By: Wentworth S.B. No. 445

A BILL TO BE ENTITLED

AN ACT

relating to juror questions and juror note-taking during civil trials.

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

SECTION 1. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 25 to read as follows:

CHAPTER 25. CIVIL JURY TRIAL PROCEDURES

Sec. 25.001. SUPREME COURT TO MAKE RULES. The supreme court shall promulgate rules relating to jury procedures for civil trials in this state in accordance with the guidelines provided by this chapter.

Sec. 25.002. SUBMISSION OF WRITTEN QUESTIONS. (a) The rules promulgated by the supreme court must require a court to permit jurors in a civil trial to submit to the court written questions directed to a witness or to the court as provided by this section.

(b) The rules must provide that:

(1) juror questions must be submitted anonymously and before jury deliberations begin;

(2) counsel for each party will be given an opportunity, out of the presence of the jury and witnesses, to object to the questions;

(3) juror questions are required to be read by the court verbatim;

(4) a witness may be recalled to the stand to answer a juror question;

(5) juror questions will be answered orally in open court and made part of the record;

(6) counsel for each party will be given an opportunity to cross-examine witnesses after a juror question; and

(7) the court may, for good cause, prohibit or limit the submission of questions to witnesses.

Sec. 25.003. NOTE-TAKING BY JURORS. (a) The rules promulgated by the supreme court must allow jurors in a civil trial to take notes regarding the evidence during trial.

(b) The rules must provide that:

(1) the court is required to provide materials to jurors for note-taking;

(2) a juror is required to turn in the notes to the bailiff at the end of each day of court;

(3) after closing arguments are presented, the bailiff or clerk is required to collect and destroy the notes; and

(4) the notes are confidential and may not be included in the record of the trial.

(c) Notes taken by a juror during trial, as provided by this section, may not be taken by the juror into the jury room.

SECTION 2. Chapter 25, Civil Practice and Remedies Code, as added by this Act, applies to a case in which a jury is sworn on or after the effective date of this Act, without regard to whether the case commenced before, on, or after that date.

SECTION 3. This Act takes effect September 1, 2009.

Revised Order Following Texas Rule of Civil Procedure 226a
-February 19, 2009-

Approved Instructions

* * *

[Prefatory Order Language]

I.

That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors after they have been sworn as provided in Rule 226 and before the voir dire examination:

Members of the Jury Panel [or Ladies and Gentlemen of the Jury Panel]:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all mobile phones and other electronic devices. Do not communicate with anyone electronically while you are in the courtroom. [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

Here is some background about this case. This is a civil case~~, which means~~. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection, which we call voir dire. But before we begin voir dire, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions:

1. To avoid looking like you are friendly with one side of the case, ~~D~~do not mingle or talk with the lawyers, ~~the~~ witnesses, ~~the~~ parties, or anyone else involved in the case~~ to avoid looking like you are friendly with one side of the case~~. You ~~can~~may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these

instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, ~~the~~ witnesses, ~~the~~ parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now. Then we will begin voir dire.

~~The lawyers will now begin asking questions.~~

II.

That the following oral and written instructions, with such modifications as the circumstances of the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:

Members of the Jury [or Ladies and Gentlemen]:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all mobile phones and other electronic devices. Do not communicate with anyone electronically while you are in the courtroom or while you are deliberating ~~during court proceedings~~. [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, d~~D~~o not mingle or talk with the lawyers, ~~the~~ witnesses, ~~the~~ parties, or anyone else involved in the case ~~to avoid looking like you are friendly with one side of the case~~. You ~~can~~may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, ~~the~~ witnesses, ~~the~~ parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not talk about the case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. ~~Do not inspect places or items from this case unless they are presented as evidence in court. Do not let anyone do those things for you. This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it.~~ For example:

a. Do not try to get information about the case, ~~the~~ lawyers, ~~the~~ witnesses, ~~or the~~ issues from outside this courtroom.
b. Do not go to places mentioned in the case to inspect the places.
c. Do not inspect items mentioned in this case unless they are presented as evidence in court.
d. Do not try to learn more about the case by looking things up in law books, dictionaries, or public records.
e. Do not try to learn more about the case by looking things up on the Internet.
f. And do not let anyone else do any of these things for you.

This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it.

7. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not presented in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess ~~about insurance or who might be~~ whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. Do not show or read your notes to anyone, including other jurors.

You may take your notes back into the jury room and consult them during deliberations. But your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken

notes.

You must leave your notes in the courtroom or with the bailiff. The bailiff will keep your notes in a safe, secure location and will not allow them to be disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are discharged, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you ~~would~~ will be guilty of juror misconduct and I may have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

III.

COURT'S CHARGE

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions, with such modifications as the circumstances of the particular case may require:

Members of the Jury [or Ladies & Gentlemen of the Jury]:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your mobile phone or any other electronic devices during your deliberations.

Any notes you have taken are for your own personal use, ~~and~~ You may take your notes ~~be taken~~ back into the jury room and consulted ~~by you~~ them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely upon your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will keep your notes in a safe, secure location and will not allow them to be disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are discharged, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not presented in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the

meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise:]. Whenever a question requires an answer other than "yes" or "no", your answer must be based on a preponderance of the evidence [unless you are told otherwise:].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least 10 of the 12 [5 of the 6] jurors. The same 10 [5] jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 [5] jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. ~~It is also possible that you might be held in contempt or punished in some other way.~~ If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions and special instructions given to the jury will be transcribed here.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to

do is choose a presiding juror.

2. The presiding juror has these duties:

a. Have the complete charge read aloud if it will be helpful to your deliberations.
b. Preside over your deliberations. This means the presiding juror will manage the discussions, and see that you follow these instructions.
c. Give written questions or comments to the bailiff who will give them to the judge.
d. Write down the answers you agree on.
e. Get the signatures for the verdict certificate.
f. Notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of 10 [5] jurors. The same 10 [5] jurors must agree on every answer in the charge. This means you ~~can~~may not have one group of 10 [5] jurors agree on one answer and a different group of 10 [5] jurors agree on another answer.

2. If 10 [5] jurors agree on every answer, those 10 [5] jurors sign the verdict.

If 11 jurors agree on every answer, those 11 jurors sign the verdict.

If all 12 [6] of you agree on every answer, you are unanimous ~~(all 12 of you agree on every answer)~~ and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 [6] of you agreeing on some answers, while only 10 [5] or 11 of you agree on other answers. But when you sign the verdict, only those 10 [5] who agree on every answer will sign the verdict.

4. [added if the charge requires some unanimity] There are some special instructions before Questions _____ explaining ~~as to~~ how to answer ~~the~~ those questions. Please follow those instructions. If all 12 [6] of you ~~unanimously~~ answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____
Judge Presiding

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve [six] of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 [6] of us.

_____ _____
Signature of Presiding Juror Printed nName of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten [Five] of us have agreed to each and every answer and have signed the certificate below.

	SIGNATURE	NAME PRINTED
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

If you have answered Question No. _____ [the exemplary damages amount], then you must sign this certificate also.

Additional Certificate
[used when some questions require unanimous answers]

I certify that the jury was unanimous in answering the following questions. All 12 [6] of us agreed to each of the answers. The presiding juror has signed the certificate for all 12 [6] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____
Signature of Presiding Juror Printed nName of Presiding Juror

IV.

That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged:

Thank you for your verdict.

I have told you that the only time you ~~can~~may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you ~~can~~may discuss the case with anyone. But you ~~can~~may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others ~~can~~may ask you questions to see if the jury followed the instructions, and they ~~can~~may ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement ~~if you want~~. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

Draft Rule 265.1 Juror Questions

(a) *Discretion of Trial Court.* On its own initiative or upon a party's written motion, the trial court in its discretion may allow jurors to submit written questions to the witnesses.

(b) *Procedure for Juror Questions.*

(1) Before voir dire, the trial court must inform parties if juror questions will be allowed.

(2) If juror questions will be allowed:

a. The trial court must read all of the following instructions to the jury after the jury is seated, and may repeat any or all of these instructions to remind the jury of its role:

In this trial, after the parties have asked their own questions of each witness, you can write and submit any questions you have for that witness. Any questions you submit should be to clarify the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally, and do not assume it is important that I decided not to ask your question.

You must treat your questions and their answers the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another juror. That is because of my overall instruction that you must not discuss the case among yourselves until you have heard my final

instructions on the law, and I have instructed you to begin your deliberations.

b. The trial court must provide the jurors with the following form and instruct them to write any questions for the witness on this form:

Juror Question Form

You may submit one or more questions for the witness to help clarify any confusion about the witness's testimony. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone, and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form. After the parties have asked their own questions of each witness, the judge will tell you to pass the form to the bailiff. The bailiff will give the form to the judge, who will review all your questions with the parties privately. Remember that the judge will apply the same rules to your questions that the judge applies to the parties' questions. As a result, some questions may be changed or rephrased, and others may not be asked at all.

You must treat your questions and their answers the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

_____

_____

_____

_____

_____

_____

(3) Upon receipt of a written question from the jury, the trial court must allow the parties to read the question and to make objections to the question on the record and outside the jury's hearing. [On its own initiative or upon a party's request, the trial court may

remove the witness from the courtroom before allowing the parties to read or object to the question.][1]

(4) The trial court must rule on any objection to the question. In its discretion, the trial court may re-word the question or decide not to ask the question at all.

(5) If the trial court re-words the question, the trial court must read the re-worded question, allow the parties to make objections to the re-worded question on the record, and rule on any objection to the re-worded question.

(6) If the trial court asks the witness a verbatim or re-worded question from the jury, the parties will be allowed to ask any follow-up questions.

(7) The trial court must include any submitted juror-question form in the record.

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[1] Senate Bill 445 provides that a court must hear objections "out of the presence of the jury *and witnesses*." Tex. S.B. 445, 81st Leg., R.S. (2009) (emphasis added). This is consistent with two opinions in which courts of appeals concluded that juror questions are permissible with appropriate safeguards, such as excusing the jury *and witness* while the court determines the admissibility of the question. *See Hudson v. Markum*, 948 S.W.2d 1, 1-3 (Tex. App.—Dallas 1997, pet. denied); *Fazzino v. Guido*, 836 S.W.2d 271, 275 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (emphasis added).

Judge Tracy Christopher indicated that there is no need to excuse a witness who is already privy to many other things said outside the jury's hearing. She also noted that even if there is a need to excuse the witness, a judge already has discretion to do so and thus, does not need explicit authority in this rule. Justice Kent Sullivan commented that the boundaries of judicial discretion and available procedural alternatives should be as transparent as possible to all people who will follow this new, essentially foreign procedure. For that reason, he suggested including the bracketed provision explicitly allowing the judge to excuse the witness.

Report to SCAC on Jury Innovations

Judge Tracy Christopher, 295th District Court

Nov. 21-22, 2008

We have been asked to review several jury innovations for civil cases. Several other committees and task forces have also looked at these issues. I have done a short survey of trial judges[1] to get their feelings on the issues, reviewed the ABA and National Center for State Courts publications, made a review of some of the other states instructions[2] and included some cursory legal research too.

1. **Note Taking**

A. SB 1300[3]

SB 1300 calls for a mandatory instruction to the jury that they make take notes and use them during deliberations to refresh their memories. The court is to provide materials for note taking and is to destroy the notes at the end of the day. The notes may not be used on appeal or for any other reason.

B. Senate Jurisprudence Committee

The Senate Jurisprudence Committee's Interim Report calls for juror note taking during civil trials but prohibit juror notes during deliberations. The court would keep all notes confidential and destroy them after the verdict.

C. PJC Oversight

Recommended that 226a include an instruction to the jury on taking notes to make it clear that note taking is permissible in civil cases. The previous PJC instruction was changed to delete the sentence "Your personal recollection of the evidence takes precedence over any notes you have taken."

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[1] Using the Texas Center for the Judiciary, I sent an email to all district judges that tried civil cases. I received over 100 responses with many responses coming from smaller counties. In fact, the more urban counties are underrepresented. I have a separate compilation of all responses but will summarize the results in this report.

[2] In 2007, my law clerk, Daniel Wilson, gathered the pattern jury charge basic instructions from a number of states: Alabama, California, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee and Virginia. I have not updated his research, nor should anyone consider it definitive research for each state.

[3] I am using the version of SB 1300 that was distributed to everyone. I understand there may be some changes when it is next proposed.

D. SCAC discussions

Recommended some restrictions on the use of notes during deliberations and decided to remain silent on the issue of what to do with the notes after trial.

E. State Bar Committee on Jury Service

Drafting a juror bill of rights that would include the right to take notes in the trial judge's discretion, incorporating some of the *Price* elements (see below).

F. State Bar Court Administration Task Force

The Task Force recommended that the Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, juror note-taking.

G. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports juror note taking with the decision left to the sound discretion of the trial judge.

H. Texas Judicial Council TJC

Its draft resolution supports juror note taking in the discretion of the trial judge with appropriate safeguards. (Vote scheduled for Dec. meeting)

I. Trial Judges Survey

The vast[4] majority of trial judges surveyed already allow juror note taking in civil trials. The vast majority do not allow jurors to show their notes to others during deliberations. A few do not allow notes back into the jury room during deliberations. A solid[5] majority have the policy of note destruction at the end of trial.

J. ABA, National Center for State Courts (NCSC) and other States

The ABA *Principles for Juries and Jury Trials* (August 2005) mandates that jurors be told that they may take notes, be given appropriate instructions about the use of notes and destroy the notes at the end of trial. Juror note taking should be encouraged because it enhances recall of the evidence.

The NCSC *Jury Trial Innovations* (Second Edition 2006) outlines the pros and cons of juror note taking and identifies as the only con that jurors who take notes may participate more effectively in jury deliberations that those who do not. The pros include: aids memory, encourages more

[4] A vast majority is in the 85% range. I am not giving the exact numbers as answers continue to come in.

[5] A solid majority is in the 60-65% range.

active participation in deliberation, decreases deliberation time, keeps jurors alert in trial, increases juror confidence and reduces the number of requests for read back portions of testimony.

The majority of other states surveyed indicated a right to take notes, with cautionary instructions and was about 50/50 on destruction of notes at the end of trial.

K. Texas case law on note taking

In *Price v. State*, 887 S.W. 2d 949 (Tex. Crim. App. 1994) the Texas Court of Criminal Appeals overturned previous case law that prohibited note taking in criminal cases and left note taking to the discretion of the trial judge in appropriate cases. It included a list of requirements that the trial judge had to meet before allowing note taking and approved instructions about note-taking. Here are the requirements: "*First,* determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at the trial. If the trial is to be relatively short and simple, the need for note-taking will be slight. On the other hand, if a long and complex trial is anticipated, note-taking could be extremely beneficial. *Second,* the trial judge should inform the parties, *prior to voir dire,* if the jurors will be permitted to take notes. If note-taking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes." *Id.* at 954

Here are the pre-trial instructions:

"1. Note taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.

2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.

3. Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

4. Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.

5. Your notes are for your own private use only. It is improper for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations."

Id. at 954-955

Here are the pre-deliberation instructions:

"You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case."

Id. at 955

The tone of the opinion was to discourage note-taking. "We note that trial judges who do *not* permit juror note-taking will eliminate review of the matter on appeal and probably save many hours of trial and appellate court time." *Id.* at 954.

In *Manges v. Willoughby*, 505 S.W 2d 379 (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.) the court held that juror note taking was probably not error and was harmless. Civil cases after *Manges* all found no error or harmless error.

L. Recommendation

The SCAC is already vetting the changes to Rule 226a on note taking. Finalize the language submitted. This appears to be the appropriate rule to use. Should we tackle the issue of destruction of notes and use of notes for appellate issues? This issue could also tie into jury misconduct.

2. Questions by Jurors During Trial

A. SB 1300, PJC Oversight, State Bar Jury Service Committee

Silent on this issue.

B. Senate Jurisprudence Committee's Interim Report

The committee recommends allowing juror questions during civil trials by permitting anonymous written questions before deliberations. Counsel would object outside the presence of the jury and witnesses. After ruling on admissibility, judges could recall the jury and witnesses. Questions would be read verbatim and counsel would have the opportunity to cross-examine each witness.

C. State Bar Court Administration Task Force

The Task Force recommended that the Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, juror questions.

D. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports juror questions, in writing, with objections outside the presence of the jury, with the decision as to whether the procedure should be used to be left to the sound discretion of the trial judge.

E. Texas Judicial Council TJC

Its draft resolution supports juror questions in the discretion of the trial judge with appropriate safeguards. (Vote scheduled for Dec. meeting)

F. Trial Judges Survey

A few[6] trial judges already allow juror questions with limitations (some only with consent of the parties.) The questions must be in writing, the lawyers and judge review them and objections are made at the bench. A solid majority of the trial judges (with an opinion) felt juror questions were a bad idea but many did not have an opinion.

For those who thought it was a good idea or that they might consider it with safeguards, all agreed that the questions should be written, not shown to other jurors, with the lawyers having a right to object and perhaps having the court re-phrase the questions. The judge then asks the question with ability to follow-up by the lawyers if they wanted to. Some variations included the idea of just showing the notes to the lawyers and letting them decide whether to incorporate the

[6] Roughly 10%

ideas into their own questions. Some thought the lawyers ought to agree to the process before it is done and some thought the judge should have the discretion to say no questions at all.

For those who felt it was a bad idea, here are some of their objections: could create error; the lawyers should be the ones in charge of their case presentation; it causes the jurors to become advocates; it could lead to juror discussion before hearing all of the evidence; delay of the trial; you do learn what the jurors are thinking which can be a problem if they are thinking of inadmissible evidence (insurance, did he take a polygraph, income tax ramifications); it would unintentionally assist one side or the other; it would help the party with the burden of proof.

G. ABA, NCSC and other States

The ABA recommends that jurors be allowed to ask questions with the safeguards outlined above; written questions, opportunity to object outside the presence of the jury, with the court or the lawyers then asking the question. The rationales for this rule are that questions can materially advance the pursuit of truth and enhance juror satisfaction.

The NSCS reports that juror questions are most useful in complex cases and that the jury should be instructed to ask questions to clarify a witness's testimony if the testimony was confusing or complicated. Advantages include: the questions alert the lawyers when jurors do not understand and gives them an opportunity to correct the misunderstanding, will increase juror comprehension and keeps jurors engaged and alert. Disadvantages include: jurors may become advocates, jurors may interpret the court's failure to ask their question as an indication that the witness's testimony should be discounted; jurors may be offended if their questions are not asked; adds to trial length.

Eight states (of the ones that I reviewed) have pattern instructions for juror questions. There is an entire ALR on this issue. 31 ALR 3d 872 "The view has been expressed by some courts that the practice of jurors asking questions in open court during trial should be encouraged on the theory that it is of prime importance for jurors to obtain a fair comprehension of the issues and clarification of any facts which will promote a better understanding of the evidence. Other courts have taken the position that juror questioning should be discouraged, reasoning that laymen are not well qualified to conduct an examination and that a complaining counsel may be placed in the unreasonable tactical position of not being able to raise an objection for fear of alienating the questioning juror."

H. Federal case law

In *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993), the First Circuit held it was not plain error to allow juror questions where the case was complex, the defendant did not object, questions were put in writing and the jurors were told not all questions would be asked and the questions asked were bland and were designed to clarify testimony already given. The court stated that juror questions should be reserved for exceptional cases and should not be routine.

Other circuits have found no reversible error in juror questions with safeguards but all discourage

the routine use of questions: *States v. Lewin,* 900 F.2d 145 (8th Cir. 1990); *DeBededetto v. Goodyear Tire &Rubber Co.*, 754 F.2d 512 (4th Cir. 1985); *United States v. Callahan*, 588 F. 2d 1078 (5th Cir.) *cert denied*, 444 U.S. 826 (1979); *United States v. Collins*, 226 F. 3d 457(6th Cir. 2000)

In *United States v. Ajmal*, 67 F. 3d 12 (2nd Cir. 1995) the Second Circuit held that the trial judge abused his discretion in allowing juror questions in a routine drug case. The court conceded that the "practice of allowing juror questioning of witnesses is well entrenched in the common law and in American jurisprudence. Indeed, the courts of appeals have uniformly concluded that juror questioning is a permissible practice, the allowance of which is within a judge's discretion." *Id.* at 14. In this case the district court "encouraged juror questioning throughout the trial by asking the jurors at the end of each witness's testimony if they had any queries to pose. Not surprisingly, the jurors took extensive advantage of this opportunity to question witnesses, including [the defendant] himself. Such questioning tainted the trial process by promoting premature deliberation, allowing jurors to express positions through non-fact-clarifying questions, and altering the role of the jury from neutral fact-finder to inquisitor and advocate. Accordingly, the district court's solicitation of juror questioning absent a showing of extraordinary circumstances was an abuse of discretion." *Id.* at 15.

I. Texas case law

In *Morrison v State*, 845 S.W. 2d 882 (Tex. Crim. App.1992), the Court of Criminal Appeals held that it was per se harmful error to allow jurors to question witnesses.

The few civil cases on point have declined to follow the Court of Criminal Appeals. In *Fazzino v. Guido*, 836 S.W. 2d 271, 275 (Tex. App.-Houston [1st Dist.] 1991, writ denied), the Houston Court of Appeals concluded that juror questions, with appropriate safeguards, are permissible. Here were the steps:

1. After both lawyers had concluded their respective direct and cross-examination, the trial court asked the jurors for written questions.

2. The jury and witness left the courtroom while the admissibility of the question was determined.

3. The trial court read the question to both lawyers and they were given the opportunity to object to the questions.

4. The jury and witness were brought back into the courtroom and the admissible questions were read to the witness verbatim.

5. After the witness answered, both lawyers were allowed to ask follow-up questions limited to the subject matter of the juror's question.

The Dallas court of Appeals agreed. *Hudson v. Markum,* 948 S.W. 2d 1 (Tex. App.—Dallas 1997, pet denied)

J. Recommendation

Full discussion of this issue by the SCAC. Perhaps obtain names of lawyers who have participated in the trials with jury questions and get their opinions on the process. Perhaps talk to the few judges that have used the procedure. If supported by a majority draft a new rule on juror questions-could be Rule 265.1-with safeguards as outlined in the *Fazzino* case. Also should rule be discretionary with the court? At the request of either side? Only with agreement on both sides? Should jurors be instructed that questions should only be asked if the testimony needed to be clarified?

3. Interim Summation/Argument

A. SB 1300

SB 1300 provides that the court may, at the request of either party or on its own initiative, allow counsel to make interim summations after opening and before closing.

Note the use of the word "summation" in the statute which according to Black's Law Dictionary is equal to closing argument.

B. PJC Oversight and State Bar Committee on Jury Service

Silent on this issue.

C. State Bar Court Administration Task Force

The Task Force recommended that Supreme Court amend the rules of civil procedure to expressly allow in appropriate cases, interim statements by counsel.

Note the use of the word "statement" which is generally used in connection with opening statement-a preview of the evidence.

D. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Supports interim summation with the decision left to the sound discretion of the trial judge as to whether it is appropriate for the case.

E. Trial Judges Survey

I may have skewed the survey process by asking the judges about interim "argument" rather than statements. Argument more closely tracks the "summation" language in SB 1300. The judges, who have actually done it, liken it more to a summary of the evidence.

A few judges have allowed interim statements of some sort in long trials or when there was a long break between days of trial. Most judges felt it might be appropriate only in very long trials, where a break in the days of trial occurred or where the trial was bifurcated in some manner but doubted they would ever try a case that needed it. Many judges thought it would never be appropriate. A couple of judges thought it might be more useful to have essentially a progressive opening statement, especially with experts, where a lawyer might get 5 minutes to explain what this expert was going to talk about and why his testimony was important, rather than a summation.

Objections to the process included: inserting argument during the trial confuses the jury as to the difference between argument and evidence; allowing argument without knowledge of the charge is a waste of time for the jurors; jurors should listen to all of the evidence before someone tries to persuade them; even if the rule was to only summarize the evidence it will lead to "argument" and more chances for error; this will encourage the jurors to discuss the case before they have heard all of the evidence.

F. Other states

I did not survey other states on this issue. The Manuel for Complex Litigation, (Fourth) §12.34 (2004) recommends interim statements in complex cases as an aid to juries. "In a lengthy trial, it can be helpful if counsel can intermittently summarize the evidence that has been presented or can outline forthcoming evidence. Such statements may be scheduled periodically (for example, at the start of each trial week) or as the judge and counsel think appropriate, with each side allotted a fixed amount of time. Some judges, in patent and other scientifically complex cases, have permitted counsel to explain to the jury how the testimony of an expert will assist them in deciding an issue. Although such procedures are often described as "interim arguments," it may be more accurate to consider them "supplementary opening statements," since the purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case."

In *AcandS, Inc. v. Godwin*, 667 A.2d 116 (Md. 1995) the trial court allowed interim summaries but the summaries became argumentative leading to frequent mistrial motions. At one point the trial judge "punished" the plaintiffs and did not allow them interim argument due to their conduct. Ultimately because the court reversed the punitive damages finding, any error as to the nature of the summation was moot.

G. Texas law

In *Parker v. State,* 51 S.W 3d 719 (Tex. App.—Texarkana 2001), the court held that there is no right to interim argument in criminal cases but that the error was harmless in this case.

I have been unable to find any civil cases on point.

H. Recommendation

Full discussion of this issue with the SCAC-particularly the distinction between statements and argument. Perhaps further discussion with trial judges or lawyers that have used this procedure. If supported by a majority, draft rule could be placed in Rule 265. Should we include criteria for granting interim argument? Also should rule be discretionary with the court? At the request of either side? Only with agreement on both sides?

4. Juror Discussions about the evidence before deliberations

A. SB 1300

SB 1300 calls for jurors to be able to discuss the evidence before deliberations with all of the other jurors as long as they reserve judgment about the outcome of the case.

B. PJC Oversight

The committee did not recommend changing our current rule that prevents this. The new draft of 226a adds language explaining why we do not want jurors to do this.

C. SCAC discussions

We had a brief discussion about this rule, recognizing that we think many jurors already do this in secret. Consensus of the group was that we did not want to change the prohibition. No vote taken.

D. State Bar Committee on Jury Service and Task Force

No discussions about this.

E. The Texas Chapter of the American Board of Trial Advocates TEX-ABOTA

Does not support interim deliberation.

F. Trial Judges

Not surveyed on this point.

G. ABA, NCSC and other States

The ABA recommends that jurors in civil cases be allowed to discuss the evidence when all are present "as long as they reserve judgment about the outcome of the case." This rule recognizes jurors' natural desire to talk about their shared experience. The ABA cited several studies that indicated that these discussions did not lead to premature judgments by the jurors, enhanced juror understanding in complicated cases and decreased the amount of "fugitive" discussion that jurors had with family members.

The NCSC reports that this innovation has been extensively studied since Arizona started the practice in 1995. The studies indicate that it does not cause any pre-judgment of the case. The studies also showed that the innovation is best for longer, complex cases-there is no advantage in shorter trials.

Of the states I surveyed, only Indiana allowed early discussions. The rest followed Texas' procedure. Indiana's specific instruction is as follows:
"When you are in the jury room, you may discuss the evidence with your fellow jurors only when all of you are present, so long as you reserve judgment about the outcome of the case until your final deliberations begin. Until you reach a verdict, do not communicate about this case or your deliberations with anyone else."

As indicated above, Arizona also allows this procedure with this instruction: Do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of trial.

H. Texas law

In *Golden Eagle Archery, Inc. v. Jackson,* 24 S.W.3d 362 (Tex. 2000), the court clarified TRCP 327 and TRE 606 as to when testimony of jurors is admissible to show misconduct. Specifically the court held that statements that a juror made to another juror before deliberations were admissible to show juror misconduct but held that the statements in that case did not rise to reversible error. Statements made by jurors during deliberations continue to be inadmissible to show jury misconduct.

I. Recommendation

Any further discussion necessary? (Any modification of the discussion rule would also invoke the issues in TRCP 327 and TRE 606)

Summary of Note Taking Discussions at the SCAC
By: Judge Tracy Christopher
February 20-21, 2009

April 4, 2008 meeting, pages 16848-16906

We had a lengthy discussion of note taking at this meeting. There was a minority that did not want the jurors to be able to take their notes back into the jury room during deliberations. The minority's concerns were dealt with by suggesting certain language be added as to the use of notes during deliberations. We voted 29 to 4 to add a mandatory instruction in 226a to inform the jurors that they had the right to take notes during trial. We voted 30 to 0 that we should have language about note taking, both before the trial began, and in the jury charge itself. We had a shorter discussion on whether jurors should be allowed to take their notes home if they wanted to. We voted 21 to 13 to allow jurors to take their notes home if they wanted to do so.

September 5, 2008 meeting, pages 17338-17365

We had a shorter but spirited discussion on the use of notes in the jury room during deliberations. By a vote of 17 to 3, we voted to increase the restrictions on the use of notes in the jury room. By a vote of 13 to 6, we voted to include the restriction that a juror may not show or read his notes to other jurors during deliberations.

November 21, 2008, pages 17380-17443

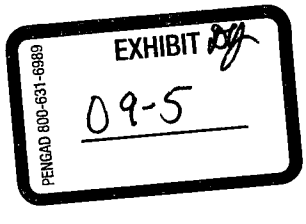
In connection with jury innovations, there were zero votes to re-open discussions on whether or not the jurors should be allowed to take their notes into the jury room for deliberations. We did have a long discussion on what to do with juror notes after the trial. We had 24 votes in favor of letting jurors take their notes home if they wanted to, but any remaining notes left at the courthouse would be destroyed. This vote was contingent on amending TRE 606 to make juror notes inadmissible evidence in connection with any inquiry into the validity of a jury verdict. We had 8 votes in favor of destroying all juror notes.

November 22, 2008, pages 17656-17696

The committee approved the revisions below for note taking instructions. We briefly discussed adding some language to the paragraph when the judge dismisses the jurors about taking notes home and lawyers asking for juror notes and decided to not revise that paragraph, although no vote was taken.

Revisions of 226a-to be read before trial begins (and in written instructions handed to the jury)

> During the trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not



take notes. Your notes are for your own personal use. Do not show or read your notes to anyone, including other jurors.

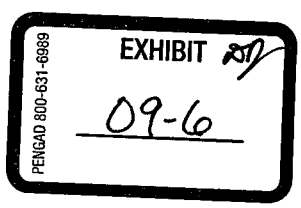
Revisions of 226a-to be read and written in the jury charge

Any notes you have taken are for your own personal use and may be taken back into the jury room and consulted by you during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely upon your independent recollection of the evidence and not be influenced by the fact that another juror has taken notes

Proposed Revisions to TRE 606
By Tracy Christopher
February 20-21, 2009

I know this was not referred to me to accomplish but in order to address concerns about juror note-taking, I propose the following language be added to TRE 606(b), as we voted in favor of this change in the November 2008, SCAC meeting.

(b) Inquiry into validity of verdict of indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during jury deliberations, or to the effect of anything in a juror's notes, or on any juror's mind, , or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit, a juror's notes, or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these reasons. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.



RULE 296. REQUESTS FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW [Revised]

(a) *Request for Findings and Conclusions*
In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request must be entitled "Request for Findings of Fact and Conclusions of Law" and filed with the clerk of the court within ten days after judgment is signed. The clerk must immediately call such request to the attention of the judge who tried the case. Each party making a request must serve it on all other parties in accordance with Rule 21a.

(b) *Duty to Make Findings and Conclusions*
If findings are properly requested, the judge must state findings of fact and conclusions of law on each ultimate issue raised by the pleadings and evidence. Unless otherwise required by law, findings of fact must be in broad form whenever feasible. The trial court's findings are to include only as much of the evidentiary facts as is necessary to disclose the basis for the court's decision.

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

RULE 297. TIME TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW [Revised]

The court must make and file its findings of fact and conclusions of law within thirty days after the date a final judgment is signed and promptly send a copy to each party.

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW [Revised]

(a) *Request for Additional or Amended Findings and Conclusions*
After the court makes and files original findings of fact and conclusions of law, any party may file a request for specified additional or amended findings or conclusions. The request for these findings must be made before the later of twenty days after the filing of the original findings and conclusions by the court or fifty days after the judgment is signed. Each party making a request must serve it on all other parties in accordance with Rule 21a.

(b) *Duty to Make Additional or Amended Findings and Conclusions*
The court must make and file any additional or amended findings and conclusions that are appropriate within the later of twenty days after such request is filed or seventy days after the judgment is signed, and promptly send a copy to each party. No findings or conclusions will be deemed or presumed by any failure of the court to make any additional findings or conclusions.

RULE 299. OMITTED FINDINGS AND PRESUMED FINDINGS
[Revised]

(a) *Basis of Judgment*
When findings of fact are filed by the trial court they must form the basis of the judgment on all grounds of recovery and of defense embraced therein.

(b) *Presumed Findings*
The judgment may not be supported on appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements necessarily referable to the ground, omitted unrequested elements, when supported by the evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested is reviewable on appeal.

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT [Revised]

Findings of fact must be filed apart from the judgment as a separate document. If there is a conflict between recitals in a judgment and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.

PROPOSED REVISED RULE 300 [New]

Rule 300. Finality of Judgment or Order.

(a) Final judgment. At the conclusion of the litigation, the court shall render a final judgment or order by disposing of all claims between all parties. A judgment or order that does not dispose of all claims between all parties remains interlocutory.

(b) Disposition of all claims between all parties. A judgment or order is final if it:

(1) expressly disposes of all claims between all parties, by itself or in combination with earlier judgments and orders or

(2) states with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that it finally disposes of all claims between all parties and is appealable.

(c) Judgment after conventional trial. A judgment rendered after a conventional trial on the merits is presumed to dispose of all claims between all parties and is presumed to be final and appealable.

Rule 301. Motions Relating to Judgments [New]

(a) Motion for Judgment on the Verdict. A party may move for judgment on the verdict at any time before a final judgment has been signed. A motion for judgment on the verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) Motion for Judgment Notwithstanding the Verdict or to Disregard Jury Finding. A party may move for judgment notwithstanding the verdict if a directed verdict would have been proper or may move the court to disregard one or more jury findings that have no support in the evidence. The motion may be made after the rendition and receipt of the jury's verdict. The motion is overruled by operation of law on the date when the court's plenary power expires.

(c) Motion to Modify Judgment. After a judgment has been signed, a party may move to modify the judgment in any respect and may include a request for judgment on all or part of the verdict; a request for judgment notwithstanding the verdict, if a directed verdict would have been proper; or one or more requests to disregard jury findings that have no support in the evidence.

A prejudgment motion for judgment on the verdict, for judgment notwithstanding the verdict or to disregard jury findings is not a prerequisite to a postjudgment motion to modify a judgment.

A motion to modify a judgment in any respect may be filed within 30 days after the final judgment is signed, but a late filed motion may be considered within the discretion of the trial court and granted or denied by signed written order while the court retains plenary power over its judgment. The court's ruling on a late-filed motion is subject to review on appeal. One or more amended or additional motions may be filed without leave of court within 30 days after the final judgment is signed, regardless of whether a prior motion containing the same requests for relief has been overruled. If not determined by

signed written order within 75 days after the final judgment was signed, any such motion is overruled by operation of law on expiration of that period.

(d) Motion for New Trial. A party may move to set aside a judgment and seek a new trial pursuant to Rule 302. A motion for new trial may be filed within 30 days after the final judgment is signed, but a late-filed motion may be considered within the discretion of the trial court and granted or denied by signed written order while the court retains plenary power over its judgment. The court's ruling on a late-filed motion is subject to review on appeal. One or more amended or additional motions may be filed without leave of court within 30 days after the final judgment is signed, regardless of whether a prior motion containing the same requests for relief has been overruled. If not determined by signed written order within 75 days after the final judgment was signed, any such motion is overruled by operation of law on expiration of that period.

If judgment has been rendered on citation by publication and the defendant did not appear in person or by counsel selected by the defendant, a motion for new trial must be filed within two years after the final judgment was signed.

(e) Motion for Judgment Nunc Pro Tunc. A party may move for correction of clerical mistakes in the written judgment to conform it to the judgment previously rendered by the trial court. Such a motion may be filed at any time after a final judgment is signed, [but if the motion is filed within 30 days after the final judgment is signed, the motion will be overruled by operation of law on the expiration of 75 days after the final judgment was signed.][1]

(f) Motion Practice. A motion identified in this rule must state the specific complaint or request for relief. A party may file one or more

[1] This rule is not intended to change existing case law.

motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion. A party must also submit a proposed judgment or order with the motion.

Periods Affected by Modified Judgment. If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules that run from the date the final judgment is signed shall run from the time the modified judgment is signed; however, if the complaint applies to the original judgment and was urged by prior motion, then no new motion is required. If a correction to a judgment is made pursuant to subdivision (e) after expiration of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing of the corrected judgment for any complaint

RULE 302. MOTIONS FOR NEW TRIAL [New]

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

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance of the evidence;

(3) when the damages awarded by the jury are manifestly too small or too large because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that probably caused rendition of an improper judgment;

(5) when injury to the movant has probably resulted from, (i) misconduct of the jury, or (ii) misconduct of the officer in charge of the jury, or (iii) improper communication to the jury, or (iv) a juror's erroneous or misleading answer on voir dire examination;

(6) when new, non-cumulative evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and its unavailability probably caused the rendition of an improper judgment;

(7) when a default judgment should be set aside upon either legal or equitable grounds;

(8) when a judgment has been rendered on citation by publication, the defendant did not appear in person or by an attorney selected by the defendant and good cause for a new trial exists;

(9) when there is a material and irreconcilable conflict in jury findings;

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably caused rendition of an improper judgment; or

(11) when any other ground warrants a new trial in the interest of justice.

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial must identify the complaint with specificity.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment; or

(4) good cause to set aside a judgment after citation by publication.

(d) Procedure For Jury Misconduct.

(1) Hearing. When the ground of the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of the jury, or improper communications made to the jury, or a juror's erroneous or incorrect answer on voir dire examination, the judge shall hear evidence from members of the jury or others in open court and may grant a new trial if it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case that injury probably resulted to the complaining party.

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in

evidence for any of these purposes. But a juror may testify about whether (i) extraneous prejudicial information was improperly brought to the jury's attention, (ii) any outside influence was improperly brought to bear upon any jury, (iii) misconduct occurring before the jury retired to deliberate, or (iv) the juror was qualified to serve.

(e) Excessive Damages; Remittitur

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Remittitur By Party. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution may issue only for the balance of such judgment.

(f) Partial New Trial. If the judge is of the opinion that a new trial should be granted on a point or points that affect only a part of the matters in controversy that is clearly separable without unfairness to the parties, the judge may grant a new trial as to that part only, but a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

PROPOSED RULE 303. PRESERVATION OF COMPLAINTS [New]

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

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objections, or motion, and the complaining party objected to the refusal.

(b) **Ruling by Operation of Law.** In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) **Formal Exception and Separate Order Not Required.** Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

NOTE: Subsections (a), (b), and (c) repeat verbatim Appellate Rule 33.1(a)(b)(c). SUGGESTION: Add a comment cross referencing Evidence Rule 103?

(d) **Motion for New Trial Not Required**. A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (b).

NOTE: This repeats verbatim current Rule 324(a).

(e) **Motion for New Trial Required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence;

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

NOTE: This repeats verbatim current Rule 324 (b).

(f) **Sufficiency of Evidence Complaints in Nonjury Cases.** In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence—including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact—may be made for the first time on appeal in the complaining party's brief.

NOTE: This repeats verbatim Appellate Rule 33.1(d).

PROPOSED RULE 304. PLENARY POWER OF THE TRIAL COURT [New]

(a) **Definition.** Plenary power is the power of the court to act, within its jurisdiction, according to law or equity, on any issue before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) **Duration.** Regardless of whether an appeal has been perfected, the trial court has plenary power, including the power to modify or vacate a judgment or grant a new trial:

(1) until the expiration of thirty days after the judgment is signed, or

(2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment, or (iii) motion to reinstate a judgment after dismissal for want of prosecution, until the earlier of the expiration of thirty days after the motion is overruled or one hundred and five days after the judgment is signed.

(c) **After Expiration.** After expiration of the time prescribed by (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the judgment;

(2) sign an order declaring a previous judgment or order to be void because signed after the court's power as prescribed in (b) has expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 301(d) if citation was served by publication; or

(7) grant a new trial or modify the judgment within the time allowed by Rule 306(a) when the moving party did not have timely notice or knowledge of the judgment.

RULE 305.

Repeal – new Rule 300.

RULE 306.

Repeal – new Rule 300.

RULE 306(a).

RULE 306(c).

RULE 307.

RULE 308.

RULE 308(a).

RULE 309.

RULE 310.

RULE 311.

RULE 312.

RULE 313.

RULE 314.

RULE 315.

Repeal – Rule 302(e).

RULE 316.

Repeal – Rule 301(e)

RULE 320.

Repeal – Rule 301(d)-302

RULE 321.

Repeal – Rule 301(d)-302

RULE 322.

Repeal – Rule 301(d)-302

RULE 324.

Repeal – Rule 303

RULE 326.

RULE 327.

Repeal – Rule 302(d)

RULE 329.

Repeal – Rule 301(d)

RULE 329(a).

RULE 329(b).

Repeal – Rule 301-302

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From the Desk of:
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Certification

January 27, 2009

VIA FACSIMILE: 512.463.1365 and
VIA REGULAR MAIL
Honorable Nathan L. Hecht
SUPREME COURT OF TEXAS
P.O. Box 12248
Austin, TX 78711

RE: Administration of Rules of Evidence Committee Recommendation

Dear Justice Hecht:

Attached are proposed Rule of Evidence 1010 "Use in Lieu of Sworn Declaration" and the required amendment to the Penal Code to add a penalty for perjury for violation of this rule. Both have been approved unanimously by the full Committee with a recommendation for adoption.

I have discussed the enclosed with our Supreme Court Advisory Committee Liaison Buddy Low and with our State Bar Board Advisor Mark Sales. I have also forwarded a copy of each to KaLyn Laney, our Legislative Liaison.

The purpose of the Rule is to provide a means for affidavits and other documents to be admitted into evidence without the necessity of using a notary public. This will simplify filing and reduce the costs involved in completing many procedures. In particular, it will permit affidavits to be obtained more efficiently and with less expense.

Also enclosed is a copy of §132.001 of the Penal Code, which currently provides for the use by inmates of unsworn declarations. This statute was the primary source for language used in the proposed Rule. A legislative amendment for this statute, removing its limitation for use only by inmates, could be requested; however, a proposal expanding permissible use of unsworn

declarations was defeated in a prior term by the lobbying efforts of notary publics. Since the primary application of the proposed Rule would be for admission of evidence, this Committee concluded that a Rule of Evidence was a viable alternative.

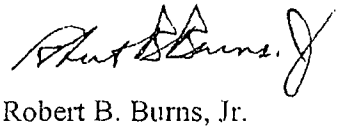
Since the Legislature is currently in session, AREC requests that the Supreme Court consider the proposed Rule 1010 for adoption as soon as possible. If the Rule is adopted, or conditionally adopted subject to passage of the criminal perjury amendment, by March 15, it is my understanding that the Legislative Committee will be in a position to seek passage of the corresponding statutory amendment.

Mark Sales and Buddy Low have agreed, given the time constraints, that I should forward this letter request and attachments directly to you. Please feel free to give any of us a call should you have any questions or would like any additional information or analysis.

Thank you for your consideration of this proposal.

Very truly yours,

BURNS ANDERSON JURY & BRENNER, L.L.P.



Robert B. Burns, Jr.
Chair, Administration of Rules of Evidence Committee

RBB/mm
Enclosures

J:\RBB-AREC\Hecht01-Ltr.doc

cc: **VIA FACSIMILE: 409.838.6959 and**
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Proposed Rule of Evidence 1010. Use In Lieu Of Sworn Declaration.

(1)(a) Except as provided by subsection (1)(b), an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.

(1)(b) This rule does not apply to an oath of office or an oath required to be taken before a specified official other than a notary public.

(2) An unsworn declaration made under this rule must be in writing and subscribed by the person making the declaration as true under penalty of perjury.

(3) The form of a declaration under this rule must be substantially as follows.

"My name is (First:) _____ (Middle:) _____ (Last:) _____, my date of birth is _____, and my residence is (City:) _____, (State:) _____, (Zip Code:) _____, and (Country:) _____.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in _____ County, Texas, on the ___ day of _____ (month), _____ (year).

_____
Declarant"

Proposed Amendment to Texas Penal Code 37.02.

37.02. Perjury

(a) A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning:

(1) he makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath; or

(2) he makes a false unsworn declaration under Chapter 132, Civil Practice and Remedies Code; or

(3) he makes a false unsworn declaration under Texas Rule of Evidence 1010.

(b) An offense under this section is a Class A misdemeanor.

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From the Desk of:
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Certification

January 27, 2009

TELECOPIER TRANSMITTAL COVER SHEET

FAX DEADLINE: ***today***

TO:	Honorable Nathan L. Hecht	**FAX NO.:**	**463.1365**
FIRM:	SUPREME COURT OF TEXAS		
TO:	Buddy Low	**FAX NO.:**	**409.838.6959**
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RE: ADMINISTRATION OF RULES OF EVIDENCE COMMITTEE RECOMMENDATION

Our File No.: ***RBB-AREC***

FROM: Robert B. Burns, Jr./mm
BURNS ANDERSON JURY & BRENNER, L.L.P.
FAX NO.: 512/338-5363
PHONE NO.: 512/338-5322

NO. OF PAGES SENT (INCLUDING THIS COVER PAGE): **9 pages**

DESCRIPTION OF DOCUMENTS/NOTE: Please see attached.

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