receive the Writ. O'Donnell's Affidavit acknowledges that the Writ very well may have been delivered to CT Corporation System where she states "If the Writ was ever given to CT Corporation,..." See Paragraph 5 of the O'Donnell Affidavit. Any failure of Defendant's registered agent to deliver the Writ does not affect otherwise valid service.

The Motion for New Trial and the O'Donnell Affidavit fail to establish that Defendant's failure to appear was unintentional and was not the result of conscious indifference. Defendant has failed to establish the first element of the Craddock test and the Motion for New Trial should be denied in its entirety.

3. ***Defendant Has Not Shown a Meritorious Defense.***

Defendant also fails to satisfy this second element of the Craddock test because Defendant's own evidence shows that it paid monies to Barnard between the time the Writ was served and the date of the Final Judgment. See Paragraph 6 of the O'Donnell Affidavit. The sole support for Defendant's meritorious defense claim is the

statement in O'Donnell's Affidavit that "Allianz was not indebted to the judgment debtor Grace Barnard in the amount of $92,722.23 when the Application was filed, when the Writ was issued, or when the Final Judgment was entered." See Paragraph 6 of the O'Donnell Affidavit. This testimony does not establish that Defendant did not pay monies to Barnard between the date of service of the Writ and the entry of Final Judgment. It is completely irrelevant whether Defendant was indebted to Barnard on the date the Application was filed, the date the Writ was issued or the date the Final Judgment was entered. It is obvious from Defendant's evidence that Defendant paid monies to Barnard during the time Defendant was ordered by this Court and the Writ to pay such monies to Prescott. Accordingly, Defendant has failed to establish a meritorious defense and failed to satisfy the second element of the Craddock test and the Motion for New Trial should be denied.

4. *There will be Injury to Prescott as a Result of a New Trial.*

Defendant has admitted that it paid monies to Barnard and has admitted that "Allianz is not currently indebted to the judgment debtor Grace Barnard in any amount." See Paragraph 6 of the O'Donnell Affidavit. As a result of Defendant's payment of monies to Barnard in violation of the Writ, the granting of the Motion for New Trial will result in injury to Prescott because there is no further debt for Prescott to collect. Had Defendant not ignored the Writ and either withheld the money it owed to Barnard or paid such money into the registry of the Court, no harm would have been done. However, under these circumstances, granting the Motion for New Trial would result in irrevocably depriving Prescott of the very protections intended by the Writ and

the Texas Rules of Civil Procedure. Accordingly, Defendant has failed to satisfy the third element of the Craddock test and the Motion for New Trial should be denied.

5. *Even if the Craddock standard is met, Allianz is still indebted to Prescott.*

Even if this Court sets aside the Final Judgment based upon the Craddock test, then the Writ still remains in effect from the date of service (i.e. June 20, 2006) to the present date and Prescott is entitled to a judgment in an amount equal all monies paid by Defendant in violation of the Writ. Accordingly, this Court must still resolve the issue of whether service of the Writ by a private process server is valid under Rule 103. For the reasons set forth herein, the Court must rule that such service was valid and the Motion for New Trial should be denied in its entirety.

C. *Defendant was Indebted to Barnard When the Writ was Served.*

Defendant's finally asserts that it was not indebted to Barnard prior to the entry of the Final Judgment. Whether true or not, it is completely irrelevant as to Defendant's duty to comply with the Writ and constitutes no support for the Motion for New Trial. Defendant also alleges that it was not indebted to Barnard in the amount of the default judgment.

Defendant was required by law to respond to the Writ and pay all monies, if any, due to Barnard in accordance with the terms of the Writ when it was served. The amount of indebtedness due Barnard as of the date of the Final Judgment is irrelevant to the obligations imposed upon Defendant under the Writ. Defendant acknowledges that it wholly failed to fulfill these obligations.

Finally, Defendant asserts that it "is not currently indebted to the judgment debtor in any amount." This argument is merely an attempt to distract the Court from Defendant's failure to comply with the mandates of the Writ. A writ of garnishment would have no affect whatsoever if the garnishee could avoid complying with the writ by simply paying all monies held by it to the judgment debtor prior to the garnishee's answer date. Defendant's final defense is not supported by Texas law and should not be considered by this Court.

V.

RECOVERY OF ATTORNEYS' FEES

If the Motion for New Trial is denied, Prescott seeks recovery of its attorney's fees and costs incurred in defeating the Motion for New Trial. Alternatively, if the Motion for New Trial is granted, Prescott seeks recovery of its attorney's fees in accordance with Defendant's offer on page 11 of the Motion for New Trial.

VI.

REQUESTED RELIEF

For all of the foregoing reasons, Prescott requests that the Motion for New Trial be denied in its entirety and that Prescott be awarded its attorneys fees and costs as set forth above.

Respectfully submitted,

Paul A. Mohtares
State Bar No. 14253600

James W. Morris, Jr.
State Bar No. 14487600

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Dallas, Texas 75270
(214) 969-5454
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Attorneys for Plaintiff,
PRESCOTT INTERESTS, L.L.C.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded in accordance with the Texas Rules of Civil Procedure to Defendant's counsel of record on this 30th day of August 2006.

Paul A. Mohtares

COPY

C/F $4.00 ATTY-P
THE STATE OF TEXAS

FILED COUNTY OF DALLAS
2006 JUN 23 AM 12: 20
CYNTHIA FIGUEROA CALHOUN
DALLAS COUNTY

GARNISHMENT WRIT AFTER JUDGMENT

CAUSE NO. cc-06-08747-d
GARNISHMENT SUIT NO. cc-06-[illegible]
In County Court of Dallas County No. 4

To Allianz Life Insurance Company of North America , Garnishee – GREETING:

WHEREAS, on the 13 th day of June 2006 A.D. John K. Pearcy made affidavit before Judi L. Underwood, Notary Public In And For The State of Texas that on the 3rd day of April 1996 A.D. in the County Court of Dallas County at Law No. 4, Dallas County, Texas, in cause No. cc-94-08271-d Prescott Interests, L.L.C. recovered against Grace Bernard a judgement for the sum of

THIRTY THREE THOUSAND ONE HUNDRED TWENTY THREE AND 23/100----------($33, 123.23)DOLLARS plus attorneys fees of $3,740.00 besides interest and cost of suit. That said judgment still remains due and unsatisfied except for the following credits of $1,315.55 applied on November 30, 1999 and $1,674.99 applied on May 18, 2005 and that the defendant has not within affiants's knowledge, property in possession, within this State, subject to execution, sufficient to satisfy such judgment; and that the Plaintiff has reason to believe, and does believed that you Allianz Life Insurance Company of North America are indebted to the Defendant, or that you have in your hands effects belonging to the Defendant, and has applied for a Writ of Garnishment against you, the said Allianz Life Insurance Company of North America.

THEREFORE, you are hereby commanded forthwith to be and appear before the said Court, at the courthouse thereof, in the City of Dallas, in said County at ten o'clock A.M. on the Monday next following the expiration of twenty days from date of service hereof, then and there to answer in writing upon oath, what, if any thing you are indebted to the said Grace Barnard, defendant and was when this writ was served upon you and what effects, if any, of the said Grace Barnard, defendant, you have in your possession, and had when this writ was served, and what other persons, if any within your knowledge, are indebted to the said Grace Barnard, defendant or have effects, belonging to Defendant in their possession. You are further commanded NOT to pay to defendant any debt or to deliver to him any effects, pending further order of this court. A copy of Application For Writ of Garnishment After Judgment is attached hereto and made part hereof.

HEREIN FAIL NOT, but of this writ make answer as the law directs.

GIVEN UNDER MY HAND AND SEAL of said Court on the 16th day of June, 2006.

Cynthia Figueroa Calhoun, County Clerk
of the county court of Dallas County,
At Law No. 4

By: Gwendolyn Thomas, Deputy

CAUSE NO. CC-06-08747-D

PRESCOTT INTERESTS, L.L.C.,	§	IN THE COUNTY COURT
	§	
	§	
Plaintiff(s),	§	
VS.	§	AT LAW NO. 4
ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,	§	
	§	
	§	
Defendant(s).	§	DALLAS COUNTY, TEXAS

AFFIDAVIT OF SERVICE

Came to hand on **Tuesday, June 20, 2006 at 1:00 PM,**
Executed at: **350 NORTH ST PAUL STREET, SUITE 2900, DALLAS, TX 75201**
within the county of **DALLAS** at **1:15 PM**, on **Tuesday, June 20, 2006,**
by delivering to the within named:

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

By delivering to its' **Registered Agent, CT CORPORATION SYSTEM**
By delivering to its' **Authorized Agent, SHIRLEY DILLON**
Each, in person a true copy of this

GARNISHMENT WRIT AFTER JUDGEMENT AND APPLICATION FOR WRIT OF GARNISHMENT

having first endorsed thereon the date of the delivery.

BEFORE ME, the undersigned authority, on this day personally appeared **Danny L. Haney** who after being duly sworn on oath states: "My name is **Danny L. Haney**. I am a person over eighteen (18) years of age and I am competent to make this affidavit. I am a resident of the State of Texas. I am not a party to this suit nor related or affiliated with any herein, and have no interest in the outcome of the suit. I am familiar with the Texas Rules of Civil Procedure, and the Texas Practice and Remedies Codes as they apply to service of process. I have never been convicted of a felony or of a misdemeanor involving moral turpitude."

Danny L. Haney

Of: **Dallas County**

By: _____
Authorized Person - SC566

Given under my hand and seal of office on this 22nd **day of June, 2006.**

_____
Notary Public in and for The State of Texas

GREG BENEFIELD
Notary Public, State of Texas
My Commission Exp. 12-27-2009

CONSTABLE'S RETURN

CAME TO HAND on the day of A.D., and executed the day of A.D., by delivering to the within named Garnishee by serving, in person, a true copy of this writ.

FEES			
Serving Notice	$		
Mileage	$	Constable	County, Texas
Total	$	By	Deputy

**** SEE ATTACHED ****
***** AFFIDAVIT *****

ATTORNEY
No. cc-06-08747-d

IN THE COUNTY COURT OF DALLAS
COUNTY COURT AT LAW NO. 4
Dallas County, Texas

Garnishment After Judgment

PRESCOTT INTERESTS, L.L.C.

VS.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA, GARNISHEE
SERVE:
CT CORPORATION SYSTEM, REG. AGENT
350 N. ST. PAUL ST.,
DALLAS, TEXAS 75201

ISSUED THIS 16TH DAY OF JUNE, 2006.

CYNTHIA FIGUEROA CALHOUN, COUNTY CLERK
BY: GWENDOLYN THOMAS, DEPUTY CLERK

PAUL A. MOHTARES, ATTY
1201 ELM STREET, STE. 4800
DALLAS, TEXAS 75270
(214)969-5454

NO OFFICER'S FEES HAVE BEEN COLLECTED
BY DALLAS COUNTY CLERK

CHAIRMAN BABCOCK: Any other questions about this?

MS. BARON: There will be.

CHAIRMAN BABCOCK: I'm sure. Just holler. Item 4, I think, Richard, proposed Rule 103 has already been posted by the Court, right.

MR. ORSINGER: Yes, it has, but there is a little something to discuss. Do you want to take a minute or two?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Lisa Hobbs has written these proposals, and I want to thank her for doing all that hard work and did a great job. If there's one constituency we've ever reached, it's the private process servers. They are so happy with what we've done. I will read you one e-mail because everything else is a variation of this. They either put a sentence in front of it, a key word in the middle of it, or a sentence after it, but it's "I would like to thank the Court for putting forth the changes to the TRCP Rules 103 and 536. These changes have been needed for a very long time. I support the changes

as published." We probably got 150 e-mails that have variations of that particular message there.

It seems like the only people that don't like it are a few constables; and I can't tell, but the people in here who are former constables say, "I was a former constable, and it was a nightmare for us. You

know, we didn't have time to do it, and we couldn't do our service and everything." So I'm not really sure that anybody is unhappy. I think the lawyers haven't noticed. I think there's hardly anything here from a lawyer.

And there are some transitional issues like "Well, if I'm certified now do I get three years on my last exam," and this, that, and the other. And then the others are interested to know about the registration and application process, and there is a packet here which has not been aproved by the Supreme Court yet, but that was our best effort to consolidate the information that we received from people in the industry; and, you know, the essentials are if you're convicted of a felony or a misdemeanor of moral turpitude, you can't serve process; and if that happens to you after you've been certified then you're going to lose that certificate if the Supreme Court finds out about it.

There's an administrative agency -- pardon me, an administrative board called the Process Service

Review Board, which apparently is going to be appointed by the Supreme Court with no legislative authority or constitutional authority or anything; and we don't know who they will be, but they will definitely be serving without compensation. Don't know where they will meet or who will store their records, but we do know that the certifications will be somehow, I guess at the Supreme

Court, on the internet so lawyers can check and see if the process was served by a certified person.

MS. HOBBS: Through the Office of Court Administration.

MR. ORSINGER: Through OCA? Okay. One point of controversy is that proposed Rule 103 as promulgated permits the private process servers to serve writs and orders. Writs and orders. Okay. Now, some of these writs allow you to take somebody's furniture and put it in the street. Another writ allows you to take a minor child away from the parent. Another writ allows you to take a person in your car down to the county jail. I mean, there's a lot of writs out there that, as one of these guys said, probably they're going to want to have people that are wearing guns serving those writs, and that may well be true; but I think the inclusion of writs and orders as something that could be served through private process may be something that you might want to raise your

eyebrow at.

Now, as a reverse, and maybe I shouldn't even say this, but it's possible that if this is controversial enough it may prompt the Legislature to react to the rule, saying, "Well, we don't really want 18-year-old kids serving, you know, writs of attachment on human beings, so we're going to go ahead and adopt a law and establish an agency and have licensing just like everybody else," in which event maybe it would be salutary

to leave writs in there. On the other hand, you know, I can -- I mean, I have been around when there were some tense writs served for minor children in family law matters, and, you know, it could be a point of controversy.

So, anyway, I'm real happy with what's happened so far; and, Lisa, what is your perception? Have you been getting different signals from what I have talked about here?

MS. HOBBS: No. I think you covered all the rules -- all the major comments that we're getting, and the majority of them are in favor of the rule, and the ones that are against the rule concentrate on the writs part of the rule. So you provided a fair summary of the comments I've received.

MR. ORSINGER: Okay. There was one piece in

here that was critical. In our proposed -- we've authorized or we've recognized or acknowledged the legitimacy of I think two of these courses; isn't that right? Two of them. And, yeah, Houston Young Lawyers and Texas Process Servers Association. There was one e-mail in the packet that said that they went to one of these two, and it really was a two-hour course, not an eight-hour course, and it really was a bunch of war stories and not much law or procedure and that the test was really a joke.

MS. HOBBS: And, Richard, I got an e-mail in response to that yesterday that it has been clarified that he did not attend the TPSA course, and he has withdrawn his comment about that course.

MR. ORSINGER: Okay. Well, we might -- I mean, we might want to kind of keep an eye on the courses that have been identified to be sure that they're legitimate, but, you know, they do a good job of that in the driving classes. I have to go to those all the time, and they make you stay there and pay attention the whole time and take a test. If they can do that for that level of administration, we ought to be able to do it on this one. But --

MR. GILSTRAP: Will you have a comedy course?

MR. ORSINGER: Yeah, I've taken the comedy course, too, and it's not much better. I did it on the internet one time, and that was worse than going to class.

CHAIRMAN BABCOCK: Judge Lawrence has got a serious comment about your frivolity.

HONORABLE TOM LAWRENCE: Well, several questions. When we talked at the last meeting, did we talk about writs being in this or was that something that was added?

HONORABLE NATHAN HECHT: I don't recall. It was added. It was not in the recommendation that came before, but it was added.

HONORABLE TOM LAWRENCE: I've got a few calls on this issue of writs, and I was looking through the writ of attachment rule, distress warrant execution and garnishment, injunction and sequestration. It's kind of interesting. Some of them talk in terms of "the citation may be served in the same manner prescribed for citations," which I presume would be private process servers. Others use the term "sheriff or constable or officer" in determining what can be done under the writ. And are we saying or is the Court saying that a private process server can serve a writ of sequestration, garnishment?

HONORABLE NATHAN HECHT: Well, the proposed

rule would let you serve -- would let a private process server serve whatever process he could serve by court authorization as long as he followed these procedures, so if there were a statute limiting service to an officer with the idea that that were public officer then the answer would probably be "no."

HONORABLE TOM LAWRENCE: Well, for example, in the writ of attachment rule, the service of the citation, apparently Rule 598(a), says it can be served in the same manner prescribed for citation. Then you've got 597 that says "sheriff or constable" and then 604, 606, and 607 use the word "officer." "Officer will return" or whatnot. So it's a little -- but the question is going to

be, if I've got a writ of sequestration or an execution or a distress warrant, does that mean that the private process server can serve that and handle everything involved in that; or are we going to have the private process server serve it and then where it says "sheriff, constable, or officer," somebody not involved in the service is going to somehow get put into this process?

HONORABLE NATHAN HECHT: No, I think that identified a problem, as Richard did, that we're going to have to clarify either by ironing out those inconsistencies or taking "writs" out.

MR. ORSINGER: Well, you know, you could

take "writs" out of here and not damage much civil litigation. The writs, writs are usually where you're using the force of law against someone against their will. I mean, that's not always the case; but most writs are issued out because the court has made either a preliminary or a final decision that somebody is going to have to do something they don't want to do; and private process serving for the most part is just getting lawsuits going and getting stuff served that allows the litigation to move along; and so taking "writs" out probably wouldn't damage the benefit that we're accomplishing; and frankly, I can't imagine an 18-year-old woman trying to, you know, move a bunch of furniture out of a house when an FE&D has been granted or trying to arrest somebody and take them to jail. I don't even know if they can. Maybe you would

know better than I, but some of these writs I think that private process servers are going to refuse to do because they're just likely to get them shot or stabbed or hit.

HONORABLE TOM LAWRENCE: Well, if you talk to a constable or sheriff that does civil process they will tell you that the service of citation is relatively simple compared to service of writs, which is what they spend most of their time training on. I don't know that the private process servers spend any time training on writs of execution, distress warrants, writs of

sequestration or garnishment. I mean, this is not something that -- I don't think they receive any training on. I think if you took writs out that you would solve a big problem, and I'm presuming that when you say "writs," would that mean a writ of possession in a forcible? It would?

HONORABLE NATHAN HECHT: Yes, it would, but once again, I think we have to look at whether it wouldn't be simpler just to take "writs" out.

HONORABLE TOM LAWRENCE: Well, I think it -- I would recommend taking "writs" out, for the time being at least until this is studied a little more. I think it's going to be very problematic.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: First I want to say to Richard that I think you grossly underestimate what an

18-year-old woman can accomplish.

HONORABLE NATHAN HECHT: He deserved that.

HONORABLE JANE BLAND: But I do not think that the -- and Levi or Kent can correct me if I'm wrong, but I don't think that the district judges use private process servers to serve writs, and so I think we're better off taking it out and leaving it out. I had to make the second comment just so I could make the first.

CHAIRMAN BABCOCK: Anybody else have any

thoughts on that? Yeah, Jeff.

MR. BOYD: What is the source of what we're talking about now that allows these new individuals to serve writs? 103 as written doesn't do that. What am I missing?

MR. ORSINGER: The proposed rule does. You need to be looking at this. That piece of paper is really not the proposed Rule 103, and I don't know why.

MR. LOW: I thought I had everything.

MR. BOYD: So this --

MR. ORSINGER: I don't know what this is. This was a version of 103 that was sitting out there, and I don't think it's the proposed rule. I don't know where it came from. I had nothing to do with it.

MR. MUNZINGER: So could someone read it outloud? It's a relatively short sentence that we need to have read. It's not included in anybody's packet.

MR. ORSINGER: I can read it. "Process,

including" -- this is it. It's in the first phrase. "Process, including citation and other notices, writs, orders and other papers issued by the court may be served."

MR. BOYD: Now, has that been published?

MR. ORSINGER: This is effective February 1 unless the Supreme Court pulls it back.

MR. BOYD: And that's the version that was published, not this?

MR. ORSINGER: True. So the writs and orders part is something that's new. It's not in our current 103.

HONORABLE TOM LAWRENCE: Doesn't the Property Code specify sheriff or constable for writ of possession?

MR. ORSINGER: Well, I think that what Justice Hecht is saying is that the statute would trump the rule, but you know, why would we have a rule that's contrary to the statute?

HONORABLE TOM LAWRENCE: Well, the statute in the Property Code I believe says writs of possessions after evictions have to be sent to a sheriff or constable.

MR. ORSINGER: The current Rule 103 says "citation and other notices may be served," so adding "writs and orders" is to change the Texas practice because under the current rule, if you had a court order that

would permit you to serve, the order would be limited to citation.

HONORABLE TOM LAWRENCE: I understand. What I'm saying is this rule as amended with "writs" would be in conflict with the Legislature when they drafted the Property Code and said only sheriffs and constable can

serve a writ of possession. I think you've got a conflict there.

CHAIRMAN BABCOCK: Carl, then Frank.

MR. HAMILTON: I would take out "other papers" also if you're going to take out "writ."

MR. ORSINGER: Well, that raises another kind of -- "other papers issued by the court may be served by" and you've got three choices, sheriff or constable or someone authorized by law, someone pursuant to a court order, or a certified person. Some of these e-mails said, "Well, you could interpret that to mean that any notice of a setting."

We have one from a judge in Midland who reads the rule as exclusive and that, therefore, lawyers may be impaired from sending notice of hearing themselves because that's another order, order setting a hearing on a motion to, you know, compel or expand the number of interrogatories or whatever; and he expressed the concern that if we were satisfied with the language maybe we ought to clarify with a comment that we're not saying that notices of hearing have to be served by Category 1, 2, or

3 and that lawyers should still be able to serve notices through the Rules of Procedure. Now, the rules that permit service already may take care of that, but I think it's reasonable.

CHAIRMAN BABCOCK: Frank, then Jeff.

MR. GILSTRAP: Apparently allowing a private person to serve writs is problematic. I have this image of like the bounty hunter coming out and breaking in and taking somebody's computer, that type of thing. So is there any reason to allow private persons to serve writs? What are the advantages of it, if any?

MR. ORSINGER: I can't think of one. I mean, it seems to me like if you're going to use force, whether it's against property or a person, you just need to be a peace officer; you need to be trained; you need to be armed; you need to know what the limits of the Constitution are and --

MR. DUGGINS: Except if you had a common writ of injunction.

MR. GILSTRAP: Common writ of what?

MR. DUGGINS: An injunction. Just in a civil case. It doesn't involve seizing people or property, just the issuance of an injunction.

MR. GILSTRAP: More the nature of a service.

MR. DUGGINS: Yes. And if you're trying to find somebody, it's hard to get a constable or sheriff to

sit outside for hours and hours waiting on them. It is convenient to use a process server in that circumstance. I agree with everybody on the other circumstances.

MR. GILSTRAP: Why don't we just allow them to serve writs of injunction and that's it, or temporary restraining orders and that's it. That might be one approach.

MR. DUGGINS: I think we should consider carving that out because it's merely service of a court order, but you can't do it presently by a process server.

HONORABLE TOM LAWRENCE: You know, if you look at the writ of attachment, you've got different language used which is a little confusing, because Rule 598a says, "The defendant shall be served in any maner prescribed for service of citation" and then Rule 597 says, "The sheriff or constable receiving the writ shall," and then 604, 606, and 607 talk in terms of the officer making such sale. "The officer executing the writ of attachment," and so I'm not -- it's a little confusing, and then you -- so which rule would trump which rule?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, aren't we really talking about writs that require the server to take action against person or property? And the other writs, they don't do that, and anybody could serve, like a writ of injunction. He's not required to take action against a person or property, so wouldn't -- isn't it -- aren't those the

writs we're talking about that require action, that server

take action against the person or property, like physically take property?

CHAIRMAN BABCOCK: We're talking about taking them out, you mean?

MR. LOW: Pardon?

CHAIRMAN BABCOCK: Talking about taking them out?

MR. LOW: Right, taking them out, but then that would leave in the other like a writ of injunction, you just serve or a notice and so forth, and it sounds like to me the only ones we're worrying about is where the server must take physical action against a person or property.

CHAIRMAN BABCOCK: Or the Property Code, if the Property Code requires --

MR. LOW: Yeah.

HONORABLE TOM LAWRENCE: I don't have my Property Code, but I believe it says "sheriff or constable" for writ of possession.

MR. ORSINGER: You could say "and other notices," comma, "and where by permitted by law, writs, orders, and other papers" so that we automatically make the rule subordinate to the statute.

MR. LOW: I know, but how does that take care of a writ of injunction?

MR. ORSINGER: Well, maybe we should say "where not prohibited by law." I mean, we've got some provisions there that really seem to require a peace officer, a certain writ, and others like a writ of injunction there's no requirement that that be served by a peace officer, so we might be able to just --

HONORABLE TOM LAWRENCE: No, in the writ of injunction you've got Rule 686 that says "serve like citation." 688 uses the term "sheriff or constable," and 689 uses the term "officer."

MR. ORSINGER: 688 is for temporary injunctions or permanent injunctions?

HONORABLE TOM LAWRENCE: Let me look.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: There's another problem. I mean, this term "writ" is extremely vague. I mean, what about writ of certiori? What about a writ of prohibition or a writ of mandamus? I mean, those are all writs, which is kind of a vague term meaning an order issuing from the court, kind of; and before we just stick in that vague term we might want to scrutinize exactly what we're allowing to be done; and maybe we need to limit it -- I mean, I like Buddy's idea, something along those lines, something that requires something more than just handing somebody a piece of paper.

CHAIRMAN BABCOCK: Elaine.

MR. LOW: You could put in there "except as provided" -- "where contrary by law" or something like that, and if the Property Code requires something, well, then it wouldn't be inconsistent.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I disfavor including writs at all and the proposed Rule 103.

MS. SWEENEY: You just favor or you disfavor?

PROFESSOR CARLSON: Disfavor.

CHAIRMAN BABCOCK: Not in favor.

PROFESSOR CARLSON: Not in favor.

MR. ORSINGER: She's against.

PROFESSOR CARLSON: I'm against. And in response to Judge Lawrence I think that the reason that the rules sometimes refer to sheriff or constable, other times officer, other times "as prescribed by the rules of citation," these rules were principally promulgated before Rule 103 was amended to allow the court to authorize a private person to serve, and I just don't think we went back and looked at that in terms of who was serving those writs.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: The new proposed rule adds what I

think was intended to be a solution to the question that was raised at our last meeting, and that's that any person certified by order of the Supreme Court can serve. Is there a proposed order of the Supreme Court already? And is that in our materials?

MS. HOBBS: It's over there on the --

MR. BOYD: What I'm wondering is maybe the order of the Supreme Court should just say these persons can serve citation only but not writs and other papers.

MR. ORSINGER: Well, that doesn't fix the problem that people under subdivision (2), who are also 18-year-old women, will be doing it under subdivision (2) instead of subdivision (3).

MR. BOYD: But that problem has existed for a long time if that's a problem, because the rules on attachment and distress warrants and all those say that they can be served by anybody authorized to serve citation, and Rule 103 has for sometime allowed them any person authorized by law or written order of the court who is not less than 18 years of age to serve citation.

I mean, as I recall, we got into this just because of the idea that serving citation didn't always have to be a constable and if we could set it up in a way to allow other people to serve citation, and we decided to solve that -- address that issue by saying we'll allow

people authorized by a Supreme Court order to do so. So the Supreme Court order could just say, "We hereby order that the following people can serve citation but not writs or other papers."

MR. ORSINGER: Well, the existing practice before this effective rule for persons authorized by written order only applies to citation and other notices, so the insertion of "writs and orders" is a change on the previous practice.

MR. BOYD: No, because if you look at the rules on service of a writ of attachment or distress warrant or others, it says those can be served by anybody authorized to serve citation, which takes you back to this rule to say any person.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, that's right. It does allow the service of a writ, but virtually everything else other than the actual service of the writ has to be done by a sheriff, constable, or officer. So as a practical matter a private process server could serve it, but they're not going to send that over to the sheriff or constable, who are not going to have anything to do with that if they didn't serve it. So while it's theoretically possible for a private process server to serve the writ of attachment, he can't do anything else.

Everything else involved in that writ has to be a sheriff

or constable or officer.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: Well, I think that the concept of private process serving was always just intended, wasn't it, for citations to facilitate the service of citations and subpoenas, perhaps; but if we exexpand to it writs, as Tom points out, how is that person going to care for and take care of property that's sequestered or something like that? They don't have any ability to do that.

CHAIRMAN BABCOCK: Why was "writs" inserted later?

HONORABLE NATHAN HECHT: There was some suggestion that it should be because it was as -- as has been pointed out by a couple of people, sometimes it's hard to serve injunctions on people, it's hard to catch them, same problem that you have with serving citation.

MR. ORSINGER: TROs particularly.

HONORABLE NATHAN HECHT: TROs.

MR. ORSINGER: They can duck a TRO for days.

HONORABLE NATHAN HECHT: And that that's one of the reasons that private process servers are so welcome by the Bar, is because they have a profit incentive to get the job done as opposed to the sheriff or constable who

may or may not act, because, in all fairness, they've got lots of other things to do; and so -- and, frankly, to get comments like we've gotten and we're talking about now to

see if this is really a good idea or a bad idea.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Wouldn't the problem be solved by simply allowing private process servers to serve citation or notice? I mean, you're never served with a writ of injunction. You're served with a notice of a temporary injunction, I believe. You're not served with a TRO. You're served with a notice of a TRO. Is that correct?

MR. DUGGINS: No, it's a writ.

MR. ORSINGER: There actually is a piece of process. Even though what the judge signs is called a temporary restraining order, it's really an order directed to the clerk of the court to issue a temporary restraining order, which is a piece of process.

MR. GILSTRAP: I thought you got a notice.

MR. ORSINGER: You have a notice of the hearing. If you get a TRO you typically get a hearing at the temporary injunction hearing, and that notice is with the TRO, and you have to serve not only a temporary restraining order signed by the clerk of the court, but you have a notice of the temporary hearing signed by the

clerk of the court, two separate pieces of process resulting from one combined order signed by the judge, and most people confuse the TRO, "I got a TRO signed by the judge." They got an order for the issuance signed by the

judge.

HONORABLE NATHAN HECHT: And covered by Rule 687.

MR. GILSTRAP: I'm wrong.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: But even with TROs and injunction, I think before you subject a citizen to contempt or the potentiality for contempt that it should be served by an officer, not by a process server.

CHAIRMAN BABCOCK: Why?

PROFESSOR CARLSON: I think not only because of the training of those folks, I think the ramifications. Maybe someone won't take it real seriously if -- well, Richard is not, if an 18-year-old girl -- apparently he's not paying attention.

HONORABLE JANE BLAND: I'm listening, and I made my comment.

CHAIRMAN BABCOCK: Yeah, but we can run with this all day.

PROFESSOR CARLSON: We've only just begun.

CHAIRMAN BABCOCK: Yeah, in light of

Richard's recent experience with an 18-year-old girl.

PROFESSOR CARLSON: I just think there is something about --

MR. ORSINGER: Which is none, I might add.

CHAIRMAN BABCOCK: Yes, Carl.

MR. HAMILTON: Rule 103 specified citations

and other notices, so it wouldn't be a big problem just to list under the new rule exactly what these people could serve. Not very many things, but just list them.

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: But some of the private process servers are better trained than the constables. We had a constable in my little county that couldn't read and write. I mean, he wasn't going to school. That is the absolute truth and --

CHAIRMAN BABCOCK: But when he served an injunction people stood up and took notice.

MR. GILSTRAP: But he does have a badge. He does have a badge.

MR. LOW: That's right. And, I don't know, we've come a long way now because in my county a lot of people can read and write. I'm not certain about some of those other counties.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: You know, probably 99.9

percent of the TROs are family law TROs. I mean --

CHAIRMAN BABCOCK: 60 percent of the cases, 99 percent of the TROs.

MR. ORSINGER: I know there are TROs in family law constantly. I don't see it that often now that the foreclosure craze is over, but we definitely would need to perpetuate private process servers for TROs in

family law matters, because, you know, you frequently have people that are avoiding service there; and you can't get a constable or sheriff's deputy to stake somebody out for eight hours, so we have to be sure we can keep that process alive.

CHAIRMAN BABCOCK: Okay.

MR. DUGGINS: It's a real problem, too, in trying to prevent somebody from taking businesses where the small business owners are fighting over the breakup of a business, and somebody is trying to grab or hide records. I mean, I think we do need to allow it in those limited circumstances because you cannot get a constable or sheriff to hide out and find this person and get them served.

MR. ORSINGER: And they won't do clever things like pretend like they're delivering flowers, you know, or be carrying a file that looks like a business file and you open it up and it's got the process inside.

Peace officers are not that --

MR. DUGGINS: Pizza delivery.

MR. ORSINGER: Yeah. There's a lot of tricks of the trade.

CHAIRMAN BABCOCK: Okay. Any other comments? Richard, anything else to say, last word?

MR. ORSINGER: (Nods negatively.)

CHAIRMAN BABCOCK: Okay. Does this give you a sense of --

HONORABLE NATHAN HECHT: Very helpful. Yes. Very helpful. Thank you.

CHAIRMAN BABCOCK: All right. Great. Paula is here on Item 5, the electronic jury shuffling.

MS. SWEENEY: You-all have a one-pager in your stack on this, which is a letter from Judge Christopher to Justice Hecht about Rule 223 of Rules of Civil Procedure, which is the jury shuffle rule; and her proposal is that when a lawyer wants a shuffle, that instead of shuffling manually the clerk be able to shuffle in the computer, rerandomize the jury cards and produce a now shuffled list without the time delay and so on of having the panel sitting around in the hall while the cards are manually shuffled. I've heard no other comment from any other group or comment on this. I personally think it's a great idea and would commend it to you and

would open the floor to comment for anybody that wants to say anything about it.

MR. ORSINGER: I don't know, Paula probably hasn't tried as many cases in South Texas as I have, but --

CHAIRMAN BABCOCK: Family cases.

MR. ORSINGER: Family law cases. If I'm in a hostile county where the opposing lawyer is very well positioned at the courthouse, I want to be able to watch the jury shuffle, and I've tried to watch it, and I think

Anna Romero

From: Christopher, Judge Tracy (DCA) [Tracy_Christopher@Justex.net]
Sent: Friday, April 27, 2007 10:45 AM
To: Ann Arnold
Subject: FW: revised "lawyers are great" text

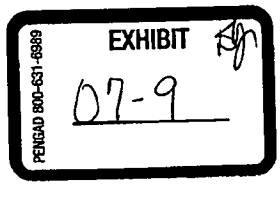
anna

From: Wayne Schiess [mailto:WSchiess@law.utexas.edu]
Sent: Thu 4/26/2007 9:50 AM
To: Christopher, Judge Tracy (DCA); Alexandra Albright
Subject: revised "lawyers are great" text

Alex,

Perhaps your notes from the oversight committee meeting are better than mine. If so, please send them along. But for now, here is my re-draft of the "lawyers are great" section, shorter and somewhat simpler:

The reason we are having a trial is that the parties disagree. This trial will be the process we use to resolve the disagreement. In a trial, the parties have lawyers who represent them. The lawyers owe a high degree of duty and dedication to their clients, and in representing their clients, the lawyers will present witnesses, make objections, and make arguments to you. Through this process you will see and hear the evidence. The lawyers' work will help you do your job and make a decision after you have heard all of the evidence in the case.



4/25 Redraft Christopher/Dawson
13-2 against any language
13-1 for shorter version if we have it

Those who are selected as jurors in this case will resolve the dispute between the parties by deciding the facts in the case.

In order for a juror to perform his or her job, the attorneys play an important role. Our jury trial is sometimes called an adversarial process. Each lawyer represents their clients and acts as their advocates. Lawyers will vigorously present their claims and defenses to you the jury. The lawyers will ask you questions during jury selection. Once the trial starts, the lawyers will present witnesses, make objections and make arguments to you. You will see and hear the evidence, through this process. Each attorney involved in this case owes a high degree of duty and dedication to their client. It is the responsibility of each attorney to present to you the relevant evidence that is most favorable to their client. It is necessary that we operate this way so that you can do your job and make your decision after you have heard all of the evidence in the case.

As the judge I will manage the trial. I rule on legal objections and give you the law that you need to decide the case.

When the attorneys, the judge and the jury carry out their respective duties faithfully, our adversary system of justice will work as it was designed and as it has worked well for over 200 years as a way to find the true facts in a case. Each of us, you the jury, the lawyers, and me, the judge play an important part in this great system that is guaranteed by our constitution.

RULE 904. AFFIDAVIT CONCERNING 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 person in charge 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 physical address of the affiant who is the provider who rendered the service.

(2) Filing and service of affidavit.

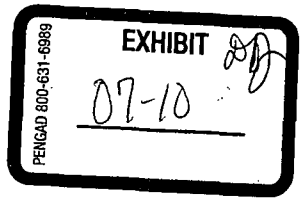
(A) A copy of the affidavit must be served upon each party to the case and the affidavit must be filed with the clerk of the court at least 60 days before the date on which evidence is first presented at the trial of the case.

(3) A person actually providing the service who signs the affidavit must be timely disclosed in response to proper discovery request.

(c) 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 and is sufficient 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 initial 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 physical address of the counter-affiant.

(2) Filing and service of counter-affidavit.

(A) A copy of the counter-affidavit must be served upon each party to the case and filed with the clerk of the court within 30 days after the date the affidavit is served, or with leave of the court, at any time before the date on which trial testimony is first given.

(d) This rule does not affect the admissibility of other evidence concerning reasonableness of the amount charged and necessity of services, except that an opponent of an affidavit may not contest reasonableness of the amount charged and necessity of services unless the opponent:

(1) files a counter-affidavit; or

(2) has specifically disclosed a testifying expert as to the specific issue in question who has given deposition testimony on the matter or for whom a report has been provided to each party to the case which includes the information required by (c)(1) (B-D).

(e) In the event an affidavit and/or counter-affidavit is filed within the time period permitted in this rule, but at a time that would not otherwise reasonably permit discovery of an affiant or counter-affiant, then only in that event, the party adversely affected may nevertheless take and use the deposition of, and/or subpoena for trial, the affiant or counter-affiant.

(f) By motion or objection of a party or on its own motion the trial court shall strike any portion of an affidavit or counter-affidavit that attempts to include language of causation, liability, or otherwise makes assertion beyond the scope of this rule prior to its submission to the fact finder. An objection to strike a part of an affidavit concerning reasonableness of the amount charged and necessity of services does not affect the admissibility of the remainder of the affidavit.

(g) This rule supersedes any Rule of Evidence, Rule of Procedure, Statute (including TEX. CIV. PRAC. & REM. CODE 18.001 *et seq.*), or Code that is inconsistent with this Rule. *See* TEX. GOV. CODE, §22.004.

(h) **PROPOSED FORMS OF AFFIDAVIT**

(1) An affidavit concerning reasonableness of the amount charged and necessity of services of the person who provided the service is sufficient if it substantially follows the following form:

AFFIDAVIT OF SERVICE PROVIDER

No. _____

John Doe § IN THE _____

(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____COUNTY, TEXAS
John Roe	§	
(Name of Defendant)	§	

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

My name and physical address are __(NAME AND PHYSICAL ADDRESS OF AFFIANT). I am of sound mind and capable of making this affidavit which is based upon my personal knowledge and is true and correct.

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 as Exhibit A and contains _____ pages.

I am the person who provided the service for ____(NAME OF BILLING HEALTH CARE PROVIDER)__ (later referred to as the "Service Provider"). Attached hereto are records from the Service provider. These records are kept by the Service Provider in the regular course of business of the Service Provider, and it was the regular course of business of the Service Provider for an employee or representative of the Service Provider, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

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 _____, 20__.

My commission expires:
_____

_____
Notary Public - State of Texas
Printed Name of Notary: _____

(2) An affidavit concerning reasonableness of the amount charged 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 substantially follows the following form:

AFFIDAVIT BY CUSTODIAN OF RECORDS

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	COURT IN AND FOR
v.	§	_____COUNTY, TEXAS

John Roe	§
(Name of Defendant)	§

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

I am of sound mind and legally capable of making this affidavit which is based upon my personal knowledge and is true and correct.

I am the person in charge of records for the person(s) who provided the service (NAME OF BILLING HEALTH CARE PROVIDER) (later referred to as the "Service Provider"). Attached hereto are _____ pages of records from the Service provider. These said _____ pages of records are kept by the Service Provider in the regular course of business of the Service Provider, and it was the regular course of business of the Service Provider for an employee or representative of the Service Provider, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

The service provided was necessary and the amount that was 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 _____, 20__.

My commission expires:
_____

_____
Notary Public - State of Texas
Printed Name of Notary: _____

(3) A counter-affidavit to rebut reasonableness of the amount of charges made and necessity of service(s) by a competent person (provided by this Rule) is sufficient if it substantially follows the following form:

COUNTER-AFFIDAVIT

No. _____

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

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

My name is (NAME OF COUNTER-AFFIANT). I am of sound mind and capable of making this affidavit which is based upon my personal knowledge and is true and correct. A true and correct copy of my curriculum vitae is attached as Exhibit A which contains my address and telephone number.

On (DATE), I reviewed the records of (NAME OF AFFIANT IN AFFIDAVIT BEING CONTROVERTED) pertaining to (NAME OF PERSON RECEIVING SERVICE) which were attached to the Service Provider's affidavit. I am qualified by knowledge, skill, experience, training, education, and other expertise to testify in opposition to the matters contained in the affidavit because _____. I specifically take exception to the necessity of services rendered and/or the reasonableness of the amount of charges made because _____ _____. (NOTE: Be specific as to which particular services were not necessary and why and/or which amounts charged were not reasonable.)

Based upon the foregoing, I do not believe the addressed services rendered were and/or the amounts charged were reasonable at the time and place that the service was provided.

_____
Counter-Affiant

SWORN TO AND SUBSCRIBED before me on the ____ day of _____, 20__.

My commission expires:
_____

_____
Notary Public - State of Texas
Printed Name of Notary: _____

Comment: This rule is a change in the law. *See CPRC 18.001 and 18.002.* Under this rule each affidavit, whether controverted or not, is sufficient to raise an issue of fact on the reasonableness of amounts charged and the necessity of the services which are the subject of the affidavit. If an affidavit is controverted by a counter-affidavit, the parties may present additional evidence on the controverted subject, as may be permitted by the Court and in compliance with the scheduling order, if any.

This rule only addresses reasonableness of amounts charged and the necessity of services; it does not address other issues. If brought to the Court's attention, it should strike any portion of an affidavit or counter-affidavit that is beyond the scope of this rule.

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."