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STATE BAR OF TEXAS

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TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

4. Suggested corrections of errors in spelling and errors of omission.

We also point out various errors in spelling and wording which have appeared in the rules as forwarded to the supreme court and as published in the bar journal. These mistakes are identified by line number and rule on the typewritten copy of the proposed rules submitted to the court.

done A. TRCP 4, line 4: "beings to run" should read "begins to run".

done B. TRCP 18b(6), line 2: "(a)(5) or (a)(6)(iii)" should read "(2)(e) or (2)(f)(iii)".

done B. TRCP 21a, lines 21-22: the words "and the notice or paper is served upon by mail" should read "and the notice or paper is served upon him by mail."

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00001

done C. TRCP 166(i), line 4: "proferred" should read "proffered".

done D. TRCP 166a(d), lines 8-9: "as for" should read "as" or "for".

done E. TRCP 200(2)(a), line 15, and TRCP 208(1), lines 20-21: in each rule the first "other" should be omitted.

done F. TRCP 201, line 17: "court of suit" should read "county of suit".

done G. TRCP 237a (comment): "judgment is a case" should read "judgment in a case".

not done H. TRCP 308a, lines 11-12: "has been violated the attorney" should read "has been violated. The attorney".

done I. TRCP 749c (comment): "the appellant requirement" should read "the appellate requirement".

done J. TRAP 49, line 5: "Suspending to Enforcement" should read "Suspending Enforcement".

done K. TRAP 90(g), last line: "Court of Appeals" should read "Court of Criminal Appeals".

done L. TRAP 91, lines 12-14: "Delivery on a party . . . shall be made on counsel" should read "Delivery to a party . . . shall be made to counsel."

done M. TRAP 100, line 9: the word "within" should not have been deleted.

TRCP 3a. ~~RULES BY OTHER COURTS~~ [Local Rules]

Each ~~COURT OF~~ administrative judicial region, district court, county court, county court at law, and probate court, may make and amend ~~THE~~ [local] rules governing practice before such courts, provided;

(1) No change.

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

~~(2)~~ (3) any proposed [local] rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas; and

~~(3)~~ (4) any proposed [local] rule or amendment shall not become effective until at least thirty (30) days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made; ~~AND~~

~~(4)~~ (5) all [local] rules [or amendments] adopted and approved in accordance herewith are made available upon request to the members of the bar/[; and]

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

[COMMENT TO 1990 CHANGE: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices from determining issues of substantive merit.]

SUBCOMMITTEE REPORT
RULES 1-14
TEXAS RULES OF CIVIL PROCEDURE

Rule 3a: There has been one comment that we should delete any reference to local rules because it destroys the uniformity of rules.

Respectfully,

Kenneth D. Fuller '58

Kenneth D. Fuller

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

Suggested Changes To
Amendments Proposed By Supreme Court

1. Rule 3(a). The suggested change is that the reference to "local rules" be struck from the proposed amendment. The basic concern expressed is that it will be virtually impossible for rules to be uniform if courts are permitted to develop local rules.

The subcommittee recommends *no* change in the proposed amendment.

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(1) TRCP3(a): The introductory paragraph to this Rule would allow each district court or county court, etc. to have its own local rules. It seems to me that this possibility should be prohibited, so that, for example, each district court in Bexar county would be required to have the same local rules. In practice, this may not be a major problem, but the literal wording of the rule could create problems in the future. With respect to subparagraph (2), I question why local rules cannot alter certain time periods created by the Texas Rules of Civil Procedure. For example, I believe that the fourteen day requirement for filing amended pleadings in the Dallas local rules has had a very positive effect on trial practice in Dallas County. Since this rule provides in subparagraph (3) for Supreme Court approval of all local rules, surely the court can determine whether the time period proposed in any local rule is appropriate.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRCP 3a
Rule X. This rule allows only for the mailing of a set of the local rules. Our goal is to publish our local rules and simply refer the attorneys to the proper cite for their location. This rule would not permit us to do so.

RONALD D. STEPHENS
Attorney-at-Law
P.O. Box 1269
GRAHAM, TEXAS 76046

Office Phone:
549-2165

Home Phone
549-2084

3a
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November 24, 1989

Honorable Nathan L. Hecht, Justice
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Justice Hecht:

In response to the invitation contained on Page 1147 of the November 1989 Texas Bar Journal, the following comments are offered with reference to the proposed changes in the Rules of Civil Procedure.

1. All reference to local rules be deleted, including TRCP 3a. Uniformity of rules cannot be accomplished if the different Courts are allowed to develop local rules.

2. TRCP 21a. and TRCP 57. are attempts to utilize current technology, but it appears that some safeguards are missing. Telecopiers are not always monitored, or may not be monitored in such a way to prevent a time limit lapse. In addition, the request to provide a telecopier number appears to be an invasion of privacy. I believe that the utilization of this should be voluntary. If provided with a State Bar of Texas identification number on a voluntary basis, then it could be utilized, but not otherwise. An alternative would be to require some type of confirmation on receipt of this type of communication in order to start the time for response.

Yours very truly,

Ronald D. Stephens

Ronald D. Stephens

RDS/jk

TRCP 4. Computation [of Time]

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. [Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three day period in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer.]

[COMMENT TO 1990 CHANGE: Amended to omit counting Saturdays, Sundays, and legal holidays in all periods of less than five days except in the three day extension provision of Rule 21a.

William C. Koons
Board Certified in Family Law
And Civil Trial Law.
Texas Board of Legal Specialization

Kenneth D. Fuller
Board Certified in Family Law.
Texas Board of Legal Specialization

Mike McCurley
Board Certified in Family Law.
Texas Board of Legal Specialization

Ike Vanden Eykel
Board Certified in Family Law
And Civil Trial Law.
Texas Board of Legal Specialization

Koons, Fuller, McCurley
& Vanden Eykel
A Professional Corporation

Practice Limited
To Matrimonial Law

Robert E. Holmes, Jr.
Board Certified in Family Law.
Texas Board of Legal Specialization

Mary Johanna McCurley
Board Certified in Family Law.
Texas Board of Legal Specialization

Jimmy L. Verner, Jr.
Board Certified in Civil Trial Law.
Texas Board of Legal Specialization

Kevin R. Fuller
Board Certified in Family Law.
Texas Board of Legal Specialization

Keith M. Nelson
Board Certified in Family Law.
Texas Board of Legal Specialization

Michael R. DeBruin

January 15, 1990

TRCP 4

Mr. Tom L. Ragland
Attorney at Law
P. O. Box 239
Waco, Texas 76703

Dear Tom:

The sub-committee met Thursday, January 11, 1990, in my office. Broadus Spivey, Frank Branson and myself are the only ones who were able to attend. The sub-committee is charged with reviewing and recommending revisions of T.R.C.P. 1 through 14.

The sub-committee recommends amending Rules 4 and 10 as published in the Texas Bar Journal in November, 1989. Because of the time frame involved, we chose to review and comment only on those rules even though we had some written input regarding some of the other rules. I enclose the results of the sub-committee meeeting with respect to Rules 4 and 10. We will recommend these changes to the committee as a whole.

Rule 4: The proposed changes were made because of input from Justices of the Peace and attorneys representing apartment owners and apartment associations. It was felt by both of these groups that enlarging the times relative to forcible entry and detainer actions and the appeals therefrom would work a substantial hardship on landlords who already were, in about 90% of the cases, losing a month or more in rent.

Rule 10: There was considerable support for adding the party's last known mailing address in motions to withdraw in cases where there was no substitute attorney. As to the deleted sentence regarding the court's imposing further conditions upon granting leave to withdraw, the committee thought it was superfluous language in that the court has this inherent power by virtue of the need to obtain court approval for withdrawal.

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* TRCP 4. Computation of Time. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three day period in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer~~.~~, and ~~Saturdays, Sundays and~~ legal holidays shall be counted for purposes of the five day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

* This proposed rule is typed as if the rule printed in the Texas Bar Journal is currently in effect. The changes indicated are recommended sub-committee changes. Underlining is new language; strike-throughs are deletions.

TRCP 4

SUBCOMMITTEE REPORT/TRCP 737-813

The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

1. Rules 748, 749, 749a, 749b, 749c

Comments support that suggested amendments to Rule 4 TRCP [to exclude Saturday, Sunday, and legal holidays from time computation of five days or less]; would serve to enlarge the times relative to forcible entry and detainer actions and appeals therefrom. Suggestions from justices of the peace and practicing attorneys support that these types of actions should be excluded from the application of the enlargement of time as proposed in Rule 4. We endorse the recommendation set forth by the subcommittee charged with reviewing and recommending revisions of TRCP 1-14, that is that Rule 4 be further amended as proposed to include this sentence following the word transfer, Saturdays, Sundays and legal holidays shall be counted for purposes of the five day periods provided under Rule 748, 749, 749a, 749b, and 749c.

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(2) TRCP4: My first problem is again with the literal language of the rule, and not with that portion being amended. By the wording of this rule, in computing any period of time prescribed or allowed "by any applicable statute," the last day of the period is not to be included if it is a Saturday, Sunday or legal holiday. It seems to me that the phrase "any applicable statute" would include statutes of limitation. Yet the rule in this state, as I understand it, is that statutes of limitation are not extended if the last day happens to fall on a Saturday, Sunday or legal holiday.

A second problem is with the wording and the effect of the amendment. Under the amendment if a party obtained a needed hearing on a Monday by filing papers the preceding Thursday, the party would now have to obtain an Order shortening the notice time, because the weekend would not count in determining the three days notice required for a hearing. Perhaps this is the intended effect, but it does seem to add an additional unnecessary requirements.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
→ TRCP 4
TRAP 51
TRAP 90
TRAP 20

TRAP 4
TRAP 4
TRAP 54
TRAP 13
TRAP 5
TRAP 40
TRAP 9
TRAP 40
TRAP 74

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

D. Definition of legal holiday. I note that one timeliness problem that has not been entirely cleared up is the question of what constitutes a holiday for filing purposes. Tex. R. Civ. P. 4 provides that something due to be filed on a legal holiday may be filed on the next day that is not a Saturday, Sunday, or legal holiday. The rule has been construed to include banking holidays. *See Johnson v. Texas Employers Insurance Association*, 674 S.W.2d 761 (Tex. 1984) (per curiam). When the Texas Rules of Appellate Procedure were first promulgated, Tex. R. App. P. 5 was derived from Tex. R. Civ. P. 4.

Subsequently, however, Tex. R. App. P. 5 was amended to state that something due to be filed on a legal holiday, "*as defined by Article 4591, Revised Civil Statutes*" (emphasis added), could be filed on the next working day. That language pretty clearly overrules *Johnson*. For example, if July 4 falls on a Sunday, July 5 is a banking holiday, but not a holiday listed in article 4591.

One commentator has noted the potential for confusion. M. O'Connor, Perfecting the Appeal 3 (1988). Filing a motion for new trial is governed by Tex. R. Civ. P. 329b. Therefore, to keep on with the example, filing it on July 5 would be timely. Filing a cost bond is governed by Tex. R. App. P. 41, so filing it on July 5 would not be timely. The variance between the two rules adds unnecessary complexity to civil procedure as a whole, but the current amendments do not address the problem.

Regards,

Craig T. Enoch
Chief Justice

PAUL HEATH TILL
JUSTICE OF THE PEACE
PRECINCT 5, POSITION 1
6000 CHIMNEY ROCK, SUITE 102
HOUSTON, HARRIS COUNTY, TEXAS 77081
TELEPHONE: 713/661-2276

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744
739 et seq
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533

November 28, 1989

The Honorable Justice Nathan L. Hecht
Texas Supreme Court
Rules Advisory Committee
P. O. Box 12248
Austin, Texas 78711

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

In response to the proposed changes in the Texas Rules of Civil Procedure, as published in the November issue of the State Bar Journal, I respectfully request that the Rules Advisory Committee consider the following comments.

PROPOSED CHANGE TO TRCP RULE 4 - COMPUTATION OF TIME

The proposal to exclude Saturday, Sunday and holidays from any time period of five days or less would have a direct and, at times, a negative impact upon the time frame of the procedures in justice court and in the Forcible Entry and Detainer section of the Rules of Civil Procedure.

As an example, the proposed change in Rule 4 would have a definite impact upon the court procedure in complying with Rule 567 New Trials, which states in part: "The justice, within ten days after the rendition of a judgment in any suit tried before him, may grant a new trial therein on motion in writing showing that justice has not been done in the trial of the cause." While the proposed change to Rule 4 would not change the time in Rule 567, it would change the time in Rule 569 to file motion for new trial. It could put the court in the unfortunate predicament of having the time to file the motion for new trial, plus the notice to the opposing party, equal to the time the court has to rule upon the motion.

I respectfully request that the Rules Advisory Committee recommend that the proposed changes in Rule 4 not be applied to Part V. Rules of Practice in Justice Court.

In the Forcible Entry and Detainer section of the rules, in Rule 744 the defendant has five days to request a jury trial from the date of service. This would be changed under the proposed revision of Rule 4. Under Rule 739, court is instructed to have the defendant appear not more than 10 days nor less than six days from date of service. This would not be effected by the proposed change in Rule 4, but would place the court in the dilemma of the defendant being able to request a jury trial on the day of trial and negate purpose and effect of the revision of Rule 744, effective January 1, 1988.

I respectfully request that the Rules Advisory Committee recommend that the proposed changes in Rule 4 not be applied to Part VII. Rules Relating to Special Proceedings, Section 2. Forcible Entry and Detainer.

The following is a listing of other rules with the five-day time frame that would also be effected. Specifically they are: Rules 569, 571, and 572 in the section of the Rules of Practice in Justice Court, and Rules 739, 740, 748, 749a, and 749b in the section of the rules for Forcible Entry and Detainer. Due to the press of time, no attempt has been made to analyze the effect that Rule 4 will have on these rules in relation to the other rules within their respective sections.

LAW OFFICES OF
KAUFMAN, BECKER, PULLEN & REIBACH, INC.
2300 NCNB PLAZA
300 CONVENT
SAN ANTONIO, TEXAS 78205-3724

WILLIAM T. AVILA
JAMES H. BARROW
DOUGLAS W. BECKER
BENJAMIN R. BINGHAM
R. DAVID FRITSCHE
GAY GUERINGER
JACK H. KAUFMAN
WILLIAM T. KAUFMAN
ROYAL B. LEA, III
ROBERT D. MAGNUSSEN
JOEL H. PULLEN
ROBERT E. REIBACH

OF COUNSEL
NELSON A. CLARE
DAN MORALES

TELEPHONE
(512) 227-2000

TELECOPIER
(512) 229-1307

November 30, 1989

4

The Honorable Nathan L. Hecht,
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Objections to changes in Texas Rules of Civil Procedure ("TRCP") 4

Dear Justice Hecht:

This firm represents the San Antonio Apartment Association. We are writing this letter as a follow-up to correspondence to you from Niemann & Niemann, attorneys for the Texas Apartment Association.

We respectfully object to the proposed changes in TRCP 4. In support thereof, we would like to incorporate Niemann & Niemann's objections. The proposed change reflects a "business day" basis for determining a respondent's response time. Apartment owners and managers provide housing on a seven-day per week basis as opposed to a five-day week basis. As a consequence, the potential delays in service of notices to vacate, writs and possession and other related forcible entry and detainer pleadings would cause an inordinate and undue hardship on apartment owners and managers.

It is not the desire of apartment owners or managers to deny tenants their rights; however, the proposed changes would inordinately burden the landlord/tenant judicial process.

Accordingly, we respectfully urge the Court to exempt the five-day time period set forth in Rule 748 through 749c of the Texas Rules of Civil Procedure when drafting the final TRCP 4.

Very truly yours,

KAUFMAN, BECKER, PULLEN & REIBACH, INC.

By: William T Kaufman
William T. Kaufman

WTK:bjd
C:/Hecht.L01

BAKER, BROWN, SHARMAN & PARKER
A PARTNERSHIP OF INDIVIDUALS AND PROFESSIONAL CORPORATIONS
ATTORNEYS
CITICORP CENTER
1200 SMITH, SUITE 3600
HOUSTON, TEXAS 77002

TELEPHONE (713) 654-8111
TELEX 762063
TELECOPIER (713) 654-1871

WRITER'S DIRECT DIAL NUMBER
(713) 951-5881

4
21a

November 21, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Proposed changes to Rules of Civil Procedure

Dear Justice Hecht:

The proposal to include service of documents by telefax (telephone document transfer) is welcome. I fail to see the reason for the three day extension of the recipient's time to act since there is no lag time in receipt. TRCP 4, 21a.

Further, with respect to Rule 21a, it seems inappropriate to authorize service upon another party or that party's attorney, at the server's choice. Counsel of record should always be served, although perhaps it would speed resolution of issues if parties themselves were also required to be served under Rule 21a.

Sincerely,

Sterling A. Minor

SAM/kc

1189038!.083
/smino/ltr

J. P. DARROUZET
COUNSELLOR AT LAW
809 RIO GRANDE
AUSTIN, TEXAS 78701
(512) 477-4210
(TX. BAR LIC. NO. 05396000)

4

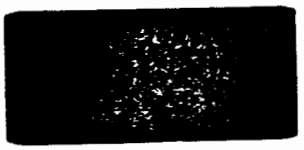
11/14/89

Hon Nathan J. Hecht
P. O. Box 12248 Cap Sta
Austin TX 78711

Re: Proposed Rule No. TRCP 4

Should there be some indication as to whether or not this Rule is meant to broaden jurisdictional time limits? Or isn't it meant to?. Surely, the way it's worded some people (including Judges) will think it's meant to. Cf. Sec. 16.003 Tex. CP&R Code and Fulghum 219 SW[2] 1014 (CA 1974 nwr) and Kirkpatrick 484 SW[2] 587 (Sup. Ct. 1972).

J. P. Darrouzet
JPD/hs



MICHAEL LUCKSINGER

Attorney At Law

(512) 756-6050

Camp Longhorn - Ranch
Rt. 2, Box 38-R
Burnet, Texas 78611

21b

November 14, 1989

Honorable Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Tx 78711

Re: "Proposed Changes to Texas Rules of Civil Procedure," etc. as outlined in the November 1989 issue, Texas Bar Journal

Dear Justice Hecht,

Much ado has often been made about "de-legalizing" much of the verbiage in legal documents, and our laws, especially, and not surprisingly, by laymen.

I would propose that such a principle be applied in the drafting and amending of our Rules of Procedure and Evidence. Arguably no other body of law or rules is more deserving of being laid out in plain language, where possible, than the "how, when and where" codes of procedure for our courts.

Example 1: The proposed amendment to TRCP 4 puzzled me at first. May I suggest-

"For any time period of five days or less in these rules, Saturdays, Sundays, and legal holidays shall not be counted, except for the purpose of the three day period of Rule 21a (which extends other time periods by three days when service is made by registered or certified mail or by telephone document transfer.)

(This is concise and easier to understand. The "thing" that we are talking about is right up front and not hidden in the sentence.)

OBJECTION TO PROPOSED CHANGE IN TRCP 4

The proposed changes in Rule 4 of the Texas Rules of Civil Procedure as published in the Bar Journal are as follows (underlined language is new):

> TRCP 4. Computation of Time. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time beings to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three day period in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer.

ARGUMENTS AGAINST PROPOSED CHANGE AS IT AFFECTS EVICTIONS

1. UNFAIRNESS. If applied to evictions, the change in TRCP 4 is unfair because it has the effect of increasing the wait from 5 days to 7 or 9 days before the landlord can get his writ of possession after he gets his eviction judgment. It adds even more days than that if holidays intervene.

The change is tantamount to giving the tenants an extra 2 to 4 days (or more) of free rent after the judge has already held that the tenant must be evicted for nonpayment of rent.

In 98% of all eviction cases, the grounds for eviction is nonpayment of rent. In those eviction cases, writ of possession is seldom obtained earlier than four to five weeks after the rent becomes delinquent. . . even if the landlord was relatively prompt in filing his F.E.D. action. This is because of (1) the landlord's normal delay in giving notice to vacate until after a grace period, (2) the mandatory wait between notice to vacate and filing the F.E.D., (3) actually filing the sworn complaint, (4) waiting for the constable to serve citation on the tenant, (5) waiting the mandatory 6 days after such service, (7) waiting for the court to set a trial date (if the case is contested), (8) waiting for the trial date, (9) waiting the mandatory 5 days after judgment before getting the writ of possession, (10) waiting for the typical front-door posting of the constable's intent to execute a writ of possession, and (11) the delays in getting the constable to actually serve the writ of possession.

It may come as a surprise to the Court that forcible detainer cases comprise approximately 11.76% of *all civil cases filed in all original jurisdiction courts in Texas*. For the reporting year which ended in 1988, the total number of new civil cases filed in JP, county level, and district courts in this state was 899,820. Of that total, 29.88% (or 268, 923 cases) were filed in JP courts. Forty percent of the JP court cases were eviction cases. We suspect, therefore, that the number of people affected by the eviction rules far exceeds any other one kind of civil litigation. The impact of eviction cases on the people of our state and their pocketbooks cannot be overemphasized.

If the Court were to adopt proposed TRCP 4 without an exception for the eviction rules, the economic damage to property owners would be measured by the hundreds of thousands of dollars, and it would give that money (in the form of free rent as a practical matter) to the tenants who are being evicted for nonpayment of rent. Approximately 107,569 eviction cases are filed each year; and at a mere $12-per-day rental figure, the Court would, by not removing the eviction rules from the proposed TRCP 4 changes, be unjustifiably taking over a million dollars out of the pockets of the landlords each year and giving it to the tenants who haven't paid their rent.

4. APPEAL TIME ELONGATED. The 5-day wait for a writ of possession is intertwined with the appeal process from an F.E.D. Necessarily, a writ of possession should not issue any sooner than

the end of the time period for appeal. Another effect of the proposed rule, therefore, is to elongate the time for appeal of an eviction case. The multiple sets of sequential 5-day periods in an appeal by a pauper would be especially devastating in nonpayment-of-rent evictions.

5. FEDERAL RULES. The argument that the change is necessary in order to make state rules track federal rules on time calculations is not persuasive. The federal courts do not adjudicate eviction cases, and there is therefore no real logical basis for making the state rules parallel to federal rules on the subject of evictions. Historically, the state rules of civil procedure have recognized the unique nature of eviction cases and the need for speed in the interest of justice. Applying non-eviction time rules to eviction cases for the sake of academic uniformity is not sound policy in view of the resultant substantive harm to the business community.

6. ALTERNATIVES. We anticipate that it might be argued that the writ delay and appeal period in eviction cases can simply be expanded from 5 to 6 days to avoid the harmful result of the TRCP 4 changes. It is bad enough that the present eviction rules force a prevailing landlord to suffer rent losses and potential additional property damages for an extra 5 days after winning his judgment. Suing evicted tenants for unpaid rent has proven to be an expensive exercise in futility in nearly all cases. If this Court were to expand this post-judgment wait from 5 days to 6 (or more), it would simply compound the economic burden on the prevailing landlord.

7. THE RULES WHICH ARE AFFECTED. Set forth below are the various eviction rules which are adversely affected by the proposed change in TRCP 4. The bold language is for purposes of emphasizing the language affected by the time-calculation changes in Rule 4.

Five-day Wait for Writ of Possession

[Existing] Rule 748. JUDGMENT AND WRIT. If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, costs, and damages; and he shall award his writ of possession. If the judgment or verdict be in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and any damages. **No writ of possession shall issue until the expiration of five days from the time the judgment is signed.**

Five-day Right of Appeal

[Existing] Rule 749. MAY APPEAL. In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.

Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered **by filing with the justice within five days after the judgment** is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he will prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.

The justice shall set the amount of the bond to include the items enumerated in Rule 752.

Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.

Pauper's Affidavit in Lieu of Bond

[Existing] Rule 749a. PAUPER'S AFFIDAVIT. If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability **within five days after the judgment is signed, which shall consist of his affidavit** filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as a part of the record. **It will be presumed prima facie that the affidavit speaks the truth, and, unless**

contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to.

If the justice of the peace disapproves the pauper's affidavit, appellant may, **within five days thereafter** bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than ten days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

No writ of restitution may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 **within five days thereafter.** If no appeal bond is filed within five days, a writ of restitution may issue.

[Existing] Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS. In a nonpayment of rent forcible detainer case, a tenant/appellant who has appealed by filing a **pauper's affidavit under these rules shall be entitled to stay in possession** of the premises during the pendency of the appeal, by complying with the following procedure:

(1) **Within five days** of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.
(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry **within five days** of the due date under the terms of the rental agreement.
(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.
(4) Landlord/appellee may withdraw any or all rent in the county court registry upon (a) sworn motion and hearing, prior to final determination of the case, showing just cause, (b) dismissal of the appeal, or (c) order of the court upon final hearing.
(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

[Existing] Rule 749c. APPEAL PERFECTED. **The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed. When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court;** however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed and when one rental period's rent has been paid into the justice court registry. In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled and, if the case involves nonpayment of rent, one rental period's rent has been paid into the justice court registry.

[Existing] Rule 751. TRANSCRIPT. **When an appeal has been perfected, the justice shall stay all further proceedings** on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

NIEMANN & NIEMANN
ATTORNEYS AT LAW
1210 MBANK TOWER
AUSTIN, TEXAS 78701

FRED NIEMANN
LARRY NIEMANN
FRED NIEMANN, JR.

TELEPHONE (512) 474-6901
FAX (512) 474-0717

November 27, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

via hand delivery

Re: TAA objections to changes in TRCP 4 and TRCP 749c

Dear Justice Hecht:

I am writing this letter on behalf of the Texas Apartment Association. TAA wishes to object to the proposed rule changes in TRCP 4 regarding computation of time and TRCP 749c regarding appeal by paupers in eviction cases. Our specific reasons for objecting to the language of the proposed changes in those rules are set forth in the attached summaries.

It may come as a surprise to the Court that forcible detainer cases comprise approximately 11.76% of all civil cases filed in all original jurisdiction courts in Texas. For the reporting year which ended in 1988, the total number of new civil cases filed in JP, county level, and district courts in this state was 899,820. Of that total, 29.88% (or 268, 923 cases) were filed in JP courts. Forty percent of the JP court cases were eviction cases. We suspect, therefore, that the number of people affected by the eviction rules far exceeds any other one kind of civil litigation. The impact of eviction cases on the people of our state and their pocketbooks cannot be overemphasized.

Accordingly, the Texas Apartment Association respectively requests that TRCP 4 be modified to exclude the 5-day time period under TRCPs 748 through 749c regarding writs of possession and eviction appeals.

Respectfully submitted,

NIEMANN & NIEMANN

By _____
Larry Niemann
Attorneys for Texas Apartment Association

nlh.8ms
enclosures

xc: Mr. Luke Soules, Jr.,Chairman, Supreme Court Advisory Committee, via FAX 224-9144
Mr. Frank Finch, TAA President
Mr. Jerry Adams, TAA Executive Vice President

JOE G. BAX, P.C.
PARTNER
BOARD CERTIFIED-COMMERCIAL REAL ESTATE LAW
BOARD CERTIFIED-RESIDENTIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

HOOVER, BAX & SHEARER
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SAN FELIPE PLAZA
5847 SAN FELIPE, SUITE 2200
HOUSTON, TEXAS 77057
(713) 977-8686
FAX (713) 977-5395

REPLY TO
P.O. BOX 4547
HOUSTON, TEXAS 77210

F
748
749c

November 28, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

VIA FEDERAL EXPRESS
AIRBILL #5000353945

RE: Objections of the Houston Apartment Association to changes in TRCP 4.

Dear Justice Hecht,

Our firm is counsel to the Houston Apartment Association, a trade association representing over 350,000 apartment units in the Houston area. We have discussed the proposed changes to TRCP Rule with Larry Niemann, counsel for both the Texas Building Owners and Managers Association, and the Texas Apartment Association. We must concur with Larry's comments and we share the same objections expressed to you by Mr. Niemann.

Simply stated, Texas landlords are in the business of collecting rent for the shelters that they provide; they are not in the business of evicting tenants. As you know the vast majority of evictions are filed for nonpayment of rent. By the time that eviction has been filed the average tenant, who knew the date the rent was due in the first place, has received a late notice, various forms of informal request for payment, a notice to vacate, and a copy of the Plaintiff's eviction petition. If the lease required some opportunity to cure there would have been an additional written notice furnished that resident. It goes without saying that at any point along that process, the resident has the opportunity of curing the default and tendering payment to the landlord, who in most cases would gladly accept the payment.

The proposed change in the rules would simply elongate the delay in returning the apartment to production.

The joinder of a claim for the delinquent rent with the eviction petition has not been effective. Most tenants are judgment proof and therefore the landlords do not have a practical remedy to gain back the lost rent. For this reason it is extremely important that the eviction process continue to be an

expedited one designed to return an unproductive asset back to an income producing apartment unit.

Candidly, we have heard no objection from any of the Constables or Justices of the Peace regarding the current rules. In fact, we have heard no real request for a modification of those rules. Accordingly, we would urge the court to make an exception to the proposed Rule TRCP 4 for the five day time periods involved in TRCP 748 through 749c regarding the waiting period for writs of possession and eviction appeals.

Respectfully submitted,

HOOVER, BAX & SHEARER

Joe G. Bax
Attorney for the
Houston Apartment Association

JGB:df

cc: Mr. Paul Heiberger

PARKER COUNTY
Weatherford, Texas 76086

4
534
536

November 29, 1989

Honorable Nathan L. Hecht
Texas Supreme Court
Austin, Texas 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

We would like to take this opportunity to comment on three proposed amendments to the Texas Rules of Civil Procedure.

TRCP 4. Computation of Time

The proposed amendment would omit counting Saturday, Sunday, and legal holidays for any prescribed time period of five days or less. This proposed rule would add at least two days, and in some cases, four days to the waiting period prescribed in Rule 748 before a Writ of Possession could be issued in a forcible detainer case. For instance, if judgment is rendered in favor of plaintiff on a Friday, then for counting purposes, Saturday and Sunday would be omitted; the prescribed five days would begin on Monday and would not be completed until midnight of the following Friday. Since the courts are closed on Saturday and Sunday, it would be the next Monday before a Writ of Possession could be issued. This would effectively give a tenant/occupant four additional days to remain on the premises of the rental property. (It would be even more if a legal holiday fell during the time period.)

We do not believe that lengthening this particular time period was the intent of the Rules Committee. However, if that is their intent, we would suggest that you simply amend Rule 748 to change the five days to seven; this would be easier for everyone involved to understand. Otherwise, Rule 748 would always have to be read in context with Rule 4, and the judge will have to constantly be explaining to both tenants and landlords that the five days in Rule 748 doesn't really mean five days.

If it is not the intention of the Rules Committee to extend the time period on Writs of Possession (and for appeals from forcible detainer judgments), then we would suggest that Rule 4, as proposed, exclude Rule 748.

TRCP 4

1. "Neither" and "nor" should be used only with two choices, not three.

TRCP 4. Computation [of Time]

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time beings to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is ~~neither~~ nor a Saturday, Sunday, or a legal holiday. [Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three day period in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer.]

[COMMENT TO 1990 CHANGE: Amended to omit counting Saturdays, Sundays, and legal holidays in all periods of less than five days except in the three day extension provision of Rule 21a.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 5. Enlargement [of Time]

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a ~~required or allowed to be done at or within a~~ specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. ~~but it~~ [The court] may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules. ~~provided, however, if a motion for new trial~~

[If any document] is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail ~~one day or more~~ [on or] before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time. ~~provided, however, that a~~ [A] legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

[COMMENT TO 1990 CHANGE: To make the last date for mailing under Rule 5 coincide with the last date for filing.]

SUBCOMMITTEE REPORT
RULES 1-14
TEXAS RULES OF CIVIL PROCEDURE

Rule 5: There was a comment that the enlargement of time would not apply to deliveries by Federal Express or like couriers. The committee felt, however, there were problems in attempting to change the concept of filing by mail that was beyond the time frame within which we could work.

Respectfully,

Kenneth D. Fuller '88

Kenneth D. Fuller

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(3) TRCP5: By making the last day for mailing under Rule 5 coincide with the last day of filing, the amendment indirectly extends the Answer date for all parties. I am not aware of any court that refuses to file an Answer after the original appearance date, so long as a Motion for Default Judgment is not already on file. The Plaintiff has no practical way to protect against a Defendant filing an Answer within the ten days allowed for receipt of an answer mailed on the last day. Because of the prohibition in this rule, he cannot move any quicker to establish the priority of his judgment.

TRCP 10. Withdrawal of Counsel

Withdrawal of an attorney may be effected (a) upon motion showing good cause and under such conditions as imposed by the Court; or (b) upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, number and State Bar of Texas identification number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only. If the attorney in charge withdraws and other counsel remain of record, substituted, another counsel must be designated of record with notice to all other parties in accordance with Rule 21a, as an attorney in charge.

[An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as counsel for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as counsel for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which

the attorney has knowledge at the time of the withdrawal and has not already notified the party. The court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and other counsel remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.]

[COMMENT TO 1990 CHANGE: The amendment repeals the present rule and clarifies the requirements for withdrawal.]

William C. Koons
Board Certified in Family Law
And Civil Trial Law,
Texas Board of Legal Specialization

Kenneth D. Fuller
Board Certified in Family Law,
Texas Board of Legal Specialization

Mike McCurley
Board Certified in Family Law,
Texas Board of Legal Specialization

Ike Vanden Eykel
Board Certified in Family Law
And Civil Trial Law,
Texas Board of Legal Specialization

Koons, Fuller, McCurley
& Vanden Eykel
A Professional Corporation

Practice Limited
To Matrimonial Law

Robert E. Holmes, Jr.
Board Certified in Family Law,
Texas Board of Legal Specialization

Mary Johanna McCurley
Board Certified in Family Law,
Texas Board of Legal Specialization

Jimmy L. Verner, Jr.
Board Certified in Civil Trial Law,
Texas Board of Legal Specialization

Kevin R. Fuller
Board Certified in Family Law,
Texas Board of Legal Specialization

Keith M. Nelson
Board Certified in Family Law,
Texas Board of Legal Specialization

Michael R. DeBruin

January 15, 1990

TRCP 10

Mr. Tom L. Ragland
Attorney at Law
P. O. Box 239
Waco, Texas 76703

Dear Tom:

The sub-committee met Thursday, January 11, 1990, in my office. Broadus Spivey, Frank Branson and myself are the only ones who were able to attend. The sub-committee is charged with reviewing and recommending revisions of T.R.C.P. 1 through 14.

The sub-committee recommends amending Rules 4 and 10 as published in the Texas Bar Journal in November, 1989. Because of the time frame involved, we chose to review and comment only on those rules even though we had some written input regarding some of the other rules. I enclose the results of the sub-committee meeeting with respect to Rules 4 and 10. We will recommend these changes to the committee as a whole.

Rule 4: The proposed changes were made because of input from Justices of the Peace and attorneys representing apartment owners and apartment associations. It was felt by both of these groups that enlarging the times relative to forcible entry and detainer actions and the appeals therefrom would work a substantial hardship on landlords who already were, in about 90% of the cases, losing a month or more in rent.

Rule 10: There was considerable support for adding the party's last known mailing address in motions to withdraw in cases where there was no substitute attorney. As to the deleted sentence regarding the court's imposing further conditions upon granting leave to withdraw, the committee thought it was superfluous language in that the court has this inherent power by virtue of the need to obtain court approval for withdrawal.

2311 Cedar Springs, Suite 300, Dallas, TX 75201 / 13355 Noel Rd, Suite 2200, Dallas, TX 75240 / (214) 871-2727 / FAX (214) 871-019

* TRCP 10. Withdrawal of Counsel. An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as counsel for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as counsel for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address; and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. ~~The court may impose further conditions upon granting leave to withdraw.~~ Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and other counsel remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

* This proposed rule is typed as if the rule printed in the Texas Bar Journal is currently in effect. The changes indicated are recommended sub-committee changes. Underlining is new language; strike-throughs are deletions.

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

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2. Rule 10. The suggested change to the proposed amendment is that counsel should be permitted to withdraw merely by filing a notice with the court. Under the proposed amendment, an attorney may withdraw only "for good cause shown."

The subcommittee recommends *no* change in the proposed amendment.

CHAMBERLAIN, HRDLICKA, WHITE, JOHNSON & WILLIAMS
A PARTNERSHIP OF INDIVIDUALS AND PROFESSIONAL CORPORATIONS
Attorneys at Law
1400 CITICORP CENTER
1200 SMITH STREET
HOUSTON, TEXAS 77002
TELEPHONE (713) 658-1818

FAX
(713) 658-2553
TELEX: 79-0142
DIRECT DIAL NO. (713) 658-2674

CHARLES E. FROST, JR.
PRINCIPAL

ATLANTA OFFICE
1400 HARRIS TOWER
233 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30303
TELEPHONE (404) 659-1410

WATS
1-800-342-5829

January 15, 1990

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Changes to the Texas Rules of Civil Procedure

Dear Justice Hecht:

Last weekend (January 6-7, 1990) I finally had an opportunity to review the November, 1989 Texas Bar Journal. In the course of reviewing that issue of the Bar Journal, I discovered the invitation for comments on the proposed amendments to the Texas Court Rules. I recognize that the deadline for comments was November 30, 1989, but find myself in the same position as the lawyer pictured on the cover of that same issue (see attachment hereto). I, therefore, respectfully request that you consider my comments herein and present them to your committee if at all possible.

The changes to T.R.C.P.10 (Withdrawal of Counsel) are particularly disturbing. The proposed amendments appear to severely restrict the occasions when an attorney can withdraw from representation. This represents a severe threat to those of us attempting to practice law because of clients who initially promise to pay and then subsequently are not able, or decide they do not wish, to do so.

A recent experience I had may provide some understanding of the extent of the problem. A professional who was familiar with our firm because of its extensive tax work approached us to assist him in recovering approximately $250,000 of stock he had sold to other insiders based upon alleged misrepresentations concerning the health of the small, start-up corporation and the availability of capital for future operations. The client represented himself to have a good practice involving approximately $100,000 of annual income plus income from investments. We mapped out a strategy based upon his discussions of what he could afford to spend. Approximately five (5) months later, however, we learned that he had lost his job and his firm had closed shortly after he first spoke with us. He allowed us to put in many thousands of dollars of work for which he did not have any ability to pay. (Fortunately

he did agree to allow us to withdraw and signed a letter to that affect.)

I can recite a number of other examples in addition to the one related above. This is a serious problem that will greatly affect the economics of practicing law. For example, in one case one of my partners handled, Judge Buie would not allow our firm to withdraw when we were approximately $50,000 of fees, and the client ultimately was able to obtain $250,000 of free work for which we have never been paid. In my view, that is an outrage!

Under the proposed amendment to Rule 10, if an attorney is required to notify the client in writing that the client has the right to object to the motion, it will almost assuredly result in many clients deciding that they can hold the attorneys captive without any intention to pay them. There is no justification for such a provision and it borders on indentured servitude enforced by the courts. (I recognize this argument has been made in the federal courts without success, but do not feel our state courts need to make the same mistakes as our federal courts.)

I respectfully request that your committee reconsider the amendments to Rule 10.

With greatest regards and best wishes for the New Year, I am

Very truly yours,

CHAMBERLAIN, HRDLICKA, WHITE,
JOHNSON & WILLIAMS, P.C.

Charles E. Frost, Jr.
Principal

CEF:jc
CEF154:73.wp

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(4) TRCP10: The sentence covering the situation where another attorney is not to be substituted, does not make it clear whether the withdrawing attorney is to advise the court "of all pending settings and deadlines" or whether the motion is to show that the withdrawing attorney has advised the party of all pending settings and deadlines. It seems that the attorney should show that he had advised the party of those settings and deadlines and in the process he can then remind the court of the same deadlines and settings.

The District Court of the State of Texas
200th Judicial District

TRCP 10
TRCP 166

Paul R. Davis, Jr.
Judge

Jill Williams
Secretary
473-9303

Robert Phelps
Bailiff
473-9782

Patty Day
Official Court Reporter
473-9325

Tencha Darrian
Court Clerk
473-9457

December 12, 1989

Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
512-473-9306

The Honorable Nathan Hecht
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Proposed TRCP Changes

Dear Judge Hecht:

I have reviewed the proposed changes to the Texas Rules of Civil Procedure and think they look very good. Here are some suggestions about a couple of them:

TRCP 10

I appreciate the amendments which are geared toward including the party in the substitution/withdrawal process. Too often substitutions or withdrawals are presented without notice to either the party or the opposing attorney(s). The biggest practical difficulty with this is its effect on trial settings when an attorney withdraws shortly before a case is scheduled for trial. The proposed amendments go a long way toward resolving this. It is also important that opposing counsel be involved in this process. It goes without saying that most attorneys will not engage in ex parte communication with the Court. For some reason, however, attorneys seem to forget this requirement when dealing with withdrawals and substitutions. I frequently receive ex parte motions for withdrawal, particularly from out of town counsel. Accordingly, I would suggest that the rule require delivery of the motion not just to the party but to all other attorneys of record in the case.

Another problem when an attorney withdrawals is that the remaining attorneys must communicate with the now unrepresented party at an address which may not be known to them. The rule should require that the motion also list the party's last known address.

Finally, I recommend that the rule expressly provide for a hearing unless the motion is agreed by the party and the opposing attorneys. A copy of my suggested changes is enclosed.

00040

TRCP 10. Withdrawal of Counsel

Withdrawal of an attorney may be effected by upon motion showing good cause and under such conditions imposed by the Court, or by upon presentation by such attorney of a notice of substitution designating the name, address, telephone number and State Bar of Texas identification number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only. If the attorney in charge withdraws and other counsel remain or become substituted, another counsel must be designated of record with notice to all other parties in accordance with Rule 21a as attorney in charge.

[An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as counsel for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as counsel for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which

both attys.

the party's last known address;

Unless the motion is agreed by the parties all other attys in the case, it shall be set for a hrg.

the attorney has knowledge at the time of the withdrawal and has not already notified the party. The court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and other counsel remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.]

[COMMENT TO 1990 CHANGE: The amendment repeals the present rule and clarifies the requirements for withdrawal.]

THORNE, GOLDEN & LAPIDUS
ATTORNEYS AT LAW
NCNB TOWER
SUITE 840
801 W. FREEWAY
GRAND PRAIRIE, TEXAS 75051

KIM R. THORNE
BOARD CERTIFIED – PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

CARL "RANDY" GOLDEN
BOARD CERTIFIED – FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

DOUGLAS J. LAPIDUS

(214) 264-1614
METRO 263-5163

10
3/a
166
166b

November 17, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

I have just had opportunity to review the proposed amendments as contained in the November edition of the Texas Bar Journal, and take this opportunity to accept your invitation for comment.

TRCP 10. WITHDRAWAL OF COUNSEL

Regardless of whether a substitution or withdrawal of counsel is proposed, this Rule always requires judicial approval before a party can change or dismiss his or her legal counsel.

I would suggest that in instances involving **substitution** of counsel, that a simple notice be filed bearing the signatures of the substituting and substituted attorneys, as well as that of the party. A notice procedure (as opposed to a motion) will eliminate unnecessary paperwork, judicial time, and uncertainty which may otherwise exist on submission of a motion as to which attorney bears responsibility for proper representation.

Thank you for your time and consideration.

Respectfully submitted,

THORNE, GOLDEN & LAPIDUS

DOUGLAS J. LAPIDUS
State Bar No. 11942200
NCNB Tower
Suite 840
801 W. Freeway
Grand Prairie, TX 75051
(214) 264-1614 or 263-5163

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

PAUL BOUDLOCHE

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-2807
ATTORNEY'S DIRECT DIAL
877-2835

10

November 16, 1989

Justice Nathan L. Hecht
P O Box 12248
Austin, TX 78711

Re: Comments to Amendments to
Texas Rules of Civil Procedure

Dear Justice Hecht:

I would like to make one comment with regards to the proposed change to Texas Rules of Civil Procedure No. 10 on withdrawal of counsel.

I would recommend that the following sentence or phrase or similar sentence or phrase be inserted within the rule following the statement that "If the motion is granted...."

> If the motion is granted, the Court's Order shall reflect the last known address in the possession of the withdrawing attorney for use of all Rule 21a service by remaining parties, and shall immediately notify....

As a trial attorney primarily doing defense practice, it is not unusual for a plaintiff attorney to withdraw from the representation of the Plaintiff one or two years after suit has been filed when the attorney is no longer able to locate his client or obtain his client's cooperation. Since the plaintiff attorney probably represented the claimant even prior to the filing of the lawsuit and since the rules of ethics for both insurance adjusters and attorneys forbid any direct contact with the claimant, my file generally will reflect only an address from the time of the initial occurrence, whereas, the plaintiff attorney may have one, two, or even three subsequent addresses which he has used to communicate with his client. Therefore, once he has withdrawn from the case, unless a provision is placed in the Court's Order and the Motion to Withdraw which provides me with an address for service of documents, I have absolutely no idea where to send any notices or other correspondence. Therefore, when an attorney attempts to withdraw from a case, I routinely ask the Court to have a provision inserted within the Court's Order designating the other party's last known address and that the remaining parties can utilize that address for Rule 21a service of notices and correspondence.

I appreciate your attention to the comment.

Sincerely yours,

Paul Boudloche

Paul Boudloche

RPB:jhp

TRCP 18b. Grounds For Disqualification and Recusal of Judges

(1) Disqualification. (No change.)

(2) Recusal. ~~Judges shall recuse themselves in any proceeding in which their impartiality might reasonably be questioned including but not limited to instances in which they have a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.~~ A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.]

[COMMENT TO 1990 CHANGE: The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

---

3. Rule 18b. This proposed amendment deals with the grounds for disqualification and recusal of judges. The principal concern about the proposed rule is that §(1) which lists the grounds for disqualification, and §2, which lists the grounds for recusal, include overlapping reasons. Some grounds are constitutional in nature, while others are not. [Elaine Carlson has agreed to do further research to determine the reason for the proposed changes to the existing rule.]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI &
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NEW YORK
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January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

8. New Rule 18(c). The suggested change would add a provision allowing a party to request a new judge to be assigned to the pending case. The request would require the presiding judge to determine the timeliness and proper form of the request. If timely and proper, the request would then be referred to the chief judge of the administrative district. Each party would be limited to one such request.

The subcommittee does *not* recommend such a change.

February 1, 1990

TO: Supreme Court Advisory Committee: Subcommittee on Rules 15 to 165

FROM: David J. Beck

The following is a draft of my views with respect to the recent correspondence forwarded to us. Since I will be unable to attend the meeting of the full Committee, I defer to the judgment of the other members of our subcommittee with respect to the conclusions to be reached.

Proposed Rule 18(b)

The comment is that in subparagraph 6 the references to the 2 subparagraphs are wrong. Since there is no (a)(5) or (a)(6)(iii) in the proposed rule, this comment is a valid one and the subcommittee recommends that the appropriate corrections be made.

BOB GLASGOW
STATE SENATOR
DISTRICT 22

The Senate of
The State of Texas
Austin

Chairman
JURISPRUDENCE Committee
Vice-Chairman
FINANCE Committee
Member
ADMINISTRATION Committee
STATE AFFAIRS Committee
LEGISLATIVE BUDGET BOARD
TEXAS LEGISLATIVE COUNCIL

January 11, 1990

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

I have received information that the Supreme Court Advisory Committee on Rules is considering a new Rule 18B "Recusal". It is further my understanding that this new Rule would require recusal if the Judge and an attorney were related within the third (3rd) degree.

This matter as regards disqualification and recusal has been considered by the Senate in 1987 and 1989 during Regular Sessions. The opinion of the Senate has consistently been that the third degree is too far reaching to be workable. The Legislature in 1989 did pass a statute requiring disqualification if the Judge and attorney were related within the First degree.

I would request that the Supreme Court Advisory Committee on Rules seriously reconsider their decision to extend the "Recusal" Rule to the third degree. This rule might work in the Urban areas, but it would be a disaster in the Rural areas of Texas. During the Senate Jurisprudence Committee hearings, and the Senate State Affairs Committee hearings, there was no testimony that the current rules are a problem. One member of the Legislature has consistently pushed the first degree disqualification rule because of a problem he sees in one county in his district. No other member of the Legislature has seen a problem.

I would hope that the Advisory Committee on Rules could develop a workable rule that did not create a problem in rural Texas.

I appreciate your concerns in this regard.

Very truly yours,

Bob Glasgow

RJG/bg

00052

P.O. Box 12068, Capitol Station
Austin, Texas 78711

6410 Southwest Blvd., Ste. 109
Ft. Worth, Texas 76109

505 N. Graham
Stephenville, Texas 76401

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(5) TRCP18(b): I have always thought that recusal was to assist judges in avoiding a violation of Canon 9. The amendment does not seem to cover all such situations. I believe that the recusal rule should also include a voluntary recusal provision to cover situations where a party could request a voluntary recusal where the judge gives notice of facts which the Judge believes might make the party desire a recusal. The example that comes most readily to mind is where a close relative of the Judge is a member of the law firm representing one of the parties, but not acting as lawyer in the proceeding.

In subparagraph (6) I believe the references to the two subparagraphs are wrong. I do not see any (a)(5) or (a)(6)(iii) in this rule.

TRCP 18
9/9/89 HJH COAJ SCAC Sub C Austin

LAW OFFICES

TAYLOR & SPICER, P.C.

4718 Camino Dorado • San Antonio, Texas 78233-6301
512-656-3711

FAX 512-590-1544

RAY TAYLOR
Certified Specialist - Criminal Trial Advocacy
National Board of Trial Advocacy

Certified Criminal Law Specialist
Texas Board of Legal Specialization

Certified Specialist - Civil Trial Advocacy
National Board of Trial Advocacy

Certified Civil Trial Specialist
Texas Board of Legal Specialization

PHILLIP R. SPICER, JR.
Certified Residential Real Estate Law Specialist
Texas Board of Legal Specialization
Member - College of State Bar

Xc Justice Hecht
Ray Taylor.

September 1, 1989

Mr. Luther H. Soules, III
175 E. Houston Street, 10th Fl.
San Antonio, Texas 78205-2230

Dear Luke:

Attached herewith please find a xeroxed copy of an article that appeared in the Texas Bar Journal regarding recusal of judges.

Also attached please find two possible proposed rule changes to considerably alter the very awkward situation we currently have. Please not there are two different alternatives.

I have also attached copies of the Wisconsin law - it has worked very well there and avoids awkward hearings. The cry that it "disrupts" proceedings simply hasn't worked out that way.

I'd like to appear before the committee to give my views, if I may.

Please present this to the Rule Change Committee and see if we can't get a decent rule.

Sincerely,

Ray Taylor

Ray Taylor

RT/njp
Enclosures

cc: Dick Clarkson
Attorney at Law

PROPOSED CHANGE TO RULE 18, TEXAS RULES OF CIVIL PROCEDURE

The Texas Rules of Civil Procedure would be amended by adding the following:

RULE 18c. Substitution of Judge.

(a) Any party to a civil action or proceeding in district court or county court may file a written request, signed by the party or its attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the Plaintiff, not later than 30 days after the petition and complaint are filed or, if by any other party, not later than 30 days after service of a petition and complaint upon that party.

(b) When the clerk receives a request for substitution, the clerk shall immediately contact the presiding judge for a determination whether the request was made timely and in proper form. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge of the judicial administrative district for determination of whether the request was made timely and in proper form and reassignment is necessary.

(c) Plaintiff may, if it chooses, file its request for substitution with its original petition and complaint, and thereafter, no pretrial hearing may be had before the judge excused until such time as the clerk has had an opportunity to determine whether the request is in proper form. Upon determination that the written request is timely and in proper form, the judge named in the request has no further jurisdiction in the matter, and no judge properly excused shall be assigned pursuant to Rule 330 to hear any matter in the case.

(d) If a new judge is assigned to the trial of a case, a request for substitution must be made within 5 days of receipt of notice of assignment; provided that if the notice of assignment is received less than 5 days prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(d) No party may file more than one such written request in any one action, nor may any single such request name more than one

judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

(e) If on appeal an appellate court enters an order such that further proceedings in the trial court are necessary, any party may file a new request for substitution with the clerk of the court, regardless whether a request had been filed prior to any appeal. Any new requests for substitution shall be filed with the clerk of the courts within 20 days of the clerk's notification that the file has been returned by the appellate court, and received by the clerk.

PROPOSED CHANGE TO RULE 18, TEXAS RULES OF CIVIL PROCEDURE

The Texas Rules of Civil Procedure would be amended by adding the following:

RULE 18c. Substitution of Judge.

(a) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the after the petition and complaint are filed or, if by any other party, not later than 60 days after service of a petition and complaint upon that party.

(b) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substituion has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and the clerk shall request the assignment of another judge. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge of the judicial administrative district for determination of whether the request was made timely and in proper form and reassignment is necessary.

(c) If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(d) No party may file more than one such written request in any one action, nor may any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

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166b
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221-279

POWELL POPP & IKARD

ATTORNEYS AT LAW

707 WEST TENTH STREET
AUSTIN, TEXAS 78701
TELEPHONE 512 473-2661
FACSIMILE 512 479-8013

M. FRANK POWELL
JAMES POPP
WILLIAM IKARD
G. WALTER McCOOL
PATRICIA L. SESSA

WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

1. TRCP 18. The proposed rule confuses disqualification with recusal. Items (2)(c), (d), (e) and (f) are all grounds for disqualification. They should not likewise be listed as grounds for recusal. I qualify this preceding remark by stating that a judge's spouse or relative within the third degree acting as lawyer in a proceeding is not a ground for disqualification. It properly could be listed as a basis for recusal.

   If the proposed rule remains as it is, then paragraph "(5)" is guaranteed to cause you trouble. Grounds for disqualification are listed among grounds for recusal, should you continue to say "[t]he parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record," you are going overrule substantial case law. Fry v. Tucker, 146 Tex. 18, 20, 202 S.W.2d 218, 220 (1947) and a host of other cases hold that if a judge is disqualified under the constitution, he is absolutely without jurisdiction, and any judgment rendered by him is void, and is subject to collateral attack. Buckholts Independent School District v. Glaser, 632 S.W.2d 146 (Tex. 1982), for example, allows for the raising of the point on a motion for rehearing on appeal. While it is a true statement that parties may waive a ground for recusal after it is disclosed on the record, parties cannot waive a ground for recusal if it also happens to be a ground for constitutional disqualification. As the proposed rule mixes constitutional grounds into the recusal part of the rule, it is erroneous to say that those grounds might be waived.

TRCP 18(b)

TRAP 74(c)
✓ 90

November 29, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, TX 78711

As a practical matter, there is one more question we would like to ask. Rule 18b of the Rules of Civil Procedure is, substantively, the same rule an appellate judge must use in determining questions of recusal. However, there appears to be a misprint in paragraph (6). That paragraph refers to subparagraphs "(a)(5) or (a)(6)(iii)." These two subparagraphs do not exist in Rule 18b as printed in the November Texas Bar Journal. Please have someone insert the correct subparagraph numbers.

Thank you for giving us the opportunity to comment on the proposed Rules changes.

Sincerely,

Yvonne Palmer

Yvonne Palmer
Chief Clerk
2nd Court of Appeals

TRCP 18b

2. The underlined subsections do no exist in the proposed rules as written.

TRCP 18b. Grounds For Disqualification and Recusal of Judges

(1) Disqualification. (No change.)

(2) Recusal. ~~Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.~~ [A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (a)(5) or (a)(6)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.]

[COMMENT TO 1990 CHANGE: The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 21. [Filing and Serving Pleadings and] Motions

A~~n~~ [pleading, plea, motion, or] application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be ~~made~~ [filed with the clerk of the court] in writing, shall state the grounds therefor, shall set forth the relief or order sought, [and a true copy shall be served on all other parties,] and shall be ~~filed/and~~ noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon [all other] ~~the/adverse/party~~ [parties], not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

[If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney-in-charge.]

[The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.]

[After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.]

[COMMENT TO 1990 CHANGE: To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73, into a single rule.]

February 1, 1990

TO: Supreme Court Advisory Committee: Subcommittee on Rules 15 to 165

FROM: David J. Beck

The following is a draft of my views with respect to the recent correspondence forwarded to us. Since I will be unable to attend the meeting of the full Committee, I defer to the judgment of the other members of our subcommittee with respect to the conclusions to be reached.

Proposed Rule 21

One concern expressed is that under the proposed rule copies of instruments must be served on *all* attorneys in a lawsuit. The rule presently provides for service only on "the adverse party." The precise concern is that in suits involving multiple parties, it could become very expensive to "serve" all parties by return receipt mail or other accepted forms of service. The suggestion is that "delivery" of copies of pleadings and other instruments should be required in all cases, but that only certain pleadings and instruments need be formerly "served" on attorneys who are "interested" in the filed pleading or instrument.

The problem with the suggestion is that it requires a determination by the serving party of whom is "interested" and therefore who may wish to respond to the document being filed, and whom is not. If that determination is incorrect, the inevitable result will be that some "interested" attorneys will not have timely receipt of a filing to which they may wish to respond. The subcommittee believes that on multi-party litigation, the trial court can address the problem by resort

to Rule 21a (court may allow service "in such other manner as the court in its discretion may direct") or to Rule 166 (pre-trial procedure rule).

Another concern expressed is that the first full paragraph does not include the possibility of a pro se party among parties represented by attorneys. That is incorrect. The proposed rule expressly requires that filed instruments be served on "all other parties." Obviously, if a party is not represented by an attorney, service should be on the party. Also, the last paragraph of the rule does not expressly say to whom the reasonable payment for copying and delivering is to be tendered. Although the proposed rule does not expressly identify to whom payment should be made, it is certainly implied in the rule that the party who provides the extra copy should receive the payment. Finally, another comment is that proposed rule 21 as currently written only requires communications seeking a court order to be served. This comment is incorrect. The first paragraph of the proposed rule expressly states that a "pleading, plea motion," or application to the court for an order "shall be served on all other parties."

Another point raised is whether the 3 days notice provision really affords sufficient time for a matter to be prepared for hearing. Also, a related concern is that a "reasonable notice" requirement would be too indefinite. The precise proposal is that a specific time period be expressed as a certain number of days greater than 3.

The subcommittee does not recommend any change in response to these comments.

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(6) TRCP21: The first full paragraph of the amendment does not include the possibility of a pro se party among parties represented by different attorneys. The last paragraph of this rule does not say to whom the reasonable payment for copying and delivering is to be tendered.

It seems to me that the scope of Rule 21 may be accidentally limited since the court has attempted to list certain things which must be filed and served. I would argue that during the pendency of any litigation, any written communication by one party to the court about anything to do with the case should be served on all other parties. The way rule 21 is written only communications seeking a court order are required to be served. Indeed, as written, although it is hard to image, an attorney opposing a motion might not have to file or serve any brief in opposition, but could merely send the brief directly to the judge. Again, I am sure that this is not what the court intended, but the literal wording of the rule would allow certain communications of the court without requiring them to be served on all other parties.

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman
Supreme Court Rules Advisory Committee

January 15, 1990

RE: Rule 21, Texas Rules of Civil Procedure
Filing and Serving Pleadings and Motions (1 page)

Some members of the Court have questioned whether the three days' notice provision in Rule 21, Texas Rules of Civil Procedure, really affords enough time generally for a matter to be prepared for hearing. I have not heard the same concern expressed with this time period in other contexts in the rules (such as Texas Rules of Civil Procedure 18a(b), 77(a), 208.3, 599, 608, 614, 614a, 664, 664a, 695, 701, 708, 712a, 718, 798).

The same members who raised this concern also seemed to feel that reasonable notice was too indefinite. Thus, they seem to favor a time period expressed as a certain number of days, greater than three.

The Court would benefit from the collective wisdom of the Committee on this subject.

4543.001

LEWIS, PETTITT & HINOJOSA
ATTORNEYS AT LAW
710 LAUREL
McALLEN, TEXAS 78502-2285
PHONE: (512) 687-8203

TELECOPIER: (512) 630-6570
MAIL: P.O. DRAWER 2285

JOHN E. LEWIS
B. BUCK PETTITT
JOHN B. SKAGGS
ROBIN W. WELCH
ROSE G. REYNA
F. G. HINOJOSA, JR.

January 12, 1990

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Proposed revisions to Texas Rules of Civil Procedure, Rule 21

Dear Judge Hecht:

I have reviewed the proposed changes to rule 21 and have discussed these changes with various members of the Cameron and Hidalgo County Bar Associations. In an effort to gain some insight into the reasoning behind the proposed changes, I have also contacted committee-person Doak Bishop.

I am concerned about the consequences of the proposed changes, in effect mandating the formal service of most "court papers". The effect of the rule promises to be time consuming and extremely expensive.

It has been the practice of attorneys in this area to interpret the current rule to require formal service of pleadings, motions and discovery only in certain situations. Most good trial practitioners in this area further acknowledge that the rules require "delivery" (as opposed to "service") of copies to all attorneys or parties.

I practice in a rural area, and accordingly, the least expensive and time consuming method of "service" defined under the rules is generally delivery by certified mail, return receipt requested. I have been advised by the secretarial staff in my office that the preparation of a return receipt letter requires three to five additional minutes and can cost as much as three dollars to mail.

In a recent case, involving multiple parties, I found myself sending a document to eighteen separate attorneys. If it had been necessary to send that document by return receipt mail, it would have required at least forty five additional minutes to address all the envelopes, and would have required more than fifty dollars in additional expense to the client.

In the scenario just described, there was only one other attorney in the lawsuit who could possibly have had any interest in the document I was sending, yet the new rules would require that I would have to "serve" that document on everyone in the lawsuit.

In contrast, other approved methods of service are generally even more expensive and time consuming. Personal delivery often requires the use of a compensated messenger, or requires that an attorney or some member of the office staff forego other duties in order to make the requisite delivery. In a rural area this can also require that the messenger drive to another county.

Under the new rule, receipted courier delivery would be extremely expensive, and is equally time consuming to initiate (i.e. address the envelopes). I have found delivery by telecopier to be generally unsatisfactory, and the "fax confirmation slip" will contain inaccurate information approximately half the time. There is also the expense of purchasing and maintaining a fax machine and supplies.

I understand the committee restructured the rule to ensure that all attorneys would receive delivery of copies of papers generated in the lawsuit. It seems to me that the simple solution is to require conspicuously in the rule that "delivery" of copies is required in all cases; however, only certain documents need to be formally "served".

I have drafted a proposed revision to the rule which is attached to this letter. The rule would require formal "service" of all notices (which would include settings and deposition notices). The rule would also require "service" on any party "who would be required to respond to" the document in question. All other documents would have to be "delivered" as opposed to "served". This would enable the bulk of law office mailings to be sent by first class mail, or at the sender's option, delivered in a more formal manner.

Other special documents could be handled on an individual basis under the rules, much like the current rules for various kinds of discovery.

Among the attorneys I have consulted, a requirement of delivery by first class mail would be an acceptable means of service or delivery in most cases. First class mail is cheaper, and in most cases seems to be two or three days faster than certified mail.

I hope these comments have been helpful.

Very truly yours,

LEWIS, PETTITT & HINOJOSA

John Skaggs

JS/gc
cc:
Mr. Luther Soules
Soles & Wallace
10th Fl, 175 E. Houston St.
San Antonio, Texas 78205

Mr. Doak Bishop
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

TRCP 21. [Filing and Serving Pleadings and] Motions

~~An~~ [pleading, plea, motion, or] application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be ~~made~~ [filed with the clerk of the court] in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be ~~filed and~~ noted on the docket. [A true copy of such document shall be served on any party who would be required to respond to such document; and shall be delivered to all other parties. Any notice shall be served on all parties.]

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon [or delivered to all other parties, as required in the last preceding paragraph,] ~~the adverse party~~ not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

[If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney-in-charge.]

[The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.]

[After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.]

WHITE, HUSEMAN, PLETCHER & POWERS

ATTORNEYS AT LAW

YANCEY WHITE
VAN HUSEMAN
ANTHONY E. PLETCHER
BRYAN POWERS
JOHN O. MILLER III
MARGERY HUSTON
MARK DEKOCH
PAUL DODSON

2100 THE 600 BUILDING
CORPUS CHRISTI, TEXAS 78473
(512) 883-3563

MAILING ADDRESS:
P.O. BOX 2707
CORPUS CHRISTI, TEXAS 78403-2707

FAX (512) 883-0210

21

21a

November 22, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

On behalf of all the attorneys at White, Huseman, Pletcher & Powers, I wish to register our comments on the proposed changes in TRCP 21 and TRCP 21a. It is our understanding that, pursuant to the proposed changes in these rules, all pleadings, motions, pleas or applications to the court for an order must be served upon all parties by hand delivery, registered mail, certified mail or facsimile transmission. We believe that a provision for service by first class mail should be added. Most such instruments are now served by mail. To limit service by mail to certified mail and registered mail would be unduly burdensome and expensive to all parties concerned especially in multi-party lawsuits. Further, it is our opinion that first class mail is far more dependable than facsimile transmission.

Thank you for your consideration of this matter.

Very truly yours,

Bryan Powers

Bryan Powers

BP:rd

E. Jack Lawrence, III
LEGAL ASSISTANT • EDUCATOR
5570 WINFREE DRIVE
BEAUMONT, TEXAS 77705
~~643-4049~~ (409) 833-0894
November 20, 1989

21
21b
166
1673
3082

Justice Nathan L. Hecht

Texas Rules of Court Conference

Dear Justice Hecht:

I would like to offer the following comments on the Proposed Amendments to the Texas Court Rules:

1. Suggested addition to TRCP Rule 21 or 21b: It shall be within the court's discretion to strike illegible documentary attachments to pleadings or motions, on motion by an opponent, subject to the right to amend seasonably.

2. Housekeeping matter - The third from the last sentence of TRCP Rule 21a begings with a noun without an article preceding it.

21
166b(4)

DAVIS & MCFALL
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2500 TWO HOUSTON CENTER
909 FANNIN STREET
HOUSTON, TEXAS 77010-1003

TELEPHONE (713) 951-1000 TELECOPIER (713) 951-1199

JOANN STOREY
DIRECT LINE (713) 951-1032

November 14, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to the Texas Rules of Civil Procedure, 52 Tex. Bar J. 1147, *et. seq.*, (November, 1989)

Dear Justice Hecht:

I believe that there is a conflict between the provisions of Texas Rule of Civil Procedure .21 and the proposed amendment to Texas Rule of Civil Procedure 166b(4). Pursuant to Rule 21, a hearing may be held with three days notice. As I understand the amendment to Rule 166b(4), the affidavits in support of an exemption or immunity from discovery must be served at least seven days before the hearing. Therefore, if a hearing is scheduled and three days notice is given pursuant to Rule 21, the party pleading an exemption or immunity will not be able to comply with Rule 166b(4) by serving any affidavits at least seven days before the hearing.

I would suggest that the rule require that the affidavits be served at the hearing. This would eliminate the conflict between the two rules and is consistent with the practicalities of civil trial practice.

Thank you for the opportunity to comment on the proposed changes before they are made.

Very truly yours,

JoAnn Storey

JAS:cb

TRCP 21a. ℕ𝕠𝕥𝕚𝕔𝕖 [Methods of Service]

Every notice required by these rules, [and every pleading, plea, motion, or other form of request required to be served under Rule 21,] other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy [thereof] 𝕠𝕗/𝕥𝕙𝕖/𝕟𝕠𝕥𝕚𝕔𝕖/𝕠𝕣/𝕠𝕗/𝕥𝕙𝕖/𝕕𝕠𝕔𝕦𝕞𝕖𝕟𝕥/𝕥𝕠/𝕓𝕖/𝕤𝕖𝕣𝕧𝕖𝕕//𝕒𝕤/𝕥𝕙𝕖 𝕔𝕒𝕤𝕖/𝕞𝕒𝕪/𝕓𝕖/ to the party to be served, or 𝕙𝕚𝕤 [the party's] duly authorized agent or 𝕙𝕚𝕤 attorney of record, either in person or by [agent or by courier receipted delivery or by certified or] registered mail, to [the party's] 𝕙𝕚𝕤 last known address, [or by telephonic document transfer to the party's current telecopier number,] or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act 𝕠𝕣 𝕥𝕒𝕜𝕖 /𝕤𝕠𝕞𝕖 /𝕡𝕣𝕠𝕔𝕖𝕖𝕕𝕚𝕟𝕘𝕤 within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail [or by telephonic document transfer], three days shall be added to the prescribed period. 𝕀𝕥 [Notice] may be served by a party to the suit, 𝕠𝕣/𝕙𝕚𝕤 [an] attorney of record, 𝕠𝕣/𝕓𝕪/𝕥𝕙𝕖/𝕡𝕣𝕠𝕡𝕖𝕣 [a] sheriff or constable, or by any other person competent to testify. [The party or attorney

of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.] A ₩ŕìŕŕéń śŕáŕéḿéńŕ certificate by [a party or] an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or ḍóćúḿéńŕ [instrument] was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. Ẅḧéń/ŧḧéśé/ŕúlés/ṕŕóṽíḍé fóŕ/ṁóŧíćé/óŕ/śéŕṽíćé/ṕý/ŕéǧíśŧéŕéḍ/ṁáíl//śúćḧ/ṁóŧíćé/óŕ/śéŕṽíćé ṁáy/álśó/ḅé/ṁáḍ/ḅý/ćéŕŧífíéḍ/ṁáíl/

[COMMENT TO 1990 CHANGE: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved service practices more current.]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH

FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

4. Rule 21a. The comments and suggestions all related to anticipated problems with the use of telephonic document transfer as a method of providing service on the opposing party. The comments at the November 30, 1989 public hearing, the comments, and the concerns of the subcommittee focused primarily on verification that telephonic document transfer has been accomplished. Another concern was that a party could provide notice after 5:00 P.M., thereby providing a shorter notice than that which a party would ordinarily be entitled. However, because the proposed amendment to Rule 21a *adds* 3 days to the prescribed service period if service is by telephonic document transfer, the latter concern seems unfounded. In fact, the subcommittee thought that the additional 3 days would probably tend to discourage telephonic document transfers.

With respect to certification, the subcommittee believed that the burden should be on the sender to verify timely receipt by the receipient. Since the proposed rule provides that "the party or attorney of record shall certify to the court compliance with this rule", and the receiving party still has the opportunity to rebut that certification, the subcommittee believed that the proposed rule as presently worded was acceptable.

Subsequent to our meeting, I received the comments of the State Bar's Administration of Justice Committee with respect to Rule 21a. That Committee made the following suggested addition to the proposed amendment to discourage service after 5:00 P.M.:

> "Service by telephonic document transfer after 5:00 P.M. local time of the recipient shall be deemed served on the following day."

The subcommittee supports the proposal of the Administration of Justice but recommends *no* other change in the proposed amendment.

February 1, 1990

TO: Supreme Court Advisory Committee: Subcommittee on Rules 15 to 165

FROM: David J. Beck

The following is a draft of my views with respect to the recent correspondence forwarded to us. Since I will be unable to attend the meeting of the full Committee, I defer to the judgment of the other members of our subcommittee with respect to the conclusions to be reached.

Proposed Rule 21a

The comment addresses the question of why any exception to the method of service is necessary. Also, the comment says that the proposed rule would allow someone to serve a party as opposed to the party's attorney, because the phrases are used disjunctively. Also, the proposed rule indicates that you can no longer send notice to an attorney, because the mailing is limited to certified or registered mail to "the party's last known address." Although it appears that it was intended that the quoted language should modify only the phrase "registered mail", the insertion of a comma between the two phrases makes it unclear.

The subcommittee recommends that the comma be removed.

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

Proposals Made but Not Recommended. All written communications concerning the Rules were read and considered by the subcommittee. One comment was made by three different attorneys. It concerns the conflict between TRCP 21 and proposed TRCP 166(b)(4). Rule 21 allows a hearing to be held with three days notice. Proposed Rule 166(b)(4) would require that affidavits in support of exemption or immunity from discovery must be served on the opposing party at least seven days before hearing. If a hearing is scheduled with only three days notice, the party pleading an exemption or immunity may not be able to comply with Rule 166(b)(4) by serving any affidavits at least seven days before the hearing. This problem is more likely to arise when the discovering party sets the objecting party's objection for hearing. The subcommittee could not think of a cure for this conflict which would not cause problems which are worse than the existing problem.

Future.

The wording of TRCP 166(b)(4) is clumsy and may cause confusion. It needs to be redrafted. Steve McConnico will attempt to redraft this section and present a proposal for re-wording section 4.

We should consider going to the Federal Rules' numbering scheme for the discovery rules. We have done this with the Appellate Rules.

4543.001

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LOS ANGELES
LONDON
ZURICH

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK

2-1-90

January 30, 1990

Re: Proposed Changes

TO: SUPREME COURT ADVISORY COMMITTEE: SUBCOMMITTEE ON RULES 15 TO 165

Attached is a copy of an article which appeared in The National Law Journal entitled, "Despite Some Doubts, Fax Filing Gains". I thought you might find this article interesting in view of the proposed amendment to Tex. R. Civ. P. 21a.

DJB/st

Enclosures

cc: Luther H. Soules, III, Esq.

0596B

SUPREME COURT ADVISORY COMMITTEE

Mr. Gilbert T. Adams, Jr.
Law Offices of Gilbert T. Adams
1855 Calder Avenue
Beaumont, Texas 77701

Mr. Pat Beard
Beard & Kultgen
P. O. Box 21117
Waco, Texas 76702-1117

Ms. Elaine A. G. Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Mr. Broadus A. Spivey
Spivey & Grigg
P. O. Box 2011
Austin, Texas 78768

Honorable Linda B. Thomas
Judge, 256th District Court
Old Red Courthouse, 2nd Floor
Dallas, Texas 75202

Mr. Kenneth D. Fuller
Koons, Rasor, Fuller & McCurley
2311 Cedar Springs Road, Suite 300
Dallas, Texas 75201

0597B

P. BECK

Federal Courts Still Hold Out

Despite Some Doubts, Fax Filing Gains

By Ken Myers
Special to The National Law Journal

FAX MACHINES are proliferating, and many attorneys swear by them. But so far the number of states that allow lawyers to file or serve court documents by fax is in the minority. And the federal courts are even further behind.

"There's more and more interest in it, and as far as I can tell, [the use of fax is] growing," said John Rockwell, research associate for the National Center for State Courts in Williamsburg, Va., who recently published a study of fax use in state courts.

For example, in December the Michigan Court of Appeals approved the validity of a warrant used to authorize a blood sample after the arresting officer faxed a copy of the unsigned warrant documents to a judge at home.

At the judge's phone instruction, the officer raised his right hand and swore to the affidavit. The officer then signed the affidavit and faxed a copy to the judge, who signed the warrant and faxed a copy back to the officer, who then stamped the judge's signature onto the original warrant form and added his own initials.

The unanimous decision said, "The signed, faxed document qualified as a court order, even if it lacked the formality necessary for a valid warrant." *...le v. Snyder*, 116527.

...ptance, Holdouts

Three states recently have adopted new fax rules. Starting in early February, litigants in Arkansas will be able to file lawsuits and pleadings by fax. New York's Gov. Mario Cuomo signed a bill into law last June that permits service of court papers on an attorney by fax if the attorney has previously consented to such service by publishing his or her fax number in a directory. That same month, Oregon amended its rules of civil procedure to allow fax service if the party on whom service is being made is represented by an attorney who has a fax machine.

But though there is increasing acceptance, some states are balking.

In Massachusetts, for example, a state Supreme Judicial Court committee recently rejected a proposal by a state bar association committee to permit lawyers to serve one another by fax. "We need to watch the technology evolve some more before we are able to give our blessing to something like this," said Allan van Gestel of Boston's Goodwin, Procter & Hoar, the chairman of the court committee that rejected the proposal.

But Warren Fitzgerald of Boston's Meehan, Boyle & Cohen, chairman of the commmittee that suggested the proposal, said many lawyers already are serving one another by fax, despite the lack of official sanction. "It removes the argument that an adversary hasn't received a document in a ...ely fashion," he said.

...bling Blocks

Marcia Mengel, clerk of the Ohio Supreme Court, says the court is reluctant to plunge into the fax morass: "We looked at [fax transmission] a year ago and decided against allowing it."

Several reasons mentioned by Ms. Mengel are commonly cited by court administrators as stumbling blocks. Collecting filing fees could be a problem with faxed documents, she said. And some types of filings require copies to be distributed, which means more work for the clerk's office. Perhaps the biggest problem is that the heat-sensitive thermal paper used by most fax machines does not always produce clear copies and tends to turn black over time. So a photocopy must be made on bond paper of any document that is to be saved.

Still, Ms. Mengel said, "I think that probably we are going to look at it again, and I wouldn't be surprised if we adopted a policy that allowed faxing in some situations."

Several counties in Ohio already are allowing faxing of court documents. The Sandusky County Common Pleas Court, for example, accepts filings of pleadings via fax if the clerk is alerted in advance. The clerk makes a photocopy of each page and charges the lawyer doing the filing $1 per page. Law firms that practice regularly before that court place a deposit in the clerk's office that is used to pay all court filing fees, including the fax-copying costs.

According to Common Pleas Judge Harry A. Sargeant, there have been no problems: "We haven't even gotten a bad check."

The federal system is not yet ready to allow fax transmissions. "Federal courts do not permit it because of Rule 11 [of the Federal Rules of Civil Procedure] concerns," said David Sellers, spokesman for the Administrative Office of the U.S. Courts.

But this may change. U.S. District Chief Judge Richard Bilby of Tucson, Ariz., chairman of the Judicial Improvements Committee of the Judicial Conference of the United States, said a pilot fax program in the Eastern District of Pennsylvania could lead to rules changes.

"Ultimately, the rules will have to be changed to allow both fax and electronic filing," he said. Judge Bilby calls faxing "an interim solution to the problem. The final solution will be electronic filing. Lawyers will file by computers, and the fees will be charged via Mastercard or Visa, or through an account with the court."

7/14
Memorandum and the additional part of the memorandum. Final Draft. Please disregard other drafts.

FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas

MEMORANDUM

TO: Mr. David J. Beck

DATE: July 10, 1989

FROM: Tammy Tran

RE: Texas Rules of Civil Procedure

I have reviewed the Texas Rules of Civil Procedure. A number of these rules expressly require the clerk or the moving party to serve notice on the opposing party and/or all parties. However, the remaining rules do not expressly require notice. If these rules are read in conjunction with Rules 21 and 21a, it appears that anytime, when a party files a motion and sets a hearing, it has to serve notice of the same on the opposing party or his counsel or other parties.

The following rules of the Texas Rules of Civil Procedure require notice:

GENERAL RULES

Rule 5 — Enlargement
A party may give notice to other parties to enlarge the specified period required to do an act.

Rule 8 — Attorney In Charge
When a party wants to change the designation of an attorney, *he has to give written notice* to other parties.

Rule 10 — Withdrawal of Counsel can be made:
(a) Upon motion showing good cause. If the withdrawing attorney files such motion, he has to give *notice*; or

(b) Upon *notice of substitution* (e.g., designating the name, address, telephone number and State Bar of Texas identification number, and the signature of the attorney to be substituted).

Rule 12 — Attorney To Show Authority
Where a suit is filed without authority, a party, by a sworn written motion can inform the court about this lack of authority. *Notice* of this motion must be served upon the challenged attorney at least 10 days before the hearing on the said motion.

Rule 13 — Effect of Signing Of Pleadings, Motions And Other & Papers; Sanctions
This rule impliedly requires a party that files any pleading, motion, or other paper to serve *notice* on all parties.

Rule 14 — Return Or Other Disposition Of Exhibits
After the judgment rendered and after a certain time, the clerk of the district court, before disposing of an exhibit, must give all attorneys of record a thirty-day *written notice* so that they would have an opportunity to claim and withdraw the trial exhibits.

Rule 18 — When Judge Dies During Term, Resigns Or Is Disabled
When a judge dies during his term, resigns or is disabled, the new judge must give *notice* to all parties.

Rule 19 — Recusal or Disqualification of Judge
The recusing party must file a motion and this rule requires that *notice be served* on all other parties or their counsel. If the judge refuses to recuse himself, he must file a motion to the presiding judge of the Administrative Judicial District (the "presiding judge"). The presiding judge must immediately set a hearing and must *serve notice of such hearing* to all parties or their counsel.

Rule 21 — Motions
Where a party makes "[a]n application to the court for an order and *notice of any hearing* thereon, not presented during a hearing or trial," such party must serve upon the adverse

party a copy of the application *and notice of the hearing* at least three days before the hearing.

Rule 21a — Notice
This rule prescribes the manner by which *notice is to be served* on the opposing party (or other parties) or his counsel.

Rule 38 — Third Party Practice
When a party files a third-party petition 30 days after the defendant serves his original answer, such party must file a motion for leave to file a third-party petition. He then must serve *notice of the hearing* to all parties to the action.

Rule 42 — Class Actions
After a court has determined that a class action may be maintained, it shall order the party claiming the class action *to direct* to the members of the class *the best notice practicable* under the circumstances, including *individual notice* to all members who can be identified through reasonable efforts.

> [T]his notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class (A) the nature of the suit; (B) that the court will excluide him from the class if he so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and (D) that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

Rule 42(e) provides that a class action can only be dismissed or compromised if *notice of the*

proposed dismissal or compromise be given to all members of the class in such a manner as the court direct.

Rule 60 — Of Intervenor
An intervenor *has to notify the opposite party* or his attorney of his filing of such pleading within five days from the filing of the same.

Rule 72 — Filing Pleadings Copy Delivered To All Parties Or Attorneys
This rule requires a party that files, or asks leave to file, any pleading, plea or motion of any character, to mail a copy of such motion or pleading to the adverse party. This rule impliedly requires that notice of any hearing on a motion be given to the opposing party.

Rule 73 — Failure To Furnish Copy of Pleadings to Adverse Party
If a party's opponent fails to serve the party a copy of any pleading, the party can file a motion requesting such pleading be stricken. This rule implies that *notice* of hearing is required to be served on the opposing party(ies).

Rule 77 — Lost Records and Papers
When any papers or records are lost or destroyed during the pendency of a suit, a party may make a written sworn motion before the court stating the loss or destruction of such records or papers. The party must serve the adverse party or his counsel with *notice* of the hearing on the motion three days before the hearing.

Rules 86, 87 — Motion to Transfer Venue
If a party wants to object to improper venue, it has to file a written motion. The opposing party can file a response. These rules impliedly require the moving party and responding party to serve *notice* on all parties.

Rule 89 — Transferred if Motion is Sustained
After the cause has been transferred, the clerk shall mail *notification* to the plaintiff or his attorney informing the same that transfer of the cause has been completed.

Rule 99 — Issuance and Form of Citation
This rule requires that the citation served on a

defendant *notifying* the same when he must file a written answer.

Rule 108 — Defendant Without State
This rule provides the method to serve *notice* on a defendant who is absent from the state or who is a nonresident of the state.

Rule 108a — Service of Process In Foreign Countries
This rule prescribes the manner to serve *notice* upon a party in a foreign country.

Rule 109-116 — Citation by Publication
These rules prescribe the manner to serve *notice* by publication upon a party whose address is unknown.

Rule 117a — Citation in Suits for Delinquent Ad Valorem Taxes
This rule provides a method to serve on a defendant *notice* of a suit for collection of delinquent ad valorem taxes.

Rule 120a — Special Appearance
A defendant may file a sworn motion for special appearance. This rule thus impliedly requires a defendant to serve on the adverse party *notice of the hearing* on the motion for special appearance.

Rule 143 — Rule For Costs
Under this rule, a party seeking affirmative relief may have to give security for costs at any time before the final judgment. Where a court requires such party to give security for costs, *notice* has to be given to such party.

Rule 145 — Affidavit of Inability
A defendant, who challenges a plaintiff's affidavit of inability to pay the court costs of an original action, may contest the affidavit by filing a written contest and giving *notice* of his contest to all parties.

Rule 162 — Dismissal or Non-Suit
A plaintiff may dismiss a case, or take a non-suit. It must serve *notice of the dismissal or non-suit* on any party who has answered or has been served with process. If it chooses to do so, it does not need the court order.

Rule 165a — Dismissal For Want of Prosecution

A court may dismiss a case for want of prosecution. *Notice of the court's intention to dismiss* and the date and place of the dismissal hearing must be sent by the clerk to each attorney of record and to each party not represented by an attorney.

A party that files a motion to reiterate must serve *notice* of the same on each attorney of record and each party not represented by an attorney. A court *will notify* all parties or their attorney of the date, time, and place of the hearing.

Rule 166a — Summary Judgment

This rule requires that the moving party shall serve the non-moving party *notice of the hearing on its motion for summary judgment* at least twenty-one days before the time specified for the hearing.

Rule 166b(2)(h) — Medical Records; Medical Authorization

A party that requests production of medical records must mail *written notice* stating that he has obtained medical records, reports, x-rays or other documentation by virtue of the written request or by virtue of authorization. If he mails this *notice* 30 days before trial and if his *notice* prescribes reasonable terms and conditions for inspection of these medical records, he is deemed to make the records "available" for other parties' inspection.

Section 5 impliedly requires that when a person files a motion for protective order, he has to send the other party a *notice*.

Rule 166c — Stipulations Regarding Discovery Procedure

This rule provides the parties may stipulate by written agreement any time of *notice* concerning depositions.

Rule 168 — Interrogatories to Parties

A party can file a motion to enlarge or shorten time for serving answers or objections. He must also serve *notice of a hearing to show good cause* on the opposing party.

Rule 184 — Determination of Law of Other States

This rule provides that a party requesting that judicial *notice* be taken must give all parties such *notice* as the court may deem necessary to enable all parties to prepare to meet the request.

This rule further provides that in the absence of prior notification, the request may be made after *judicial notice* has been taken.

Rule 184a

This rule provides that a party who intends to raise an issue concerning the law of a foreign country shall give *notice* in his pleading or other reasonable *notice* at least 30 days prior to the date of trial.

Rule 187 — Deposition to Perpetuate Testimony

This rule provides that a petitioner who files a verified motion for deposition to perpetuate testimony must serve *notice*, at least fifteen days before the date of hearing, upon the witness or each person named in the petition as an expected adverse party. If the petition states that the name or residence is unknown to petitioner, and his agent or attorney cannot be ascertained after diligent inquiry, the clerk of the court or justice of the peace shall, on petitioner's request, cause the *notice* to be published in some newsletter.

Rule 187(3) governs how *notice of deposition to perpetuate testimony* is made in an application to probate will.

Rule 187(4) provides that *notice* may be served on all parties providing time, place and manner of taking deposition.

Rule 188 — Depositions in Foreign Jurisdiction

This rule provides that when deposition, written or oral, is taken in foreign jurisdiction or foreign jurisdictions, the requesting party has to give *notice* on all parties.

Furthermore, this rule provides that "[a] commission, a letter rogatory, or a letter of request shall be issued on application and *notice* and on terms that are just and appropriate."

Rule 200 — Deposition Upon Oral Examination

Under Subsection 2, reasonable *notice* must be served in writing by the party or his attorney proposing to take a deposition upon oral examination to every other party or his attorney of record. The *notice* shall state the name of the deponent, the time and place of the taking of his deposition, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

Rule 201 — Compelling Appearance; Production of Documents and Things; Deposition of Organization

This rule provides that when the deponent is a party, service of the *notice* upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, *notice to take the deposition* which is served upon the party or the party's attorneys of record shall have the same effect as a subpoena served on the deponent. This rule also provides that if the *notice* sets forth the individual items or categories of items to be produced with reasonable particularity, a party, his agent or employees or any person subject to that party's control, may be compelled to produce designated documents or tangible things.

Subsection 4 discusses *notice* when the deponent named in the *notice* is a public or private corporation or partnership, association or governmental entity.

Rule 202 — Nonstenographic Recording; Deposition by Telephone

This rule requires that any party intending to make a nonstenographic recording shall give five day *notice* to all other parties by certified mail, return receipt requested, and shall specify in said *notice* the type of nonstenographic recording which will be used.

Rule 202(e) provides that a court may order that nonstenographic recording to dispense with the

requirement of a stenographic transcription of the deposition, however, *notice before the deposition is taken* must be given to all parties.

Rule 204 — Examination, Cross-Examination, and Objection
This rule provides that any party in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition. However, the written questions must be served ten days from the date of the *service of notice* provided for in Rule 200.

Rule 207 — Use of Deposition Transcripts In Court Proceedings
Subsection 3 of this rule provides that a party that files a motion to suppress the deposition transcript or some part thereof must give *notice of the written objections made in the motion* to every other party before the trial commences.

Rule 208 — Depositions Upon Written Questions
This rule provides that a party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a *written notice* ten days before the deposition is to be taken. The *notice* shall state the name and, if known, the address of the deponent, the suit in which the deponent is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken. Subsection 2 also provides *notice by publication.* Subsection 3 of this rule provides that any party may serve cross-questions upon all other parties within ten days after the *notice* and direct questions are served. Subsection 5 provides that the officer delivering the deposition transcript shall give prompt *notice of its delivery* to all parties. It shall be sufficient *notice of delivery* for the officer to forward to each party a copy of the officer's certification described in the paragraph 1 of Rule 206.

Rule 209 — Retention And Disposition of Deposition Transcripts And Depositions Upon Written Questions
The clerk must first give all the attorneys affected *written notice* that they have an opportunity to claim and withdraw deposition transcripts and depositions upon written questions.

Rule 215 — Abuse of Discovery; Sanctions

A party upon *reasonable notice* to other parties and all other persons affected thereby, may apply for sanctions or any order compelling discovery. Subsection 2 provides that the court in which the action is pending may make sanctions orders against the party upon which sanctions are sought, however, *notice of the hearing* has to be given on such party.

Rule 237a — Cases Remanded From Federal Court

This rule requires that the plaintiff shall file a certified copy of order of remand with the clerk of the state court and shall give *written notice* of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such *notice* to file an answer.

Rule 239a — Notice of Default Judgment

This rule provides that immediately upon the signing of the judgment, the clerk shall mail *written notice* thereof to the party against whom the judgment was rendered at the address shown in the certificate. The *notice* shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment.

Rule 246 — Clerk To Give Notice of Settings

This rule requires that the clerk shall give *notice* to any nonresident attorney of the date of setting of any case upon request by mail from such attorney accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient grounds for continuance or for a new trial if it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

Rule 247 — Tried When Set

This rule provides that no cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good

cause upon motion and *notice* to the opposing party.

Rule 279 — Admissions From The Judge

This rule provides that a party before the judgment is rendered may file a motion to request the court to make and file written findings on admitted elements in support of the judgment. However, he has to serve a *notice of the hearing* on the opposing party.

Rule 296 — Conclusions of Facts And Law

A party may file a request asking the trial court to state in writing his findings of facts and conclusions of law. Such request shall be filed within ten days after the final judgment is signed. The party has to serve the opposing party a *notice of the filing of the request* as provided in Rule 21a.

Rule 298 — Additional or Amended Findings

After the judge files original findings of facts and conclusions of law either party may, within five days, request the judge to specify further additional amended findings; and the judge shall, within five days after such request, prepare and file such further, other or amended findings and conclusions as may be proper. *Notice of the filing of the request* provided must be served on the opposite party as provided in Rule 21a or 21b.

Rule 201 — Judgments

This rule provides that upon motion and *reasonable notice* the court may render judgment notwithstanding the verdict if a direct verdict would have been proper, and provided further that the court may upon motion and *notice* disregard any jury finding on a question that has no support in the evidence. *Notice of the filing of the request for judgment notwithstanding the verdict* shall be served on the opposite party as provided in Rule 21a or 21b.

Rule 306a — Periods To Run From Signing Of Judgment

Subsection 3 of this rule provides that when the final judgment or other appealable order is signed, the clerk of the court shall immediately give *notice* of the parties or their attorneys of record by first-class mail advising that the judgment or order was signed.

Rule 308a — In Child Support Cases

This rule provides that the court may issue a show cause order to the person allegedly having disobeyed a support order commanding that person to appear and show cause why they should not be held in contempt of court. *Notice* of such order shall be served on the respondent in such proceedings in the manner provided in Rule 21a not less than ten days prior to the hearing on such order to show cause.

Rule 316 — Correction of Clerical Mistakes In Judgment Record

This rule provides that clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after *notice of the motion* has been given to the parties interested in such judgment by the moving party. The *notice* has to follow Rule 21a.

RULES RELATING TO ANCILLARY PROCEEDINGS

Rule 592a — Bond for Attachment

Under this Rule, a defendant or plaintiff may file a motion to increase or reduce the amount of bond or to question the sufficiency of the sureties thereon in the court in which such suit is pending. However, *he has to give notice to the opposite party*, either before or after the issuance of the writ.

Rule 599 — Defendant May Replevy

This Rule provides that at any time before the judgment, should the attached property has not been previously claimed or sold, the defendant may replevy the same. However, he has to give a bond. Either party shall have the right to prompt judicial review of the amount of the bond required, denial of bond, sufficiency of sureties, and estimated value of the property by the court with authorized issuance of the writ. This moving party *has to give reasonable notice* to the opposing party which may be less than three days before the hearing.

The defendant shall have the right to move the court for a substitution of property of equal value as that attached for the property attached. *He has to give reasonable notice to*

the opposing party which may be less than three days.

Rule 603 — Procedure for Sale

This rule requires that *notice* has to be given in a manner as directed by the order of the court.

Rule 608 — The Solution or Modification of Writ of Attachment

This Rule provides that a defendant whose property has been attached; or any intervening party who claims an interest in such property may file a sworn written motion seeking to vacate, dissolve or modify the writ and the order directing its issuance. Such defendant or intervening party *has to give reasonable notice* to the plaintiff which may be less than three days.

Rule 609 — Amendment

An party may make an application in writing to the judge or justice of the court in which the suit is filed to amend clerical errors in the affidavit, bond, or writ of attachment, or the officer's return thereof. He has to give *notice* to the opponent.

Rule 611 — Bond for Distress Warrant

This rule provides that no distress warrant shall issue before final judgment until the party applying therefore has filed with the justice of the peace authorized to issue such warrant a bond . . . .

This rule also provides that *after notice to the opposite party,* either before or after the issuance of the warrant, the defendant or plaintiff may file a motion to increase or reduce the amount of such bond.

Rule 614 — Defendant May Replevy

This Rule provides that at any time before the judgment, if the seized property has not been previously claimed or sold, the defendant may replevy the same. He has to give a bond. Either party shall have the right to prompt judicial review of the amount of the bond required, denial of bond, sufficiency of sureties, and estimated value of property by the court having jurisdiction of the amount in controversy. Such

party *has to give reasonable notice* on the opposing party which *may be less than three days*.

This Rule also provides that the defendant shall have the right to move the court for a substitution of property, of equal value as that attached, for the property seized, the defendant *has to give reasonable notice on the opposing party* which may be less than three days.

Rule 614a — Dissolution or Modification of Distress Warrant
This rule provides that a defendant whose property has been seized or any intervening claimant who claims an interest in such property, may by sworn written motion, seek to vacate, dissolve, or modify the seizure. This rule also provides that the motion shall be heard after *reasonable notice* to the plaintiff.

Rule 617 — Procedure for Sale
This Rule provides that upon order of the judge to sell perishable personal property, a party *has to give notice* thereof in such manner as directed by the order.

Rule 631 — Execution for sale of particular property
This Rule provides that the officer making the sale must give *the public notice* of the time and place of sale required by law and this Rule.

This rule provides that the officer making the sale must give *the public notice* of the time and place of sale required by law in this rule.

Rule 639 — Levy
This rule provides that where the defendant in execution has an interest in personal property, but is not entitled to possession, the levying officer *must give notice* of levy to the person who is entitled to the possession, or one of them where there are several.

Rule 640 — Levy on Stock Running at Large
This rule requires that *a notice must be given in writing* to the owner of his holder or agent, if such person resides within the county and known to the officer.

Rule 647 — Notice of Sale of Real Estate

This rule requires that the time and place of sale of real estate under execution, order of sale, or venditioni exponas, shall be advertised by the officer by having the *notice thereof published in the English language once a week for three consencutive weeks preceeding such sale,* in some newspaper published in said county. The notice shall contain a statement of the authority by virtue of which the sale is to be made, the time of levy and the time and place of sale; it shall also contain a brief description of the property to be sold, and shall give the number of acres, original survey, locality in the county, and the name by which the land is most generally known. If there be no newspaper published in the county, or none of which will publish the notice of sale for the compensation fixed under this rule, the officer *shall then post such notice in writing in three public places in the county, one of which shall be at the courthouse door* of such county, for at least 20 days successively next to before the day of sale. The officer making the levy *is also required to give the defendant,* or his attorney, *written notice of such sale,* either in person or by mail, which notice shall substantially conform to the foregoing requirements.

Rule 650 — Notice of Sale of Personal Property

This rule provides that previous *notice* of the time and place of the sale of any personal property levied or under execution shall be given *by posting notice thereof for 10 days* successively immediately prior to the day of sale at the courthouse door of any county and at the place where the sale is to be made.

Rule 652 — Purchaser Failing to Comply

This rule provides that a plaintiff can file a motion requiring any person that bid off property at any sale made by virtue of an execution, if such person fails to comply with the terms of the sale requiring to pay the plaintiff 20% on the value of the property thus bid off, besides costs. The plaintiff must give *five day notice of such motion to such purchaser.*

Rule 658a — Bond for Garnishment

This rule requires that either before or after the issuance of the writ for garnishment, the defendant of plaintiff may file a motion to increase or reduce the amount of bond, or to the question of sufficiency of the sureties. Such defendant or plaintiff *has to give notice to the opposite party*, either before or after the issuance of the writ.

This rule also requires that if it be determined from the garnishee's answer that the garnishee is indebted to defendant or has in his hands effects belonging to the defendant in an amount or value less than the amount of the debt claimed by the plaintiff, then the court in which such garnishment is pending, upon a hearing, may reduce the required amount of such bond. However, *notice has to be given to the defendant before the hearing.*

Rule 663a — Service of Writ on Defendant

This rule provides that the defendant shall be served in any manner prescribed for service of citation or as provided in Rule 21A with a coy of the writ of garnishment.

Rule 664 — Defendant May Replevy

This rule requires that the defendant may replevy the garnished property but he has to pay a bond. Either party shall have the right to request a judicial review of the amount of the bond required. However, such person has *to give reasonable notice to the opposing party which may be less that three days.* This rule further provides that the defendant shall have the right to move the Court for a substitution of property. However, *he has to give reasonable notice to the opposing party* which may be less than three days.

Rule 664a — Dissolution or Modification of Writ of Garnishment

A defendant whose property or account has been garnished or any intervening party who claims an interest in such property or account may file a sworn written motion seeking to vacate, dissolve, or modify the writ of garnishment and the order directing its issuance. The defendant or the intervening party *has to give reasonable notice*

to the plaintiff which may be less than three days.

Rule 675 — Docket an Notice

This rule requires that clerk of the court of the justice of the peace to *issue a notice to the garnishee* stating that his answer has been so controverted and that such issue will stand for trial on the docket of such court. *Such notice* shall be directed to the garnishee, be dated and tested as other process from such court and served by delivering a copy thereof to the garnishee.

Rule 679 — Amendment

A party may apply in writing to the judge or justice of the court to amend clerical errors in the affidavit, bond or writ of garnishment, or the officer's return thereof. Such party *has to give notice to the opponent*.

Rule 680 — Temporary Restraining Order

This rule provides that no temporary restraining order shall be granted *without notice to the adverse party* unless it clearly appears from the specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury loss, or damage will result to applicant before notice can be served and a hearing can be had.

This rule further provides that the adverse party may appear and move its dissolution of modification. But he must give *notice* to the party who obtained the temporary restraining order.

Rule 681 — Temporary Injunction: Notice

This rule provides that *no* temporary injunction *shall be issued without notice* to the adverse party.

Rule 686 — Citation

This rule provides that *a notice has to be given* if a hearing is held on a temporary restraining order or temporary injunction.

Rule 694 — No Mandamus Without Notice

This rule provides that *no mandamus shall be granted* by the district or county court *without*

a notice. Any mandamus granted without notice shall be abated on a motion.

Rule 695 — No Receiver of Immovable Property Appointed Without Notice

This rule provides that except provided by the statute, *no receiver shall be appointed without notice* to take charge of property which is fixed and immovable. When an application for appointment for receiver to take possession of property of this type is filed, the court shall set the same down for hearing and *notice of such hearing* shall be given to the adverse party by serving notice thereof not less than three days prior to such hearing. If the order finds that the defendant is a nonresident or that his whereabouts is unknown, *the notice* may be served by affixing the same in a conspicuous manner and placed upon the property or if that is impracticable, it may be served in such other manner as the court or judge may require.

Rule 698 — Bond For Sequestration

Under this rule the defendant or plaintiff may file a motion to increase or reduce the amount of bond. *He has to give notice to the opposite party* either before or after the issuance of the writ.

Rule 700 — Amendment

This rule provides that a party may move to amend practical errors in the affidavit, bond, or writ of sequestration or the officer's return therefore. *He has to give notice* to the opponent before the hearing.

Rule 700a — Service of Writ on Defendant

This rule provides that the defendant may be served as provided in Rule 21a or the defendant shall be served in any manner provided for service of citation.

Rule 701 — Defendant May Replevy

This rule provides that at any time before the judgment, if the sequestered property has not been previously claimed, replevied, or sold, the defendant may replevy the same or any part thereof of the proceeds from the sale of the property. The defendant has to give a bond. Either party shall have the right to prompt

judicial review of the amount of the bond required, the denial of bond, sufficiency of surities, an estimated value of the property. However, before the hearing, the party *has to give reasonable notice to* the opposing party which may be less than three days.

Rule 708 — Plaintiff May Replevy

This rule provides that the plaintiff may replevy the property, however, he has to give a bond. This rule further provides that either party shall have the right to prompt judicial review of the amount of bond required, the denial of bond, sufficiency of sureties, an estimated value of the property, by the court which authorized issuance of the writ. *Such party has to give reasonable notice* to the opposing party which may be less than three days period.

Rule 712a — Dissolution of Modification of Writ of Sequestration

A defendant whose property has been sequestered or any intervening party who claims an interest in such property may file a sworn written motion seeking to vacate, dissolve, or modify the writ and the order directing its issuance. The moving party has to give *reasonable notice* to the plaintiff which may be less than three days.

TRIAL OF RIGHT OF PROPERTY

Rule 718 — Property Delivered to Claimant

This rule provides that any claimant who claims an interest in property on which a writ has been levied may, by sworn written motion seek to obtain possession of such property. The motion shall be heard promptly after *reasonable notice* to plaintiff which may be less than three days.

RULES RELATING TO SPECIAL PROCEEDINGS

Rule 740 — Complainant May Have Possession

This rule provides that a party at the time of filing his complaint may execute and file a possession bond to be approved by the Justice in such amount as the Justice may fix. The defendant *shall be notified* by the Justice Court that the plaintiff has filed a possession bond. Such notice shall be served in the same manner as

service of citation and shall inform the defendant of all of the rules and procedures set forth under Rule 740 a, b, c and d.

Rule 749 — May Appeal

This rule provides that either party may appeal from a final judgment in forceable entry and detainer cases. It also provides that the Justice shall set the amount of the bond. It further provides that within five days following the filing of such bond, the party appealing *shall give notice* as provided under Rule 21A of the filing of such bond to the adverse party.

Rule 749a — Pauper's Affidavit

If an appellant is unable to pay the cost of appeal, he shall file an affidavit and give notice to the opposite or his attorney of record.

Rule 749b — Pauper's Affidavit in Non-Payment of Rent Appeals

Subsection 3 provides that the tenant or appellant failed to pay the rent into the court registry within the time limit prescribed by the rules, the appellee may file a notice of default in County Court.

Rule 751 — Transcript

This rule provides that when an appeal has been perfected, the Justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all of the entries made on his docket of the proceedings had in the case. The clerk shall immediately notify both appellant and the adverse party the day of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the County Court when the defendant has pleaded orally in the Justice court.

Rule 762 — Writ of Partition

This rule provides that the clerk shall issue a writ of partition, directed to the sheriff or any constable of the county, commanding such sheriff or constable to *notify* each of the commissioners of their appointment . . . . (Commissioners are competent and disinterested persons who are appointed by the court to make partition of real estate).

Rule 791 — May Demand Abstract of Title

After an Answer is filed, either party may, *by notice in writing*, duly served on the opposite party or his attorney of record, not less than 10 days before the trial of the cause demanding an abstract in writing of the claim or title to the promises in question upon which he relies.

Rule 792 — Time to File Abstract

When an Abstract of Title shall be filed with the court, the court may, *at the notice* and hearing prior to the beginning of trial order that no evidence of the claim or title of such opposite party be given on trial.

Rule 798 — Common Sources of Title

This rule provides that it shall not be necessary for the plaintiff to deraign title beyond a common source. Proof of a common source may be made by the plaintiff by certified copies of the deeds showing a change of title to the defendant emanating from and under such common sources. This rule further provides that before any such certified copies shall be read in evidence, they shall be filed with the court three days before the trial. This rule requires that the plaintiff has to serve the adverse party *with notice* of such filing as in the other cases.

RULES OF PRACTICE IN JUSTICE COURTS

Rule 565 — Rules Governing

This rule provides that the rules governing the district and county courts in relation to judgment and confession therefore, shall also apply to justice courts, insofar as they do not conflict with some provision of the rules applicable to justice courts. Thus, *the notice requirements* under the general rules are applicable in the justice courts.

Rule 566 — Judgments By Default

This rule provides that a Justice may, within 10 days after a Judgment by Default of Dismissal is signed, set aside such judgment, on motion in writing. Notice of such motion shall be given to the opposite at least one full day prior to the hearing thereof.

Rule 569 — Notice

This rule provides that all motions to set aside a judgment or to grant a new trial shall be made within five days after the rendition of judgment and *one day's notice shall be given the opposite party* or his attorney.

APPEAL

Rule 571 — Appeal Bond

This rule provides that a party, in order to appeal, must file with the Justice a bond. Within five days following the filing of such Appeal Bond, the party shall give notice as provided in Rule 21a or 21b of the filing of such bond to all parties to the suit who have not filed such bond.

Rule 572 — Affidavit of Inability

This rule provides that an appellant who is unable to pay the cost of appeal or gives securities therefore, shall file an affidavit with the justice of the peace stating his inability to pay such costs. He has to give notice thereof to the opposite or his attorney of record by any officer of court of party to the suit.

STATE BAR OF TEXAS

hjh
LHJ
1-9-90
SB

4543.001

TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

The Committee on the Administration of Justice has reviewed the Supreme Court Advisory Committee's proposed rule changes. We believe that the vast majority of the proposals are sound and should be approved. We have a few suggestions to make, which fall into these four categories: (1) alternate proposals for rules 21a and 166, (2) criticism of proposed rules 271-275, (3) recommendation that TRAP 90 remain unchanged, and (4) the highlighting of various inadvertent errors in the wording of several of the rules.

1. Alternate proposals for TRCP 21a and 166.

We support the objectives of the proposed amendments to rules 21a and 166. Rule 21a would authorize FAX service of legal papers, and rule 166 would clarify and strengthen the trial court's powers at pre-trial conferences. Alternate proposed revisions of rules 21a and 166 are attached. Our suggested additions to the SCAC version are underlined twice; our suggested deletions from its version are stricken through with a slash (/) and a hyphen.

P. O. Box 12487 / Austin, Texas 78711

A. Rule 21a.

We suggest that the wording of rule 21a be modified to achieve three purposes. First, the rule should ensure that when a lawyer FAXes documents to opposing counsel after working hours the service is deemed to take place the next day. This should frustrate gamesmanship in which a lawyer waits until after hours to serve papers. In addition, since the purpose is to make FAX service the equal of hand delivery, we have provided that when an instrument is served by FAX the usual three days are not added, as happens when papers are served by mail. Finally we have restored language that we believe was inadvertently deleted from the existing rule--"as the case may be"--to make clear that when a litigant is represented by an attorney, service must be made upon the attorney and not upon the litigant.

If this modification of rule 21a is adopted, the words "or by telephonic document transfer" should be deleted from proposed rule 4.

TRCP 21a. ~~/Notice~~ [Methods of Service]

Every notice required by these rules, [and every pleading, plea, motion, or other form of request required to be served by Rule 21,] other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy [thereof] ~~of the notice or of the document to be served as the case may be/~~ to the party to be served, ~~or~~ his [the party's] duly authorized agent, or his attorney of record, as the case may be, either in person or by [agent, by telephonic document transfer to the recipient's current telecopier number, by courier receipted delivery or by certified or] registered mail, to [the ~~party's~~ recipient's] his last known address, ~~[or by telephonic document transfer to the party's current telecopier number,]~~ or it may be given in such other manner as the court in its discretion may direct. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act ~~or take some proceeding~~s within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail ~~[or by telephonic document transfer]~~ three days shall be added to the prescribed period. ~~It~~ [Notice] may be served by a party to the suit, ~~or~~ his [an] attorney of record, ~~or by the proper~~ [a]

sheriff or constable, or by any other person competent to testify. [The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.] A written statement certificate by [a party or] an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document [instrument] was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. When these rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.

[COMMENT TO 1990 CHANGE: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved service practices more current. Delivery by telephonic document transfer is defined to be similar to hand delivery, except that it should occur before 5:00 p.m. local time. This prevents service after normal business hours merely because an unattended telecopier is left operational.]

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(8) TRCP21(a): My first comment is in the form of a question. Why is any exception to the method of service needed? Such exceptions would seem inconsistent with the stated purpose of the amendments to Rule 21 and 21(a).

The amendments also cause me to review the language of this rule in terms of the service allowed. First of all, as worded, the rule would allow someone to serve a party as opposed to the party's attorney, since those are stated disjunctively. Secondly, the amendment adding service by an agent or by a courier changes the meaning of the phrase "in person." Prior to the amendment, I believe that phrase referred back to the party being served, so that it would read that you could serve the party or attorney in person as opposed to mailing. Now by mixing this phrase with other methods by which service can be effected, it would refer to the person doing the serving, not the person being served. As such, "in person" would mean the party or attorney serving the paper must personally deliver the paper to the other party or attorney.

The confusion with this amendment is even greater, however. As worded, service on the attorney of record can be in person, by agent, or by courier, but no longer can you mail anything to an attorney, since mailing is limited to certified or registered mail to "the party's last known address." Likewise, the new method of service--telephone document transfer--is also limited to the party's current telecopier number, not the attorney's. This confusion obviously needs to be changed.

The sentence beginning with the word "whenever" which talks about the three day additional time is missing a word or contains an extra word. I believe the word "upon" preceding the phrase by mail or by telephoning document transfer should be deleted.

If you are going to authorize the use of telephone document transfer, I do not see the necessity of adding three days to the time to respond when service is made by this method. I would assume the whole purpose in using such a method of service would be to speed up the court processes and the time for any response similar to "in person" service. By allowing three additional days you defeat this purpose. I would also recommend that the rule provide that any time telephonic document transfer is used, it must be followed up by mail service as well.

LAW OFFICES
OF
PAT MALONEY
PROFESSIONAL CORPORATION

December 4, 1989

Justice Lloyd Doggett
The Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

** PAT MALONEY
* PAT MALONEY, JR.
* GEORGE LeGRAND
JANICE MALONEY
* VIRGIL W. YANTA
PATRICIA MALONEY
TOM JONES
CHARLES NICHOLSON
AL M. HECK (1896-1977)
STEPHANI WALSH
ROGER G. BRESNAHAN
* GARY HOWARD
OF COUNSEL
T.J. SAUNDERS
OF COUNSEL

RE: Proposed Revisions to Texas Rules

Dear Mr. Justice Doggett:

After having reviewed the proposed changes to the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence, I wanted to point out the following less-than-salutary provisions in the rules, as well as the one exemplary provision, all of which are stated below:

The Texas Rules of Civil Procedure:

21a:

Considering telecopied delivery the same as mailed delivery makes no sense, for it should be considered the same as a hand-delivered document, as long as it is "received" by the recipient during normal business hours. As proposed, the revision discourages telecopying of items, for it tacks on the three additional days automatically tacked on for mailed documents.

Very truly yours,

LAW OFFICES OF PAT MALONEY, P.C.

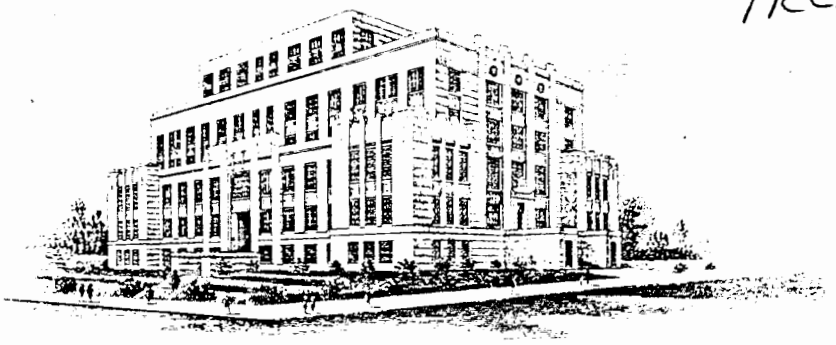
By: Virgil W. Yanta
VIRGIL W. YANTA

VWY:naj

cc: Chief Justice Thomas R. Phillips
Justice Franklin S. Spears
Justice C.L. Ray
Justice Raul A. Gonzalez
Justice Oscar H. Mauzy
Justice Eugene A. Cook
Justice Jack Hightower
Justice Nathan L. Hecht

TRCP 21a

County of TRAVIS
STATE OF TEXAS



J. DAVID PHILLIPS
JUDGE
COUNTY COURT AT LAW NO. 1
COUNTY COURTHOUSE
AUSTIN, TEXAS

January 8, 1990

Hon. Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, TX 78711

Re: "Fax": Proposed changes to the Rules of Civil Procedure

Dear Justice Hecht:

Mr. James Jolly Clark has kindly provided me with a copy of his letter to you of January 3, 1990, wherein he suggests some changes in the Texas Rules of Civil Procedure. These rule changes are to have the effect of authorizing the filing of copies of pleadings and documents rather than the originals.

As a trial judge, I have some reservations about the wisdom of the changes proposed. It seems that Mr. Clark is asking the Court to make the Rules fit the available technology simply because the technology exists. It would appear to me to be the wiser course to recognize the availability of the technology and then to examine how it can work to benefit litigants in our courts.

Facsimile machines (or "Faxes" to corrupt the language with jargon and probably violate someone's trademark) are, of course useful in transmitting documents instantaneously across long distances. It would be of benefit to counsel confronted with the problem of e.g., filing an original answer or a response to a motion for summary judgment at the last minute before a deadline. Of concern to the trial bench is the fact that the "faxed" document is not susceptible to the close scrutiny sometimes needed to determine the sufficiency of the original. Not an insignificant number of cases turn on the issue of the validity of documents. Without the original of, perhaps, an affidavit, in hand, a trial judge may be unable to determine the sufficiency of the document.

Mr. Clark's proposal attempts to remedy this problem (which he recognizes) by providing that the original is to be kept and produced "should a question be raised as to its authenticity." This seems to me to misplace the burden. A better rule would be that the "faxed" document, be it an answer, a motion, etc., will suffice to forestall adverse action which might otherwise occur in the case but for the filing of the "fax"; however, the original of the document must be filed within some reasonable time (e.g., 10 days) or in any event before the hearing at which the document is to be used.

The foreseeable adverse consequence of my proposal would be an overburdening of the clerk's office with the double-filing of documents. This would only occur, however, if attorneys overuse "faxing" by "faxing" every routine document rather than reserving the use of the technology and its accompanying expense for documents which are unusually time-sensitive. If attorneys know that a "fax" will save them and their cases from the passage of a deadline, they will use the "fax"; if they know that is not a complete substitute for the actual document, I suspect they will not overuse the "fax". Your hard work and attention to the workings of the Rules in the trial courts is greatly appreciated.

Sincerely,

J. David Phillips
Judge, County Court at Law #1

cc: James Jolly Clark
601 W. 11th St.
Austin, Tx 78701

LAW OFFICES OF
BISHOP, PAYNE, LAMSENS & BROWN
SUITE 1800
500 WEST SEVENTH STREET
FORT WORTH, TEXAS 76102-4782
(817) 335-4911
FAX (817) 870-2631

TRCP 21a

January 9, 1990

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

I apologize for being so late with this letter; I noted that you requested comments prior to November 30, 1989.

I wish to comment on one proposed rule and that is the proposed TRCP 21a. In said rule, you are allowing service of pleadings, pleas and other responses by use of a telephonic document transfer. After a recent experience with some attorneys in Dallas, in my opinion this is a rule that could be subject to much abuse. On three occasions I have received in excess of 35 pages by fax. The first two occasions contained Notices to Take Depositions, with Subpoena Duces Tecum. The second occasion was the same Notices with an agreed change of time because of scheduling conflicts, and on the third occasion were 37 pages of Interrogatories. On none of the occasions was there a rush, urgency, or need. This increases the cost of the use of the machine that is basically in the law office for the convenience of clients, and emergency matters that need a quick resolution. If everyone starts using telefax machines to send notices of pleadings, this would necessitate an expense against the client, which is simply not needed. The Interrogatories I received on Friday, December 29, pursuant to the proposed rules, still have an additional three days added to same. Receipt on Tuesday, January 2, would have been just as adequate. In fact, after receipt by fax, the next business day I received same in the mail.

Although the cost of the law firm for the fax paper may not be tremendous, nevertheless, I am very cost conscious. I had already written the Dallas law firm a letter requesting that the fax no longer be used when not required, and now I am going to send them a bill.

There needs to be another solution.

Yours truly,

S. Cary Werley

SGW:lea
11399/SGW41

TRCP 21a

December 5, 1989

Texas Supreme Court
200 West 14th Street
Room A-G II
Austin, Texas 78701

RE: §51.803 of Tex. Gov't Code Ann.-Supreme Court Regulation and Approval of Electronic Filing of Certain Documents

Dear Honorable Justices of The Texas Supreme Court,

Now comes, Diana La-Fontaine and Chris Vanderford to respectfully request the Texas Supreme Court to promulgate a rule authorizing the utilization of filing faxed documents with the appropriate clerk and/or court.

Diana La-Fontaine and Chris Vanderford, hereinafter referred to as "Houston Facs File", are two women in the final stages of making Houston Facs File a reality. Houston Facs File will be a service available to attorneys and pro se individuals throughout the state of Texas and the United States, which allows them to fax their documents to us for the purpose of filing in the appropriate clerk's office and/or court. The final stage that Houston Facs File is currently in is being able to obtain a very prompt approval of rules that would cover our procedure. Wherein, with this approval our investors would agree to release the funding for Houston Facs File. As we all know the final stage to any business endeavor is to obtain funding. That is the main reason we, Houston Facs File, have come forth and respectfully requested a prompt ruling regarding the filing of faxed documents.

Wherefore it would be greatly appreciated and we also respectfully request a letter response from the Texas Supreme Court stating or responding to the following:

(1) The status and time frame of the aforementioned ruling?
(2) Will Houston Facs File need to seek the approval of the Texas Supreme Court regarding their system?
(3) Will the Texas Supreme Court need to regulate the operation of Houston Facs File as per §51.803?
(4) In filing a faxed document is the procedural intent satisfied?

(5) Can Houston Facs File obtain any proposed rules and/or studies pertaining to faxed documents and/or electronic filing?

(6) Any input or feedback pertaining to Houston Facs File guidelines would be greatly appreciated.

Based on Houston Facs File's diligent research and marketing survey we have truly found a great need for this service. The feedback from various sources, mainly attorneys, has been only positive. They have expressed not only interest in the concept of Houston Facs File but would like to know exactly when services will be available for usage. We also have meet with the Harris County District Clerk's Office and have been informed that faxed documents would be received and filed with the appropriate court.

Enclosed please find for your perusal the following documents:

(1) Procedural Guidelines for Houston Facs File

(2) Conceptual Background for Houston Facs File

(3) Information on Houston Facs File

(4) Letters of endorsement from Career Institute-Paralegal People and James I. Wiedemer, Esquire

Thanking you in advance for your prompt reply.

Respectfully Submitted,

Diana La-Fontaine Chris Vanderford

Diana La-Fontaine, President
Chris Vanderford, Vice-President
Houston Facs File
PO Box 2025
Bellaire, TX 77402-2025
Enclosures

cc: Thomas R. Phillips
C.L. Ray
Oscar H. Mauzy
Jack Hightower
Lloyd Doggett
Franklin F. Spears
Raul A. Gonzalez
Eugene A. Cook
Nathan L. Hecht

PROCEDURAL GUIDELINES FOR HOUSTON FACS FILE

I. The attorney and/or pro se individual, hereinafter referred to as "Sending Station", will fax their document that needs to be filed with the clerk and/or court to Houston Facs File, hereinafter referred to as "Receiving Station".

II. The Receiving Station will have a transmission report obtained from the fax machine when transmission is complete.

III. The Receiving Station will fax back to the Sending Station the transmission report obtained from the fax machine to certify verification of the receipt of all pages of the document. As well as, approval of the charge (Mastercard, Visa, Diner's Club, and American Express are all going to be available to the Sending Station as optional forms of payment).

IV. The Receiving Station will file the actual facsimile transmission received with the proper clerk and/or court.

V. The Receiving Station will only be utilizing high resolution bonded paper fax machines. Therefore, eliminating the potential of filed original documents from every fading.

VI. The Receiving Station will make all required copies necessary for filing the document.

VII. The Receiving Station shall distribute the documents as required by statute or rule to the appropriate clerk and/or court along with the statutory filing fee.

VIII. The Receiving Station will be making multiple filings at specified times throughout the business day.

IX. The fax machines will be available for receiving transmission 24 hours a day.

X. At the time of filing a receipt for the filing fees and a filed stamped copy will be obtained.

XI. The Receiving Station will subsequently transmit to the Sending Station both a file stamped copy, receipt for the filing fees, and an in house filing status report.

CONCEPTUAL BACKGROUND OF HOUSTON FACS FILE

Upon the initial introduction of Houston Facs File both Diana La-Fontaine and Chris Vanderford, found that numerous attorneys were very receptive. Thru due diligence it is found that the only service currently available to attorneys is a costly runner service. This service not only charges for pick-up and delivery but also for the time the runner spends trying to locate the correct clerk to file the document with, as well as, for the time the runner stands in line waiting to record the document with the clerk and/or court. Houston Facs File will only charge a flat fee and will fax back the file stamped copy the same night. The attorney is also not limited by the hours of 8:00 am to 5:00 pm to get the document in the hands of a runner, since the usage of a fax machine is available 24 hours a day with Houston Facs File.

Diana La-Fontaine and Chris Vanderford have been residents of Houston, Harris County, Texas, for most of their lives. Both are graduates from Career Institute-Paralegal People in the top 10% (ten percent) of the class of December 1987.

Diana La-Fontaine's father was a practicing civil/criminal attorney in Houston, Harris County, Texas, for over 30 (thirty) years. Therefore, Diana La-Fontaine was heavily exposed to the legal community all of her life. For the past 9 (nine) years she has been involved in all phases of real estate from sales (licensed Real Estate Agent-1985), financing of real estate, title commitments to closing the loan, and to selling of investment portfolios on the secondary market. Prior to that she was in the banking community working in the bookkeeping/proof department for Texas Commerce Bank. In 1988 to the present she has been a Real Estate/Business Development Officer with Exchequer Enterprises, Inc., a local investment banking firm, which has held a Security and Exchange License since 1983.

For the past 2 (two) years Chris Vanderford has been actively involved in the legal community. She has worked as a paralegal and law office adminstrator for Rex Mounger and Don Campbell.

Currently she is involved in doing legal research, by contract, for various law firms in Texas. Prior to that Chris Vanderford held several corporate executive positions and was sole proprietor of a couple of businesses located in the Galleria and 1960 area for over 6 (six) years. Because of her vast background in business development she comes forth with great expertise.

Diana La-Fontaine and Chris Vanderford both come forth with many years of successful accomplishments and intend to make Houston Facs File another one. In the past 15 (fifteen) years they have worked together successfully in several business ventures some of those being Farrar's of Texas, Farrar's of California, Continental Lady, and Vanderford Enterprises.

This is a new concept that Diana La-Fontaine and Chris Vanderford came up with after having found the legal system to have several inadquacies. Being of strong entrepreneurial backgrounds they decided to be one of the new forces in the legal community to implement the usage of today's new technology. Although this is a new concept, the reception from numerous attorneys and the Harris County District Clerk has only been that of a very positive nature. As we all know, anytime changes are made it takes great due diligence to implement the change and become successful. Because of the extremely positive reception and their strong entrepreneurial backgrounds Diana La-Fontaine and Chris Vanderford believe that they can be one of the new forces to make some changes in the legal community thru the implementation of Houston Facs File.

HOUSTON FACS FILE

I. Houston Facs File is a service exclusively available to attorneys needing to file documents with the Harris County Judicial Courts. This service is offered by use of your fax machine. Without leaving your office you, your associates and staff can file documents by calling Houston Facs File. Simplify your filing procedures. Technology has advanced to the point that the judicial system can now use the new advances to the benefit of more efficient ways of record keeping. This advancement is made available to the judicial system by way of utilizing facsimile machinery.

II. Texas Rules of Civil Procedure 45 and 57 require the attorney filing a pleading to sign his/her name to that pleading. Texas courts have explained that there are two reasons for such a signature: (1) to leave no doubt the identity of each party's attorney and (2) to make each attorney responsible for the contents of his/her pleading. See Ingram v. Card Co., 540 S.W. 2d 803 (Tex. Civ. App.-Corpus Christi 1976, no writ); Turnbow Petroleum Corp. v. Fulton, 194 S.W. 2d 256 (Tex.1946). Texas courts have also said that the signature is merely a formality, and a filed pleading is not invalid simply because the attorney has failed to sign it. See Loomis Land and Cattle Co., Inc. v. Woods, 699 S.W. 2d 594 (Tex. App.-Texarkana 1985, no writ); Frank v. Corbett, 682 S.W. 2d 587 (Tex. App.-Waco 1984, no writ).

III. BENEFITS TO USING HOUSTON FACS FILE

A. Last date to file pleadings just call Houston Facs File
B. No parking fees to pay
C. No traveling time
D. Personnel experienced with the judicial system that comprehends the repercussions of not filing in a timely manner and the requirements of the courts
E. No more paying by the minute while a runner trys to find the correct clerk and/or court to file your document with
F. Better time management of yourself, your associates, and your very valuable staff

G. Flat fee per document therefore no hidden costs to you
H. Savings to be passed on to your client
I. No more wondering if the U.S. Postmaster has delivered within the 3 (three) day statutory period aloted
J. All necessary copies made for filing, inclusive of the file stamped copy, of which you will receive documentation the same night via your fax machine

IV. Houston Facs File is the beginning toward the movement for better management of our courts filing system. The courts are swamped with millions of pages to documents. Thru new technology the judicial system can be better time managed, which in turn will help to give more time to expedite the real meaning of the courts, that being to hear the pleadings.

V. Houston Facs File strongly backs the movement towards the utilization of new technology in our judicial system..

Career Institute

THE PARALEGAL PEOPLE

3015 Richmond Ave. • Houston, Texas 77098 • 713/529-2778

October 23, 1989

To Whom it May Concern:

This letter is to certify that Diana La-Fontaine and Chris Vanderford successfully completed the Paralegal program at Career Institute in Houston, Texas.

Both Diana and Chris graduated with honors and have acquired the skills necessary to excel as members of the Houston legal community.

I am excited about their "Facs File" concept and look forward seeing it introduced to the legal community. I am sure the reception will be very positive.

Please contact me if I may be of assistance.

Cordially,

Doyle Happe
Director

JAMES I. WIEDEMER
ATTORNEY AT LAW
6750 West Loop South, Suite 800
Bellaire, Texas 77401
(713) 664-5008

October 23, 1989

TO: Diana LaFontaine
Chris Vanderford

RE: FACS File business concept for filing pleadings and other court papers by FAX machine.

The concept of filing court papers by FAX machine with the Harris County courts is an excellent idea. Such a proposal has a strong potential for success.

Currently, attorneys who wish to file court papers have several options: (1) send papers down by an independent runner; (2) send a member of the law firm's staff down; and (3) mail the papers in. The current alternatives have many disadvantages. Sending papers down by a runner is expensive. Even if expense is no object, the runner must be available, and must be notified long enough in advance in order to make a trip over to the law firm, pick up the papers, and deliver them. Sending a member of the law firm's staff to file the papers may rob a small to mid size law firm of the services of a valuable person when they are needed to do other things. Finally, mailing the papers in is an excellent idea unless time is of the essence. I have had clients who walked in a day or two late after an Answer was due, which risks a default judgment. Under such circumstances, speed is imperative, and mailing it is useless. Also, in the real world, while we would like to have pleadings ready days in advance so that they could be safely mailed in, it just doesn't always work that way. Also, it would be nice to have confirmation that the papers had in fact been received by the court and that there were no problems.

I would have a good deal of use for a service such as the one that Diana and Chris propose. In fact, last week, I needed to file a lawsuit and I had to use a runner to do it. It would have been better if it could have been faxed. As it turned out, the filing fee had increased and my runner lacke the funds to file the papers, which meant an additional days delay. That wouldn't have happened with Diana and Chris's system. Also, this morning, I had to get papers in. There was no time to lose, so I took them in personaly. I had to skip five to ten minutes early from my 8-10 engagement to do so. Such problems are constant in the practice of any law firm and can be particularly acute for the small firm or solo practititioner.

I hope Chris and Diana succeed with their concept. It is an excellent idea. I am sure many attorneys would be glad to use it. Many additional services could be provided which would help attorneys in many ways, such as automatic filing and mailing of a certificate of service, and verification that pleadings have been received. In the long run, the computerization or even the direct transmittal of papers to the courts are inevitable. However, as a state agency with a limited budget, the problems of getting such a system set up may be insurmountable, or at least may take a long time to solve. A private business could make a handsome profit for many years by serving as a front end or intermediary between law firms and the courts. When computerized data or faxed documents are sent in, an intermediary can "spoon feed" or hand the data to the courts in a way that they can handle, whereas the problems of dealing with a multiplicity of law firms trying to do the same thing would probably overwhelm the District and County Clerk's office.

Sincerely yours,

James I. Wiedemer

RONALD D. STEPHENS
Attorney-at-Law
P.O. Box 1269
GRAHAM, TEXAS 76046

Office Phone:
549-2165

Home Phone:
549-2084

3a
21a
57

November 24, 1989

Honorable Nathan L. Hecht, Justice
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Justice Hecht:

In response to the invitation contained on Page 1147 of the November 1989 Texas Bar Journal, the following comments are offered with reference to the proposed changes in the Rules of Civil Procedure.

1. All reference to local rules be deleted, including TRCP 3a. Uniformity of rules cannot be accomplished if the different Courts are allowed to develop local rules.

2. TRCP 21a. and TRCP 57. are attempts to utilize current technology, but it appears that some safeguards are missing. Telecopiers are not always monitored, or may not be monitored in such a way to prevent a time limit lapse. In addition, the request to provide a telecopier number appears to be an invasion of privacy. I believe that the utilization of this should be voluntary. If provided with a State Bar of Texas identification number on a voluntary basis, then it could be utilized, but not otherwise. An alternative would be to require some type of confirmation on receipt of this type of communication in order to start the time for response.

Yours very truly,

Ronald D. Stephens

RDS/jk

BAKER, BROWN, SHARMAN & PARKER
A PARTNERSHIP OF INDIVIDUALS AND PROFESSIONAL CORPORATIONS
ATTORNEYS
CITICORP CENTER
1200 SMITH, SUITE 3600
HOUSTON, TEXAS 77002
TELEPHONE (713) 654-8111
TELEX 762083
TELECOPIER (713) 654-1871

4
21a

WRITER'S DIRECT DIAL NUMBER

(713) 951-5881

November 21, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Proposed changes to Rules of Civil Procedure

Dear Justice Hecht:

The proposal to include service of documents by telefax (telephone document transfer) is welcome. I fail to see the reason for the three day extension of the recipient's time to act since there is no lag time in receipt. TRCP 4, 21a.

Further, with respect to Rule 21a, it seems inappropriate to authorize service upon another party or that party's attorney, at the server's choice. Counsel of record should always be served, although perhaps it would speed resolution of issues if parties themselves were also required to be served under Rule 21a.

Sincerely,

Sterling A. Minor

SAM/kc

1189038!.083
/smino/ltr

THORNE, GOLDEN & LAPIDUS
ATTORNEYS AT LAW
NCNB TOWER
SUITE 840
801 W. FREEWAY
GRAND PRAIRIE, TEXAS 75051

(214) 264-161-
METRO 263-5163

KIM R. THORNE
BOARD CERTIFIED – PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

CARL "RANDY" GOLDEN
BOARD CERTIFIED – FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

DOUGLAS J. LAPIDUS

10
21a
166
166b

November 17, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

I have just had opportunity to review the proposed amendments as contained in the November edition of the Texas Bar Journal, and take this opportunity to accept your invitation for comment.

TRCP 21a. METHODS OF SERVICE

My concern is that while the Rule would appear to be a reasonable recognition of the ever-expanding usage of telecopiers, the devise can be an instrument of abuse in the hands of an inconsiderate adversary.

For example, on one occasion, I received over fifty telecopied pages of discovery responses from a local attorney. He thus avoided a courier charge. Why should I be called upon to pay (through the provision of my telecopier paper) for my adversary's discovery responses?

Finally, the use of telecopiers makes it possible to "serve" notice literally at the eleventh hour so as to effectively deprive the recipient of one full working day's notice.

My suggestion is that if telecopiers are to be officially blessed, that there be a five page limit (including transmission cover page) imposed on each notice, pleading, plea, motion, or other document proposed to be transmitted, and that transmissions made between 6:00 p.m. and midnight be deemed to have been given the next business day.

WHITE, HUSEMAN, PLETCHER & POWERS

ATTORNEYS AT LAW

YANCEY WHITE
VAN HUSEMAN
ANTHONY E. PLETCHER
BRYAN POWERS
JOHN O. MILLER III
MARGERY HUSTON
MARK DEKOCH
PAUL DODSON

2100 THE 600 BUILDING
CORPUS CHRISTI, TEXAS 78473
(512) 883-3563

MAILING ADDRESS:
P.O. BOX 2707
CORPUS CHRISTI, TEXAS 78403-2707

FAX (512) 883-0210

21
21a

November 22, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

On behalf of all the attorneys at White, Huseman, Pletcher & Powers, I wish to register our comments on the proposed changes in TRCP 21 and TRCP 21a. It is our understanding that, pursuant to the proposed changes in these rules, all pleadings, motions, pleas or applications to the court for an order must be served upon all parties by hand delivery, registered mail, certified mail or facsimile transmission. We believe that a provision for service by first class mail should be added. Most such instruments are now served by mail. To limit service by mail to certified mail and registered mail would be unduly burdensome and expensive to all parties concerned especially in multi-party lawsuits. Further, it is our opinion that first class mail is far more dependable than facsimile transmission.

Thank you for your consideration of this matter.

Very truly yours,

Bryan Powers

Bryan Powers

BP:rd

GOULD, BROUDE & NELSON, P.C.
ATTORNEYS AT LAW
200 OIL & GAS BUILDING
309 WEST SEVENTH STREET
FORT WORTH, TEXAS 76102
(817) 335-1615
METRO 654-3505

WARREN H. GOULD

FAX (817) 335-1603

21a

November 20, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed change to Texas Rules of Civil Procedure 21A

Dear Justice Hecht:

I think that the rule allowing service by FAX transmission is an excellent rule considering the new technology available to attorneys today. I do not see any reason, however, to add three days to the prescribed period since a FAX transmission is nearly instantaneous. I would ask that the Court consider deleting that portion of the amendment adding the three days.

Sincerely,

WARREN H. GOULD

WHG/slk

NOV/55.6.1

SNEED, VINE, WILKERSON, SELMAN & PERRY
ATTORNEYS-AT-LAW
901 CONGRESS AVENUE
POST OFFICE BOX 1409
AUSTIN, TEXAS 78767-1409
TELEPHONE (512) 476-6955
TELECOPIER (512) 476-1825

JEROME SNEED, JR. (1898-1967)
HARRY VINE, III (1917-1986)
LOUIS SCOTT WILKERSON (1915-1987)
SAM R. PERRY
JEROME E. SNEED
MARK J. SILVERSTONE
WILLIAM D. BROWN
THOMAS A. RUTLEDGE
JIM SHAWN
JACK A. SELMAN
KAY L. TAYLOR
RON K. EUDY
JAMES O. GULEKE, II

SHARON A. SELMAN
KEVIN F. LEE
JULIE K. SNEED
MICHAEL R. PERKINS

ROBERT C. SNEED
OF COUNSEL

21a

November 21, 1989

Texas Supreme Court Rules Advisory
Committee
c/o The Honorable Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to the Texas Rules of Civil Procedure

Dear Justice Hecht:

The latest issue of the Texas Bar Journal has set forth the proposed amendments to the Texas court rules that the Texas Supreme Court is considering, and indicates that written comment may be submitted to the Rules Advisory Committee through you before November 30, 1989. Please accept this letter as such a comment to the proposed amendments to TEX. R. CIV. P. 21a.

While I realize that the Advisory Committee has probably already heard from proponents and opponents of service by telephonic document transfer, I would add my voice in opposition of including this manner of service in Rule 21a, unless done upon an agreed or voluntary or Court ordered basis. If on an agreed or voluntary basis, then I do think it appropriate to treat service by fax machine the same as service by mail so that the three additional days are added to a prescribed period for response or action as presently contemplated by TEX. R. CIV. P. 21a for service by mail.

I realize I express my opposition at the risk of being criticized for not practicing law in the 20th Century, much less on the eve of the 21st Century; however, in this instance, I do not believe that the benefits are sufficient to outweigh the problems and the abuses that will be caused by allowing service in this manner on other than an agreed or voluntary basis. I do recognize that, presently, a court may, in its discretion, direct that service of a pleading,

plea, motion or other formal request required to be served under Rule 21 be made by fax machine, but a court direction has the attendant procedural safeguard to prevent or, at least, correct an abuse.

If we are to use service by fax machine, I would recommend that we condition it as has apparently been done by the New York State Assembly by requiring that an attorney consent to fax service by putting his or her fax number in the address block of a court paper served or filed in the action before an opposing attorney may serve papers by fax in the action.

Quite frankly, it has been my experience that telefax are not all that reliable. All too often, I arrive at my office in the morning to find a telefax that was transmitted the night before that is incomplete, either with pages missing or words and characters garbled. Because the technology is not yet sufficiently reliable, I can foresee this being yet one more area of dispute for lawyers to argue about in pre-trial matters before district trial judges. I submitted that facsimile service on a voluntary or agreed basis will lessen the chance of these type disputes taking up trial court time.

Additionally, mandated service by fax machine will have the effect of actually costing lawyers, and therefore their clients, more. Lawyers that do not have fax machines may feel compelled to run out and buy them with the attendant hardware costs and monthly telephone line charges. Various fax machines have incompatible speeds and formats. Because every lawyer may not have machines of all types, technological problems may be compounded. The courts may then be faced with issuing guidelines for electronic service that will regulate the quality and types of machines. Many fax machines use a special type of paper on which the ink fades and the paper deteriorates. This will necessitate making regular copies of facsimile copies to preserve the quality of document for the file.

Imposing an obligatory rule may actually have the effect of suppressing technological advances in law firms, rather than advancing them. I can foresee lawyers ordering that their fax machines be removed from their offices as a means of avoiding service in this manner.

I respectfully request that the Advisory Committee consider these comments and, if it chooses, in its recommendation to the Court, to recommend service by telephonic document transfer, that it provide that such service be done only on a voluntary and agreed basis.

Respectfully,

James O. Guleke, II

JOG:em

HAZEL M. PIKE
COURT REPORTER

CHERYL ROSSON
COURT COORDINATOR

LARRY W. STARR, JUDGE
188TH JUDICIAL DISTRICT COURT
GREGG COUNTY
LONGVIEW, TEXAS 75606

P. O. BOX 3[illegible]1
214-758-6181

21a

271(1)

273

296-298

November 27, 1989

Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to the Texas Rules of Civil Procedure

Dear Judge Hecht:

Please don't encourage people to send things to a judge under Rule 21a. Judges are not mail clerks or even filing clerks and ordinary mail should suffice.

Sincerely,

Larry W. Starr

Larry W. Starr

LWS:cr

LAW OFFICES OF
TOBOLOWSKY, PRAGER & SCHLINGER
A PROFESSIONAL CORPORATION

300 CRESCENT COURT, SUITE 950

DALLAS, TEXAS 75201

214-871-3900

TELEX 4630189 TELECOPY 214-871-3914

EDWIN TOBOLOWSKY
JEROME L. PRAGER
GERALD W. BENSON
RONALD L. McKINNEY
N. HENRY SIMPSON, III
PETER M. GROSS
ROBERT A. MILLER
EMILY G. TOBOLOWSKY
STUART A. LAUTIN
MORGAN A. JONES
FRANK J. SIGNORIELLO, JR.
JOHN H. TULL, JR.
TERRY T. PICCO
J. HUNTER JOHNSON

HENRY D. SCHLINGER
(1921-1988)

November 28, 1989

21A & TRAP 4(f)

The Honorable Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Telephonic Document Transfer; TRCP Rule 21A and TRAP Rule 4(f)

Dear Judge Hecht:

On behalf of myself and my entire firm, I suggest an amendment to the Rules on telephonic service under the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure. First, the hours of transmission should be limited to regular business hours, such as 9:00 a.m. to 5:00 p.m. Monday through Friday. There are instances where notices have been telecopied very late in the evening notifying counsel of a hearing the next morning and this is an abuse that the Rules should prohibit from the outset. Additionally, the number of pages that can be telecopied should be limited. I suggest a limit of five pages, since anything longer inordinately ties up the telecopy machine. Finally, on each telecopy, the time of transmission and the sender should be clearly identified. I have been involved in a case where over fifty pages of deposition notices were telecopied beginning at 11:00 p.m. This type of conduct should not be condoned.

In the alternative, the Rules could be written so each counsel could agree to accept telephonic notice during extended hours. However, I believe a uniform statewide rule is necessary and preferable.

Yours very truly,

Robert A. Miller

RAM:ag

THE LAW OFFICES OF
FRANK L. BRANSON, P.C.
18TH FLOOR
HIGHLAND PARK PLACE
4514 COLE AVENUE
DALLAS, TEXAS 75205-4185

214-522-0200
D/FW METRO: 214-263-7452
FAX: 214-521-5485

FRANK L. BRANSON
PAUL N. GOLD
DEBBIE DUDLEY BRANSON
RICHARD K. BERGER
GEORGE (TEX) QUESADA
JERRY M. WHITE
J. STEPHEN KING

TED Z. ROBERTSON
OF COUNSEL

November 27, 1989

21a
166b(2)(b)
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VIA FEDERAL EXPRESS

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: 1990 Proposed Changes to
Texas Rules of Civil Procedure

Dear Justice Hecht:

Thank you for the open invitation that appeared in the November State Bar Journal to comment upon the 1990 proposed changes to the Texas Rules of Civil Procedure. I would have liked to have appeared at the November 30 hearing; however, I will instead be out of state taking depositions. This, then, will outline my observations, which focus exclusively on the changes to the Rules pertaining to discovery.

RULE 21a

It is my understanding that if a document were to be hand delivered to a party, three days would not be added to the time period for responding. Assuming this to be correct, I fail to see why three additional days should be added to the response time if a document is received by telephonic transfer. The uncertainties posed by mail delivery simply do not exist in telephonic transfer. The document is either received within seconds of being sent or it is not received.

I appreciate your consideration of these points.

Best regards,

Very truly yours,

PAUL N. GOLD

PNG/dk

00134

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-19
BEN F. VAUGHAN, III, P.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5629

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

2. Is there a typographical error in the *Bar Journal* where the word "A" is struck out at the beginning of the sixth sentence of Texas Rule of Civil Procedure 21a?

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRCP 21a.

3. The "A" should not have been deleted.

TRCP 21a. ~~Notice~~ [Methods of Service]

Every notice required by these rules, [and every pleading, plea, motion, or other form of request required to be served under Rule 21,] other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy [thereof] ~~of the notice or of the document to be served, as the case may be,~~ to the party to be served, or ~~his~~ [the party's] duly authorized agent or ~~his~~ attorney of record, either in person or by [agent or by courier receipted delivery or by certified or] registered mail, to [the party's] ~~his~~ last known address, [or by telephonic document transfer to the party's current telecopier number,] or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act ~~or take some proceedings~~ within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail [or by telephonic document transfer], three days shall be added to the prescribed period. ~~It~~ [Notice] may be served by a party to the suit, ~~or his~~ [an] attorney of record, ~~or by the proper~~ [a] sheriff or constable, or by any other person competent to testify. [The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.] ~~A written statement~~ certificate by [a party or] an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or ~~document~~ [instrument] was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. ~~When these rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.~~

[COMMENT TO 1990 CHANGE: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved service practices more current.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 21a

As to my questions concerning the proposed changes:

1. In Rule 21a, why add 3 days for notice by telecopier? The sender knows whether transmission was immediately successful. Why may the party receiving notice put on proof they did not receive notice by mail within 3 days, but not a party receiving notice by fax?

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

CJA Appointments Mandatory

To increase the number of attorneys who serve as CJA panel members, the Court now requires all members of the Southern District of Texas to accept CJA appointments in criminal cases.

A continuing legal education program is being developed to provide information to attorneys unfamiliar with service as counsel through the CJA panel. Part of the program will include sitting "second chair," pro bono, with a qualified, experienced criminal attorney.

The increase in the number of criminal defendants has increased the number of CJA attorneys appointed. To expedite payment to appointed counsel, the judges of this district have adopted a plan which shifts the responsibility of processing CJA vouchers to the Clerk of this Court.

Before the judges adopted this plan the Administrative Office in Washington processed vouchers for all districts. The Houston division now processes all vouchers submitted in our district, facilitating payment to counsel.

After the vouchers are approved, entered into the computer, and certified for payment, the Administrative Office in Washington issues and mails the checks.

Recently, the Court approved funding for this plan, which will be provided from the attorney admissions Special Fund.

Filing by FAX is Unacceptable

The Court of the Southern District of Texas has adopted the policy established by the General Counsel of the Administrative Office in Washington that instruments filed by facsimile machines or bearing facsimile signatures are not acceptable.

The Federal Rules require the filing of original documents with original signatures, preventing the acceptance of documents filed by facsimile transmission.

Admissions Committee Appointed

Three new members were appointed by the judges of the Southern District to serve on the Admissions/Grievance Committee for the Houston Division by General Order 89-36.

The new committee members, Charles Crady, chairman, Mike Perrin, and Anthony J. Sadberry, are appointed for three-year terms.

Local Rule 1 established the Admissions Committee and authorized it to review applications and to make recommendations on applications for admissions.

NSF Check Policy Adopted

The Court has approved a new policy to deter attorneys from submitting non-sufficient fund (NSF) checks to the Clerk's Office for payment of fees.

Any attorney who submits an NSF check will be restricted to a cash-only basis for paying all future fees. Additionally, the U.S. Treasury imposes a $25 fee on all returned checks.

"All checks received are run through the automated system," says Michael Milby, Director of Administrative Programs and Planning for the Clerk's Office. "When an NSF check is received, it must be pulled from the system manually, which greatly reduces the efficiency of the processing system."

BENCH NOTES is a publication of the Southern District of Texas. Inquiries or comments should be directed to 515 Rusk, Room 5300, Houston, Texas, 77002.

Editor, Suzie Brawley, is a second year law student at the University of Houston Law Center.

BENCHNOTES
Office of the Clerk
515 Rusk
Room 5300
Houston, Texas 77002

PRESORTED
FIRST CLASS MAIL
POSTAGE & FEES PAID
UNITED STATES COURT
PERMIT NO. G 18

4543.001

Um
with
✓ 10-12-89

October 3, 1989

john f. campbell
lawrence j. morgan
robert e. black

HJH -
Distribute

Mr. Luther H. Soules
Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Fax Filing

Dear Luther:

I believe that you have received a copy of a letter from the Honorable Nathan L. Hecht, Justice of the Supreme Court of Texas regarding fax filing.

As a matter of fact, whether authorized or not, this process is already in progress and it is my understanding that you have a company in San Antonio that is filing fax copied pleadings.

For your ready reference, I am enclosing copies of information from three or perhaps four companies that I know to be operating in Dallas and Austin.

I have tried to include a complete package that is distributed to lawyers in soliciting their business.

This procedure is going forward both in the State Courts and the Federal Courts.

I am also enclosing some materials which have been offered as support for the procedure.

To my knowledge, there have been no repercussions to utilizing this program. It is my understanding that where sworn pleadings are required they are handled differently.

The services include not only filing pleadings but also getting trial settings and in some instances, obtaining the signatures of Judges and it is my impression that that is often done by unlicensed personnel.

The assumption of course is that the lawyer who faxes the pleadings maintains in his file the original signed copy which can be produced if needed and of course it is assumed that the lawyer who submits the faxed copies subjects himself or herself to any sanctions associated with inappropriate pleadings.

campbell morgan & black, p. c.
attorneys and counselors
805 West 10th third floor
austin, texas 78701

512/476-6036 fax 512/478-8919

In any event, all of this is being sent to you via a chain which started with Judge Harley Clark, reacted to by Judge David Phillips and Judge Mike Schless, who in turn wrote Justice Hecht and thence to you.

Incidentally, the only repercussions from the Federal level have been that they require the fax entity to maintain on file an authorization from the attorney with respect to documents they handled on behalf of that attorney.

My interest in the whole matter is that I have represented Fax-A-Case, Inc. here in Austin from its inception.

Any thoughts and comments that you may have would be appreciated.

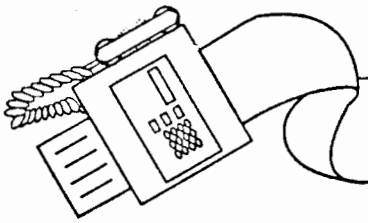
Yours very truly,

John F. Campbell

JFC:Sk

Encl.

cc: Honorable Nathan L. Hecht
Honorable David Phillips
Honorable Mike Schless
Honorable Harley Clark
Sharon Clark
Jim Clark



FAX-A-CASE, INC.

Filing with Legal-Ease

FAX-A-CASE, INC. is a filing service that allows any attorney, through the use of the fax machine, to have a speedier and more cost efficient access to the courthouse.

How???

By faxing your legal documents to **FAX-A-CASE, INC.**, who then prepares the necessary copies, files them, obtains citations and subpoenas, has process issued and has it served, by your server or ours. In a short time, we then fax or send back to your office all signed, stamped and file marked copies, along with any necessary exhibits and our billing report, containing an itemized list of all the functions we performed. It is as simple as that. If you will look at our SERVICES OFFERED sheet, you will find we perform these and many other functions in all court jurisdictions -- Justice, Small Claims, County, State, and Federal.

What will this cost???

Cost??? You'll actually <u>INCREASE your PROFITS.</u>

FIRST — You will save your time, by not having to go to the courthouse, and thus, increase your billable hours.

SECOND — You will save your employees' time, by not having to go to the courthouse, and thus, increase their productivity by utilizing the saved time for other tasks.

THIRD — As this is a receiptable expense, you can bill your client for the filing services, as you do for long distance and copy costs, and thus, turn what was an expense into income.

As a result, the time, money and increased productivity gained, from the above three factors, will translate into increased income and thus, a much <u>MORE PROFITABLE BOTTOM LINE</u> for you.

Where do I get a fax machine???

If you do not have one, **FAX-A-CASE, INC.** will give you one, which you can use, 24 hours a day, 7 days a week, for your every fax need, be it business or personal.

When can I start utilizing this service???

**IMMEDIATELY ** This is definitely a win-win situation, anyway it is viewed.

Call —**FAX-A-CASE, INC.** — at (512) 478-4131 and ask for SHARON.

FAX-A-CASE, INC.
601 West 11th Street - Suite 116
Austin, Texas 78701
PHONE # (512) 478-4131
FAX # (512) 478-5252

00141

... It will be In-Fax-Uating doing business with you ...

QUESTIONS ???

QUESTION: Will the courts accept copies for filing in lieu of original signature pleadings?

ANSWER: YES. According to the officials who are in charge of the offices that handle the filing of legal documents, they will allow and accept copies to be filed. In addition, **FAX-A-CASE, Inc.** has met with all of the governing court officials and received their approval.

QUESTION: Will you file documents in the Federal Courts?

ANSWER: YES. As you are aware, the federal courts require an original ink signature on each document that is filed. As you fax a docutment to us to be filed, we will attach one of your pre-signed aurthorization forms and file it. Our filing procedures have been approved by the authorities in charge of the Western District.

QUESTION: What services will **FAX-A-CASE, Inc.** perform for me?

ANSWER: **FAX-A-CASE, Inc.** will perform all of the filing jobs you now do yourself. In addition to filling all documents in all jurisdictions, we will deliver notices, obtain citations, arrange for issuance of process and it's service. In addition, we will do many other services. Please check the order form.

QUESTION: If I need copies of documents from the Court's files, will you get them?

ANSWER: YES. We will copy the documents you desire and fax them back to your office. See the order form for charges.

QUESTION: Will you advance filing fees and court costs?

ANSWER: YES. We will advance any fees and then charge your account for the amount plus 5% for the service. The 5% will cover our handling costs.

QUESTION: What does the phone company charge for sending a document by fax?

ANSWER: Nothing, when sent locally. Faxed material sent long distance is charged at the same rate your long distance phone calls are charged.

QUESTION: How will I know that my work has been completed?

ANSWER: **FAX-A-CASE, Inc.** will fax an itemized filing report along with your completed documents when we have completed our work.

QUESTION: How will I be billed?

ANSWER: **FAX-A-CASE, Inc.** will charge against your credit card or work from a pre–arranged escrow account or set up some other acceptable arrangement.

QUESTION: What are your hours of operation?

ANSWER: When the Courts are open so is **FAX-A-CASE, Inc.** However, our fax machines are turned on 24 hours a day to receive you documents whenever you send them.

THE VERDICT: **FAX-A-CASE, Inc.** will be your liaison with the courthouses. If it is just a normal filing or a special service you need to be performed, we are cheerfully at your disposal. Pick up the phone and tell us or write it up and fax it to us — we are here to serve you.

FAX-A-CASE, INC. AGREEMENT

Wherein **FAX-A-CASE, INC.** of Austin will provide a fax machine to the law firm of _____, hereinafter referred to as, **LAW FIRM,** for its use in the conduct of its business: and whereas **FAX-A-CASE, Inc.** of Austin is solely responsible for the maintenance of the fax machine: and whereas **LAW FIRM** is responsible for the fax machine remaining on its premises located at _____ and for **LAW FIRM** to have insurance to cover the fax machine for fire, theft and other perils in the sum of $1,600.00 while in its possession.

FAX A CASE, Inc. is happy to have you use the fax machine 24 hours a day, 7 days a week, for any and all of your transactions, be they business or personal. Our only agreement with you with respect to the use of the fax machine would involve your filing documents exclusively with **FAX-A-CASE, Inc.** when transmitting any legal documents or information that are to be filed by a filing service in Travis County with the Travis County, Texas State or the U. S. Federal Court systems. If **LAW FIRM** ceases to use **FAX-A-CASE, Inc.** as its exclusive filing agent in Travis County, **LAW FIRM** will return the fax machine to **FAX A CASE, Inc.** within five days.

For the use of the fax machine, **LAW FIRM** will file through **FAX-A-CASE, Inc.** each month a minimum of 7 documents listed in SECTION "A" on the order form or any combination of other documents that equal the same total dollar value of $119.00. Any amount less than $119.00 will be due and billed the following month.

FAX-A-CASE, Inc. will provide high quality supplies for the fax machine at a cost plus 15% charge. If you desire to purchase your supplies from another vendor, **FAX-A-CASE, Inc.** has no objection, as long as high quality supplies are used. If inferior supplies are used that cause the fax machine to gum up and thus malfunction, **LAW FIRM** will be responsible for the service charge to have the machine repaired. It is not **FAX-A-CASE, Inc.**'s intention to make large profits on the sale of supplies, we just want to protect our investment in the equipment from being harmed by low quality supplies that are on the market. Some of the supplies are of such horribly poor quality, that the manufacturers will void the warranty if they are used.

LAW FIRM	FAX-A-CASE, Inc.
AUTHORIZED SIGNATURE	AUTHORIZED SIGNATURE
DATE	DATE
# 115	5302041
Model	Serial number

CHECK EACH SERVICE YOU NEED & FAX THIS SHEET WITH THE DOCUMENT YOU WANT FILED!

FAX-A-CASE, INC.
Filing with Legal Ease
601 West 11th Street, Suite 116
Austin, Texas 78701

SERVICES OFFERED

PHONE # 512-478-41 1
FAX # 512-478-5252

DATE _____ CONTACT PERSON _____ PHONE # _____

LAW FIRM _____ ATTORNEY _____ FAX # _____

CASE # _____ STYLE _____ VS _____

COURT TO BE FILED IN (CHECK ONE): ☐ JUSTICE ☐ SMALL CLAIMS ☐ COUNTY ☐ STATE ☐ FEDER L

CHECK EACH SERVICE YOU REQUIRE:

Section A

- ☐ File a Motion ---------- $ 17.00
- ☐ File a Petition ---------- $ 17.00
- ☐ File an Answer ---------- $ 17.00
- ☐ Obtain a Subpoena ---------- $ 17.00
- ☐ File Miscellaneous Pleadings ---------- $ 17.00
  (Enter Instructions below)

Section B

- ☐ Obtain a Citation for Service ---------- $ 8.00
- ☐ Enter an Agreed Order ---------- $ 13.00
- ☐ Deliver a Notice ---------- $ 10.00

*** NOTICE ***

On a per month basis - First 10 filings in Section "A" billed at $ 17.0
Second 10 filings billed at $15.00 - All after 20 filings billed at $13.00

Section C -- Other Services

- ☐ Return file marked copy by mail ---------- $ 2.00 + postage
- ☐ Special Requests—per quote made on-Date ___/___/___ . **Give instructions below.** ---- $ _____
  e.g. deliver faxed material to an attorney in trial at the courthouse; locate someone at the courthouse to deliver a message to -- Call us for a Quote for each special service.
- ☐ Advance Court Costs or filing fees ---------- Amount advanced plus 7 %
  $$$Amount of costs or fees to be advanced $ _____ Paid to _____

Section D

- ☒ Copies made in our Office ---------- 10¢ per page
- ☐ Copies of Courthouse files ---------- First 5 pages at ---------- $ 1.00 per page
  ($5.00 Minimum) ---------- After 5 pages ---------- 25¢ per page
- ☐ **COPIES TO BE:** ☐ Certifed ☐ Conformed ☐ Regular -- Plus Courthouse charges ---------- $ _____
- ☐ Fax Paper -- Please send _____ cartons @ cost + 15 %

All Items in Section D are subject to Sales Tax

PROCESS SERVER INSTRUCTIONS:

- ☐ FAX-A-CASE, Inc. will be responsible for having the Process served.
  (Our **FEE** will be **10 % less** than the officially posted fee schedules.)
  Address for Service: _____
- ☐ Notify my Process Server: Name _____ Phone # _____

Billing Instructions -----Charge the above services to:

☐ American Express ☐ Visa ☐ Mastercard ☐ Other _____ CC # _____

Name on Card _____ Exp. Date _____ Auth. Signature _____

☐ Escrow Account ☐ Debit my account --Bank Name _____ Acct. # _____

Other Arrangement _____

Additional Instructions:

FAX-A-CASE, INC.
Filing with Legal Ease
01 West 11th Street, Suite 116
Austin, Texas 78701

BILLING REPORT

If you have any questions about the following transactions please call.

PHONE # 512-478-413
FAX # 512-478-525

DA(_____ CONTACT PERSON _____ PHONE # _____

LAW FIRM _____ ATTORNEY _____ FAX # _____

CASE # _____ STYLE _____ VS _____ COURT _____

THE FOLLOWING SERVICES HAVE BEEN PERFORMED BY FAX-A-CASE, Inc.

Section A

__ Filed a Motion ---------- $ _____
__ Filed a Petition ---------- $ _____
__ Filed an Answer ---------- $ _____
__ Obtained a Subpoena ---------- $ _____
__ Filed Miscellaneous Pleadings ---------- $ _____

Section B

__ Obtained a Citation for Service ---------- $ _____
__ Entered an Agreed Order ---------- $ _____
__ Delivered a Notice ---------- $ _____

Section C -- Other Services

__ Returned file marked copy by mail — $2.00 + postage $ _____ = $ _____
__ Special Requests—per quote made on-Date __/__/__ ---------- = $ _____
__ Advanced Court Costs—Amt. $ _____ + 5% _____ = $ _____

Section D

__ Copies made in our Office—Number of pages _____ X $.10/copy ---------- = $ _____
__ Copies of Courthouse files - Total Number of Pages _____
__ Number of pages _____ X $ 1.00/page for First 5 pages ---------- = $ _____
__ Number of pages _____ X $ .25/page for each page above 5 pages ---------- = $ _____
__ plus Courthouse charges _____ copies X $ _____ + Certification $ _____ = $ _____
__ Cartons of Fax paper -- _____ @ $ _____ per carton ---------- = $ _____
SALES TAX on Section D ---------- = $ _____
TOTAL of all charges for Sections A-B-C-D ---------- = $ _____

CHARGES FOR PROCESS SERVER

__ Notice ---------- $ _____
__ Citation ---------- $ _____
__ Garnishment ---------- $ _____
__ Subpoena ---------- $ _____
__ TRO ---------- $ _____
__ Other ---------- $ _____
__ Notified Your Process Server ---------- $ no charge
TOTAL of all Process Server Charges ---------- $ _____

(**GRAND TOTAL OF ALL CHARGES** ---------- $ _____

00145

Grand Total was charged to ☐ AE ☐ Visa ☐ Masted ☐ Other _____ CC # _____
Name on Card _____ Exp. Date _____ Auth. Signature _____
☐ Escrow Account ☐ Debit my account --Bank Name _____ Acct. # _____
Other Arrangement _____

We look forward to doing business with you

ATTORNEY SERVICES

A Professional Investigations Company

Need a subpoena issued and served?
Fax us your notice and the subpoena is on its way.

Austin service fee is only $30.00.
For same day service add $15.00.

Attorney Services will serve process anywhere in the State of Texas.
Please call for a quote by phone.

SPECIAL SERVICES

Surveillance / Stakeout	$30.00 an hour
Investigative Services	$30.00 an hour
Routine Field Skip Trace	$15.00
Skip Trace	$45.00 (if sucessful)

Office (512) 445-7014

FAX (512) 445-0664

Attorney Services is owned and operated by Blackie Blackmon.
Licensed by the State of Texas, State License No. A-3657.
Bonded and Insured, 17 years Experience.

00146

ATTORNEY SERVICES

Office 445-7014

Fax 445-0664

SUBJECT INFORMATION

Please provide as much information as possible. It will help us to succeed in our mutual goal. If a photo is provided we will return it on request.

Subjects name;_____

Nickname;_____

Date of birth;_____

Height_____Weight_____Hair color_____

Facial hair_____

Sex_____Race_____

Home Address_____

Business address_____

Name of business_____Phone_____

Business hours_____Occupation_____

Car make_____Model_____Year_____

License plate number_____

****

If there are any problems locating subject please call;

Client name_____Phone_____

Work Phone_____

Other Information_____

_____

_____

_____

_____

OFFICE
(512)
445-7014

FAX
(512)
445-0664

ATTORNEY SERVICES WANTS YOUR BUSINESS!

ASSET SEARCHES	$95.00
Skip Tracing (If Successful)	$45.00
Process Serving (Austin)	$30.00
Sworn Video Statements	$75.00
Investigations (per hour)	$30.00

Child Custody and Child Recovery, Criminal, Domestic Surveillance, Missing Persons & Personal Injury

ATTORNEY SERVICES SERVES FEDERAL AND STATE, LEGAL DOCUMENTS.

I know your need for good service, I give it, and I would appreciate your business !

(512) 445-7014

MEET

FAX FILE, inc.

A NEW CONCEPT IN FILING

FAX FILE, INC. is a company developed by attorneys to offer the legal profession a filing service that is as fast as your facsimile machine. Your pleadings are telecopied from your office to **FAXFILE, INC.** along with an instruction sheet. **FAX FILE, INC.** then makes sufficient additional copies, files the pleadings, obtains hearing dates, secures TRO's, and has process issued. Process is then ready to be served according to your instructions. File-marked copies, receipts for court costs and a confirmation of work done is FAXed back to your office immediately. It's as easy as that! **FAX FILE, INC.** has offices in Austin, Dallas, Houston, Denton and Greenville. Other cities will be added soon.

COST

Only a fraction of what it is costing you now to use your time or your employees time.

PAYMENT

All services and court costs are charged on your credit card or contact us for other special payment arrangements.

INTERESTED

Call us to set up your account and begin processing your work within the hour.

Dallas	**(214) 748-0091**	**Greenville**	**(214) 455-3647**
Austin	**(512) 476-3967**	**Denton**	**(817) 566-0592**
		Houston	**(713) 880-8007**

FAX FILE, inc.

400 South Houston Street
Union Station
Dallas, Texas 75202

Phone (214) 748-0091
FAX (214) 748-0-FAX

Firm: _____ Total Page Count _____
Attorney: _____ (not including this form)
Fax # _____ ID# _____ Phone # _____

ORDER FORM

Instructions to Fax File, Inc.:

☐	File Petition	18.00	_____
☐	File Answer	18.00	vs
☐	Issue Subpoena	18.00	_____
☐	File Motion	18.00	
☐	Issue & Set Hearing on TRO	10.00	(requested dates)_____a.m./p.m._____ a.m./p.m.
☐	Set Hearing on Motion	10.00	(requested dates)_____a.m./p.m._____ a.m./p.m.
☐	Issue Citation	7.00	
☐	Issue Notice	7.00	
☐	Issue Citation & Notice	12.00	
☐	Enter Agreed Order	12.00	
☐	Advance Process Cost		
☐	Advance Filing Fee	5% S.C.	
☐	Return Hard Copy By Mail	2.00	
☐	Special Requests	$15/hour ($5 min.)	_____
☐	Other		_____

Service Instructions:

Address for Service: Residence_____between
hours of _____.M. and _____.M.
Business Name_____, Address_____
between the hours of_____.M. and _____.M.

☐ Call my process server_____ at (phone #) _____
to pick up and serve the above and instruct him to bill me direct. OR

☐ **Fax File, Inc,** deliver process to a Private Process Server that is immediately available.
Please use process servers whose fees comply with Dallas County Schedules.

Billing Instructions: Charge all of the above to: ☐ Hold 5 days for check

☐ VISA ☐ MASTERCARD ☐ DISCOVER ☐ AMERICAN EXPRESS

Card # _____ Name on Card _____
Expiration Date _____ Authorized Signature _____

Special Instructions:

00150

7189

FAX FILE, Inc.

CUSTOMER APPLICATION / AUTHORIZATION

Date _____

Firm _____

Address _____

TaxI.D. (also your Fax File #) _____

Telephone # ( )_____ **FAX #** ( )_____

ATTORNEYS USING THIS ACCOUNT

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

EMPLOYEES AUTHORIZED TO REQUEST SERVICE ON THIS ACCOUNT

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

METHOD OF PAYMENT

1. Credit Card; ☐ American Express ☐ Master Card ☐ Visa ☐ Discovery
   Credit Card Number_____ Exp. Date_____
   Name on Card _____

2. Escrow Account: Deposit Amount _____ Maintenance Level _____

3. Credit Card to secure payment. The charge slip will be held for up to five (5) working days for a firm to replace the charge slip. If a check has not been received in that time, the charge slip will be executed.

Estimated number of documents filed in your office per month: _____

_____
Person Authorizing this Account

001

IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS

_____	)	DOCKET NO.
_____	)	_____
_____	)	
VS	)	
_____	)	
_____	)	
_____	)	

Attorney's
Authorization To
Execute Documents

I do hereby authorize _____, a FAX FILE, INC. representative, to execute the attached documents in my behalf so they may be promptly filed in the above styled and numbered cause.

Attorney for _____

_____

FAX FILE, inc.

400 South Houston Street
Union Station
Dallas, Texas 75202

Phone (214) 748-0091
FAX (214) 748-0-FAX

THIS IS THE FORM YOU WILL RECEIVE WHEN ALL OF YOUR WORK HAS BEEN COMPLETED BY FAX FILE

Cause No. _____

Case Style:

_____

vs

_____

Firm: _____

Attorney: _____

Fax # _____

Total Page Count _____
(Not Including this form)

FILING REPORT

Fax File, Inc has done the Following:		Charge	Copy FAXed to You
☐	Filed Petition		☐
☐	Filed Answer		☐
☐	Issued Subpoena		☐
☐	Filed Interrogatories		☐
☐	Filed Motion		☐
☐	Issued & Set Hearing on TRO		☐
☐	Set Hearing on Motion		☐
☐	Issued Citation		☐
☐	Issued Notice		☐
☐	Issued Citation & Notice		☐
☐	Delivered Process to Your Process Server		☐
☐	Delivered Process to Fax File, Inc. Approved Server	*-- No Charge --*	☐
☐	Entered Agreed Order		☐
☐	Advance Court Costs of $_____ +5% ($_____) =		☐
☐	Special Requests Completed		☐
☐	Other _____		☐
☐	Court House Copy Costs		☐
☐	Fax File Copy Costs		☐
☐	Return Hard Copy by Mail		☐
	TOTAL		

Process Server & Charges:		_____ Phone _____	
☐	Citation		☐
☐	Notice		☐
☐	Subpoena		☐
☐	Motion		☐
☐	TRO		☐
☐	Other _____		☐
	TOTAL		

The Total All Charges have been charged to: _____
_____ card # _____
in the name of _____.

TOTAL ALL CHARGES _____ 00153

Any Questions ? ..... Refer to Fax File # _____ 7189

EXPRESS SERVICE

No extra charge. All of our service is express and we make special effort to meet emergency deadlines when the need arises.

FAX FILE CHARGES

FILE PETITION	$18
FILE ANSWER	$18
FILE MOTION	$18
ISSUE SUBPOENA	$18
ISSUE & SET HEARING OF TRO	$10
SET HEARING OF MOTION	$10
ISSUE CITATION	$7
ISSUE NOTICE	$7
ISSUE CITATION & NOTICE	$12
ENTER AGREED ORDER	$12
RETURN HARD COPY BY MAIL	$2
ADVANCE PROCESS & FILING FEE	5% SC
APPELLATE BINDING	$3/copy

COPY CHARGES
Copies made in Fax File office 10 cents per copy
Copies made at courthouse $1 per copy plus out-of-pocket expense.
Minimum charge for courthouse copies is $5 plus copy expense.

LONG DISTANCE FAX CHARGES: Up to 8 pages are returned to you by long distance FAX at no charge. Additional pages are 50 cents per page.

CALL ATTORNEY'S CHOICE OF SERVER OF PROCESS $5

CALL ONE OF THE APPROVED SERVERS OF PROCESS -NC-

SPECIAL REQUESTS: Minimum of $5. Jobs requiring excessive time i.e. standing in line at bankrupcy court, copying entire files, etc. are billed at $15 per hour.

TRAINING & BONDING

The Fax File staff has been properly trained to file documents and to perform all other courthouse functions. The Fax File represenatives do these jobs repeatedly and know the right people required to get them done properly. Our staff is bonded for your security.

OFFICE HOURS

The office is open Monday thru Friday from 8:30 A.M. to 4:30 P.M. The facsimile machines are *always* on.

CHOOSING SERVICE OF PROCESS

THERE ARE TWO CHOICES WITH FAX FILE FOR SERVICE OF PROCESS.

1. We call one of several qualified private companies who specialize in the service of process and whose fees comply with local county schedules. We pay them and bill you the process fees. A 5% service charge is added for advancing these fees if your credit card is used.

2. We call your choice of private service of process. We charge $5 for time spent contacting your process server. We ask that they bill you directly, or we can add this to your Fax File charges.

FAX FILE LOCATIONS

Fax File, Inc. has offices in Dallas, Austin, San Antonio, Houston, Greenville and Denton, with expansion planned soon in other cities. These offices will receive and process work from attorneys in any city in the United States.

ADDITIONAL SERVICES

Private service of process is offered in all Fax File offices. One call will take care of everything.

ANOTHER STAFF MEMBER

Fax File, Inc. would like for you to consider our representatives as extentions of your own staff who are located at the courthouse. We get paid only when we do something for you, which eliminates downtime. We are here to be of service to you and your staff. All Fax File offices are conveniently located in close proximity to the respective courthouses so all work is done efficiently, economically and quickly.

8189

PRINCIPALS

Mr. Reagan Martin is a 1961 graduate of SMU Law School. He has practiced law in Dallas since that time and is a family law specialist. He has also owned and operated several other successful businesses during that time. His offices are at 3503 Fairmount, Dallas, Texas 75219. The telephone number there is (214) 559-0555.

Mr. Reyburn U. Anderson is a 1962 graduate of SMU Law School. He has been a family law specialist since 1975. He has been involved in several other ventures since 1962 but law has been both men's primary endeavor. Mr. Anderson offices at 17120 Dallas Parkway, Suite 226, Dallas, Texas 75248. The telephone number at his law office is (214) 248-8383.

Mr. Martin and Mr. Anderson have realized how much valuable time attorneys and their legal assistants spend in filing various documents and doing other time-consuming tasks at the courthouse. It became evident to them that a better way had to be found to handle these jobs. With facsimile machines becoming so popular in the last few months, it became obvious that this method of communication could solve the filing problem. A solution for them and for you is FAX FILE, INC. Using the facsimile machines that Fax File already has in place, your work is handled efficiently and with the utmost care to personal detail. The following information will lay out how the system works. We are very excited about this new concept and we look forward to being of service to you and your staff.

WILL COURTS ACCEPT FAX COPIES ?

YES. Rule 1001, Texas Rules of Court (Page 254, 1989 Pamphlet) allows the court to treat copies like originals.

YES. The Federal Courts will also accept faxed copies but require an authorization from the attorney. This authorization allows the Fax File representative to sign the document with the attorney's name "by the staff member of Fax File who is processing the document". An authorization form for this purpose is included in this packet. This form must be completed and faxed to us with the document. It is attached to the document at the time of filing.

PROCEDURES

1. Fax your pleadings or other requested work to the appropriate Fax File, Inc. office along with a completed Fax File order form. Please make extra copies of this blank form for future use.

2. Necessary hard copies of your document are made in the Fax File office and these are the ones we file.

3. A trained Fax File representative takes the copies to the appropriate courthouse. Don't forget the attorney authorization if it is to be filed in Federal Court.

4. The documents are filed; the hearings set; the citations, subpoenas, TRO's or notices issued; special requests carried out and process arranged.

5. Fax File accomplishes all the tasks quickly. The filing report, which itemizes the work and all charges, is completed. This report, along with copies of your completed work, receipt for court costs & your charge card receipt, are faxed back to you immediately.

6. The time-consuming work at the courthouse is accomplished in a very short time and you and your staff are free to do more productive work.

FINANCIAL ARRANGEMENTS

FAX FILE, INC. OFFERS TWO METHODS OF PAYMENT

1. Use a company or an individual MasterCard, Visa, Discover or American Express Card. A 5% service charge is added for the monies advanced for filing or process fees when a credit card is used. At your request, we will hold the credit card for 5 working days, allowing time for the firm to forward a check to cover the charges. If the check is not received in this time, the credit card transaction is completed.

2. The other method is to arrange an escrow account. Anticipate your approximate need for 2 to 4 weeks at a time, including court costs. This amount is strictly up to you and these funds are placed in your operating account. When the amount reaches a certain level you will be notified to replenish the account..... *Either method works efficiently. The choice is yours.*

August 24, 1989

Mr. John F. Campbell
Attorney at Law
805 W. 10th St., Third Floor
Austin, TX 78701

Dear Mr. Campbell,

The enclosed information will introduce you to a new service Legal Action Fax - DFW is offering at the Dallas and Fort Worth courthouses. We offer, via the medium of fax, to be your firm's presence at the courthouses, and to accomplish the services you request of us in the most efficient, professional and speedy manner available.

In essence, we are offering to receive documents for filing, etc. via our state of the art laser fax machine; to make the necessary copies, to file at the courthouses and to fax the court-stamped pages back to the lawyer. We also do retrieval, set hearings and a number of related services, as you will see from the "Service Instruction" sheet I have included with the brochure. Our prices are listed in the middle of the page. (Any documents remaining in our possession are mailed back to the lawyer immediately).

My co-director is an instructor of law and the administrator of the Legal Assistants Program at the Dallas Community Colleges. His students, who work in our office, are trained to do the tasks required of them and are aware of the sensitive nature of the documents received in our office. They are efficient and professional and when a problem arises that they cannot solve, they immediately contact the lawyer and try to find alternatives which will "get the job done".

Since we would need to issue the check for filing fees when necessary, we usually set up a credit card agreement with the firms who use our services. (A sample of this agreement is included for your information). We would be happy to help you if there are occasions when you need our services at the Dallas or Fort Worth courthouses. Once you have had an opportunity to read the enclosed brochure, please do not hesitate to call me collect if you, or any of your associates have any questions, or if we can help you in any way.

Sincerely yours,

Lee Lain

Enclosures

LEGAL ACTION FAX - DFW

900 JACKSON STREET, SUITE 170 • DALLAS, TEXAS 75202

FAX 214 653 1671 TEL 214 653 1221

RETRIEVAL AND RESEARCH

Legal retrieval services from:

Courts, government agencies, libraries, administrative agencies and medical centers.

■

Retrieval of:

Medical records, police records, birth and death certificates, marriage records, adoption and custody records, deed records and incorporation records.

■

Legal research:

Access to summaries and full text of sources from both federal and state cases and statutes, administrative law, Shepard's Citations and other specialized materials.

For more information:

Legal Action Fax – DFW

Founders Square

900 Jackson Street, Suite 170

Dallas, Texas 75202

Tel: 214-653-1922

Fax: 214-653-1671

■

LEGAL ACTION FAX™

THE FASTEST AND MOST PROFESSIONAL SYSTEM FOR FILING AND RETRIEVAL

WHAT LEGAL ACTION FAX DOES

Legal Action Fax is a specialized professional service designed to cater to the exacting standards of the legal profession.

By making use of the most advanced fax equipment available we will, in many situations, not only eliminate the need for courier services, but also achieve the same result in a fraction of the time that you are accustomed to. Our objective is for you to regard us as an extension of your firm at the courthouses.

Legal Action Fax will accept your instructions and documentation via fax. Confirmation reports and court-stamped documents are fax returned to you immediately after filing.

Our specially trained staff will research and retrieve necessary information for you and fax it to you in the shortest time possible, and by doing so, free you and your staff to concentrate on other important issues.

Legal Action Fax is staffed by professional, qualified paralegals. Our staff includes an administrative director, who is a law school graduate and an instructor of law working closely with a number of legal entities in the development of Legal Assistant programs in Texas.

FILING SERVICES

Federal filing services at federal courts and federal administrative agencies.

■

State and local filing services at state, county, local courts and state administrative agencies.

■

Complaints, discovery materials, motions, TRO's, petitions, answers and administrative documents.

COURT ACCEPTANCE OF FAX COPIES

Authority is found in both the Federal Rules of Evidence, Rule 1003, as incorporated by the Texas Rules of Court, Evidence, ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS; Rule 1003: "A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

■

Federal Courts have requested that the attorney's authorization to execute documents accompany a filing by fax. This form will be included in your Client Information Package.

LEGAL ACTION FAX-DFW

900 Jackson, Suite 170
Dallas, Texas 75202

PHONE: 214 653-1922 FAX: 214 653-1671

SERVICE INSTRUCTIONS

Please type or write in block capitals.

CAUSE NUMBER _____ (When available) CASE STYLE _____ (if applicable)

VS _____

FIRM NAME _____ PHONE # _____

REPRESENTATIVE _____ CONTACT PERSON _____

BUSINESS ADDRESS _____

DIRECT PHONE # _____ FAX # _____ # OF PAGES _____ (not including this one)

BILLING INSTRUCTIONS:

ACCOUNT CODE _____, OR:

VISA ____ MASTERCARD ____ DISCOVER ____ AMERICAN EXPRESS ____ OTHER _____

NAME ON CARD _____ CARD # _____

EXPIRATION DATE ____/____ AUTHORIZED SIGNATURE _____

FEES FOR SERVICES:

$20.00 per service performed / 10¢ per page copied

Court-stamped pages faxed back to you / 35¢ per page LD charge for pages 4 and up

50¢ per page received after 20 pages / $1.00 + cost of mail for return of document.

Waiting time: 50¢ per minute after first 15 mins to a maximum of $10.00

Costs to us (eg. copies made at courthouse) charged to you.

CIRCLE SERVICE REQUESTED:

FILE PETITION	ISSUE CITATION	SET HEARING ON TRO
FILE MOTION	ISSUE NOTICE	SET HEARING ON MOTION
FILE ANSWER	ISSUE SUBPOENA	ENTER AGREED ORDER
FILE INTERROGATORIES	SPECIAL REQUESTS _____	

_____

NUMBER OF COPIES NEEDED _____ EXPECTED FILING FEE $ _____

IS THIS MATTER SUBJECT TO DEADLINE? YES____ DATE/TIME _____ NO____

AUTHORIZED BY: _____ SIGNATURE: _____

Signature required for services to be performed

LEGAL ACTION FAX - DFW, INC.

SERVICE AGREEMENT

AND CREDIT CARD USE AUTHORIZATION

We hereby authorize LEGAL ACTION FAX - DFW, INC. :

(i) to perform the services marked on any Legal Action Fax - DFW Service Instructions form ("Service Instructions");

(ii) to accept Service Instructions from the persons named below;

(iii) to pay any filing or other fees on our behalf; and

(iv) to use the corporate credit card named below to pay for services directed by our Service Instructions, costs of services, or fees extended on our behalf.

We acknowledge we have received and have read the Service Instructions form and your brochure explaining your services.

VISA_____ MASTERCARD_____ AMERICAN EXPRESS_____

DISCOVER _____ OTHER _____

CARD #_____EXPIRATION DATE ____/____

PRINTED NAME OF CARD HOLDER_____

AUTHORIZATION SIGNATURE_____

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Courts Differ on Willingness to Accept Filings by Facsimile

Although many state courts are experimenting, federal courts generally refuse fax filings

by Robert L. Rothman, *Associate Editor*

Although somewhat wary of the technology and the administrative burden that may be involved, federal and state courts throughout the country are studying the possibility of utilizing fax equipment in connection with court filings, service, and the transmission of court documents. Leading the way is Minnesota, where the Supreme Court concluded a year-long experiment by approving the use of telefaxed legal documents for everything from court filings to issuance of arrest or search warrants.

"The experiment has been so well received by the law enforcement officers, lawyers, judges, and court administrators it was meant to assist that the Minnesota Supreme Court has approved the telefaxing of any document," said Minnesota State Court Administrator Sue K. Dosal.

A New York court ruled last year that service of papers on opposing counsel is valid under that state's civil procedure rules. *Calabrese v. Springer Personnel of New York, Inc.*, 534 N.Y.S.2d 83 (Civ. Ct. N.Y. Co. 1988).

Recently the New York State Assembly amended service provisions to allow service of interlocutory papers by fax under certain circumstances. Mark Davies of the Fordham University School of Law, who drafted a report on fax service for the New York State Bar Association, however, is critical of the bill, which he believes contains serious limitations that effectively negate the use of fax by attorneys. The most important example noted by Davies is the requirement that an attorney consent to fax service by putting his or her fax number in the address block of a court paper served or filed in the action before an opposing attorney may serve papers by fax in the action. Davies believes the consent requirement "may well spell the death of fax service in New York" since, in his view, few attorneys will consent to fax service.

Davies said that Rule 5(b) of the Federal Rules of Civil Procedure should be interpreted to allow fax filings as it is now written. The report recommended adoption of an express rule, however, to "obviate the need for district courts around the country to rule on these questions."

A rules change to permit service by fax also is being contemplated in Illinois, where the Illinois State Bar Association has asked the Supreme Court to permit service of documents by telefax. William W. Madden, Deputy Director of the Administrative Office of the Illinois Courts, says that the request is under consideration. Madden says he expects the Illinois Supreme Court to be very cautious in its approach to the utilization of electronic filing and service.

Although many judges and court administrators share an interest in the use of telefax, some have expressed concerns that the technology is not yet sufficiently reliable. Others have expressed concerns about the administrative burdens that would be placed on court staffs that are already spread too thin.

Joseph A. Haas, Clerk of the U.S. District Court for the District of Maryland, says that fax filings are allowed in his district only with the specific approval of a judge in a particular case. In the absence of such approval, the clerk will not accept fax filings. Haas explains that there is one fax machine for the entire court, and it runs all day just handling internal court communications. Allowing lawyers to file pleadings or other documents by fax would interrupt the internal workings of the court and place a substantial burden upon court staff.

That concern is shared by Luther D. Thomas, Clerk of the U.S. District Court for the Northern District of Georgia. Thomas notes that, in addition to interrupting internal court use of the fax machine, receipt of fax filings would require an employee to be stationed at the machine to route documents and make duplicate copies of pleadings as required by local rules. Thomas believes that the benefit to the bar in allowing fax filings would be outweighed by the problems created within the clerk's office.

Robert Heinemann, Clerk of the U.S. District Court for the Eastern District of New York, says that fax filings are not allowed in that district for yet another reason. Heinemann notes that fax filings do not contain an original signature as required by the Federal Rules of Civil Procedure. The issue of whether an original signature is required on documents filed with a federal court has lead the general counsel of the Administrative Office of the United States Courts to advise clerks against allowing fax filings. In its May 1989 Information and Management Bulletin, the general counsel's office stated: "We have consistently advised that filings by FAX or computer is not authorized by the Federal Rules. Although the Federal Rules do not specifically preclude such filings, Federal Rules of Civil Procedure 5(e) and 11 would appear to require the filing of an original document with an original signature . . . . [We] think that the best interpretation of the Federal Rules is that facsimilie filing is not authorized."

John L. Chastain, assistant general counsel of the Administrative Office, says that in addition to the issue of original signature, technological problems present the most significant obstacle to the use of fax filing. He points out that various fax machines have incompatible speeds and formats. Courts do not have enough money to provide machines of all types, and thus the technology is not equally accessible to everyone who would be interested in using

Section Consulted on Choosing Women Judges

by Elizabeth Roth
Associate Editor

The Bush Administration has approached the National Association of Women Judges to seek help in locating women qualified for the federal bench. Los Angeles Superior Court Judge Judith Chirlin, the chair of the NAWJ's Committee on Judicial Appointments, seeks the participation of the Litigation Section in helping her to increase the number of women applicants for federal judgeships. "Women who are active in the ABA Litigation Section are natural targets for Judge Chirlin's efforts," said Louise A. LaMothe, Los Angeles, CA, Section Council member.

Chirlin was contacted this spring by Mark Paoletta, deputy to the director of presidential personnel, who communicated to her the determination of the Bush Administration to reach out to women and minority candidates. Paoletta asked Chirlin's committee to look at states in which there are no Republican senators and this is our focus "for the most part," said Chirlin.

Her committee will seek to provide the Administration with the names of interested and qualified candidates, and Chirlin seeks help from members of the Litigation Section to provide to her both resumes and recommendations of the names of possible candidates. Chirlin said that her committee welcomes the participation of practicing lawyers. "We are not restricting our outreach to sitting women judges," she said.

A difficulty not unique to women, Chirlin noted, is that the salary gap between federal judges' compensation and leading lawyers in some communities is so large that it is difficult to entice talented women lawyers away from private practice. She said that her committee is constantly learning more about the political and geographical constraints that operate in the appointment process.

Chirlin has lectured extensively in California and has lobbied California Governor George Deukmejian to appoint more women to state judgeships. She said that there are many women attorneys who could be appointed to the federal bench and who could be approved by the Bush Administration. The real need, she thinks, is to get more women to apply. There are at least 40 vacancies now, providing an opportunity for the Administration to identify and recruit women candidates.

Chirlin asked that interested candidates write directly to her, sending a current resume and specifying the federal district and circuit in which the candidate is located and the level of appointment the candidate would consider. Write to: Judge Judith C. Chirlin, Department 121, Criminal Courts Building, 210 West Temple Street, Los Angeles, CA 90012.

4543.001

THE LAW OFFICE OF
REAGAN M. MARTIN
ATTORNEYS AND COUNSELORS AT LAW
3503 FAIRMOUNT AT TURTLE CREEK
DALLAS, TEXAS 75219

REAGAN M. MARTIN
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214-559-0555
FAX
214-521-8438

September 29, 1989

Mr. Luther H. Soules
Chairman - Supreme Court Advisory Committee on Rulemaking
175 E. Houston Street
San Antonio, Texas 78205

Re: Proposed Rule of Civil Procedure for filing of Faxed Pleadings

Dear Mr. Soules:

As we discussed by telephone on Wednesday, September 6, Mr. Reagan Martin of our offices is part owner of a company called Fax File, Inc. Fax File is basically a service which file court pleadings for attorneys through the use of fax transmissions. Attorneys using this service send their pleadings to Fax File using a fax machine, and Fax File files the pleading with the court. Obviously, services such as Fax File will work only if Texas courts will accept faxed pleadings for filing purposes.

The Texas Rules of Civil Procedure do not presently address the issue of whether courts may allow the filing of faxed pleadings, and the question has yet to be resolved. I have recently researched case law on the subject, and have enclosed a copy of the resulting memorandum for your review. As you will note from the memo, the cases strongly indicate that faxed pleadings are acceptable in Texas, but no case has made a definite ruling on the point.

In addition to case law, I have reviewed recently enacted statutory law which deals directly with the issue of filing of the court. The relevant statutes are Tex. Gov. Code ANN. Section 51.801 - Section 51-807 (Vernon 1988)(copies enclosed). These statutes became effective on September 1, 1987 and direct the Supreme Court to adopt rules and procedures to regulate the use of electronic copying devices for filing in the courts. These statutes indicate the desire of the Legislature to allow filing of pleadings by the use of electronic transmissions.

The only argument which may be raised against the filing of faxed pleadings is that a faxed pleading does not contain the original signature of the party filing that pleading. Rules 45 and 57 do require pleadings to be signed; however, as the memorandum points out, this requirement is merely a formality and under Texas law a pleading is valid even without a signature. Further, if the Legislature is willing to allow filing of pleadings by direct fax transmissions of the pleading to a court

clerk, it cannot be concerned about an original signature on the pleading. In fact Section 51.806 directly addresses this issue by providing that the sender of the faxed pleading must maintain a signed original of the pleading which must be filed upon motion by a party and order of the court.

I believe that the most efficient way to insure the validity of filing faxed pleadings is for the Supreme Court to promulgate a new Rule of Civil Procedure specifically authorizing the filing of such faxed pleadings. In this regard, I would propose that the following rule be added to the current rules:

Rule 74A. Filing of Documents Reproduced by Facsimile

> A pleading reproduced by means of facsimile transmission shall be accepted as the signature pleading for filing and for all other court related purposes provided that the original pleading complies with the signature requirements of Rule 57, and the reproduced pleading bears a facsimile of the original signature. The party filing a pleading reproduced by fascimile transmission shall retain the original signed pleading. Any party to a suit may request the original signed pleading, which request must be made in the form of a motion to the Court. If the Court grants the motion, the Court shall order the original signed document to be filed with the Court.

As you will note, this proposed Rule 74A is based upon the language of Section 51.806, and is therefore parallel to Legislative intent. I numbered the Rule as 74A, as I believe it should be placed immediately after Rule 74, which directly addresses the filing of pleadings and other papers with the clerk of the court. For your convenience, I have enclosed copies of the proposed rule on seperate sheets of paper.

As we discussed by phone, I would appreciate your placing this proposed rule on the Rules Committee docket for consideration as a new rule to go into effect in January, 1992. Also, in view of the fact that a ruling regarding the validity of filing faxed pleadings is extremely important to the continued operation of businesses such as Fax File, I would like to know if it might be possible to [illegible] a memorandum ruling from the [illegible] extremely helpful in light of the fact that a new rule cannot be enacted until 1992.

I would appreciate your reviewing the proposed rule and the enclosed materials. I will be calling your within the next few weeks, and will be interested in your comments. In the meantime, please feel free to call me should you have any questions regarding this matter.

Sincerely,

Paul R. Clevenger

Paul R. Clevenger

Rule 74A. Filing of Documents Reproduced by Facsimile

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4543.001

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

September 14, 1989

Mr. Luther H. Soules III
Soules and Wallace
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I enclose County Court-at-Law Judge Phillips' letter to Chief Justice Phillips regarding electronic filing of documents.

Has the Committee done any work on this subject? The statutes to which Judge Phillips refers were enacted effective September 1, 1987.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

September 14, 1989

Hon. J. David Phillips
County Court-at-Law Number 1
Travis County Courthouse
Austin, Texas 78767

Dear Judge Phillips:

The Chief Justice has referred to me your letter regarding rules for the electronic filing of documents. I am the Court's liaison for all matters pertaining to the rules.

The Rules Advisory Committee has recommended amendments to the rules which would permit service of papers, other than citation and papers required to be served by hand, upon parties by electronic means. However, the Committee has not recommended rules on filing of documents by electronic means.

To avoid unnecessary proliferation of local rules, I anticipate that our Court will want to try to fashion rules which will apply statewide. However, we would welcome any suggestions you or others have.

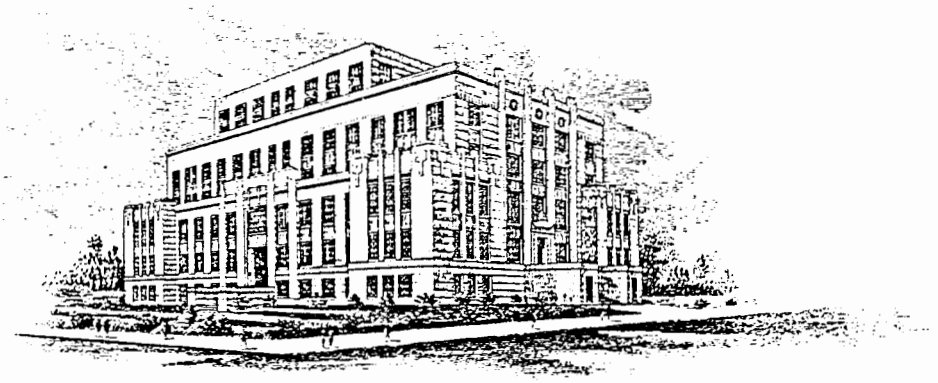
I am advising the chairman of the Rules Advisory Committee, Luther H. Soules of San Antonio, of your letter and your interest in this subject, and you may be hearing from him further as work on this subject proceeds. Thank you for your interest in procedures to increase the efficient operation of the courts.

Sincerely,

Nathan L. Hecht
Justice

c: Judge Schless
Judge Clark

County of TRAVIS
STATE OF TEXAS



J. DAVID PHILLIPS
JUDGE
COUNTY COURT AT LAW NO. 1
COUNTY COURTHOUSE
AUSTIN, TEXAS

September 8, 1989

Hon. Thomas R. Phillips
Chief Justice of Texas
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Electronic filing of documents

Dear Mr. Chief Justice:

As you are no doubt aware, "FAX" machines have become the latest tool and toy available to the modern law office. With the explosion in use of this technology, entrepreneurs have entered the "fax" field offering services to attorneys. Sample advertisements from two of these are attached.

At the trial court level, we are concerned about the foreseeable impact of the use of these services by attorneys. It is not clear what legal force facsimile copies carry when filed with a court. We therefore write to inquire whether the Supreme Court is planning to offer us guidance.

Sections 51.801 through 51.807 of the Government Code appear to be the only statutes pertaining to the subject. Section 51.803 provides that the Supreme Court "shall adopt rules and procedures" while Section 51.807 says that local courts "may adopt local rules" and submit them to the Supreme Court for review and adoption.

Does the Supreme Court plan to promulgate rules as the legislature has directed? Should we in the local courts await your guidance before attempting local rules, or do you intend the rules to be initiated at the local level? Your guidance in this matter would be greatly appreciated.

Kindest regards,

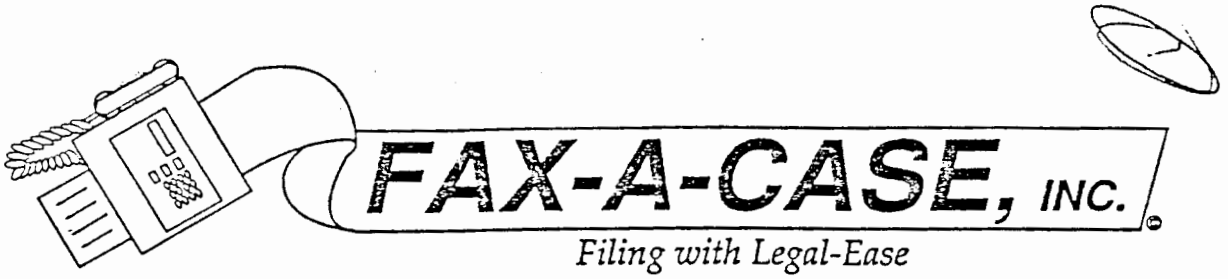
J. David Phillips, Judge

JDP/src

Enclosure

xc: Hon. Michael J. Schless
Local Administrative Statutory
County Court Judge

Hon. Harley Clark
Local Administrative District
Court Judge



FAX-A-CASE, INC. is a filing service that allows any attorney, through the use of the fax machine, to have a speedier and more cost efficient access to the courthouse.

How???

By faxing your legal documents to FAX-A-CASE, INC., who then prepares the necessary copies, files them, obtains citations and subpoenas, has process issued and has it served, by your server or ours. In a short time, we then fax or send back to your office all signed, stamped and file marked copies, along with any necessary exhibits and our billing report, containing an itemized list of all the functions we performed. It is as simple as that. If you will look at our SERVICES OFFERED sheet, you will find we perform these and many other functions in all court jurisdictions -- Justice, Small Claims, County, State, and Federal.

What will this cost???

Cost??? You'll actually INCREASE your PROFITS.

FIRST — You will save your time, by not having to go to the courthouse, and thus, increase your billable hours.

SECOND — You will save your employees' time, by not having to go to the courthouse, and thus, increase their productivity by utilizing the saved time for other tasks.

THIRD — As this is a receiptable expense, you can bill your client for the filing services, as you do for long distance and copy costs, and thus, turn what was an expense into income.

As a result, the time, money and increased productivity gained, from the above three factors, will translate into increased income and thus, a much MORE PROFITABLE BOTTOM LINE for you.

Where do I get a fax machine???

If you do not have one, FAX-A-CASE, INC. will give you one, which you can use, 24 hours a day, 7 days a week for your every fax need, be it business or personal.

When can I start utilizing this service???

**IMMEDIATELY ** This is definitely a win-win situation, anyway it is viewed.

Call —FAX-A-CASE, INC. — at (512) 478-4131 and ask for SHARON.
Clark

FAX-A-CASE, INC.
601 West 11th Street - Suite 116
Austin, Texas 78701
PHONE # (512) 478-4131
FAX # (512) 478-5252

... It will be In-Fax-Uating doing business with you ...

QUESTIONS ???

QUESTION: Will the courts accept copies for filing in lieu of original signature pleadings?

ANSWER: YES. According to the officials who are in charge of the offices that handle the filing of legal documents, they will allow and accept copies to be filed. In addition, FAX-A-CASE, Inc. has met with all of the governing court officials and received their approval.

QUESTION: Will you file documents in the Federal Courts?

ANSWER: YES. As you are aware, the federal courts require an original ink signature on each document that is filed. As you fax a docutment to us to be filed, we will attach one of your pre-signed aurthorization forms and file it. Our filing procedures have been approved by the authorities in charge of the Western District.

QUESTION: What services will FAX-A-CASE, Inc. perform for me?

ANSWER: FAX-A-CASE, Inc. will perform all of the filing jobs you now do yourself. In addition to filling all documents in all jurisdictions, we will deliver notices, obtain citations, arrange for issuance of process and it's service. In addition, we will do many other services. Please check the order form.

QUESTION: If I need copies of documents from the Court's files, will you get them?

ANSWER: YES. We will copy the documents you desire and fax them back to your office. See the order form for charges.

QUESTION: Will you advance filing fees and court costs?

ANSWER: YES. We will advance any fees and then charge your account for the amount plus 5% for the service. The 5% will cover our handling costs.

QUESTION: What does the phone company charge for sending a document by fax?

ANSWER: Nothing, when sent locally. Faxed material sent long distance is charged at the same rate your long distance phone calls are charged.

QUESTION: How will I know that my work has been completed?

ANSWER: FAX-A-CASE, Inc. will fax an itemized filing report along with your completed documents when we have completed our work.

QUESTION: How will I be billed?

ANSWER: FAX-A-CASE, Inc. will charge against your credit card or work from a pre–arranged escrow account or set up some other acceptable arrangement.

QUESTION: What are your hours of operation?

ANSWER: When the Courts are open so is FAX-A-CASE, Inc. However, our fax machines are turned on 24 hours a day to receive you documents whenever you send them.

THE VERDICT: FAX-A-CASE, Inc. will be your liaison with the courthouses. If it is just a normal filing or a special service you need to be performed, we are cheerfully at your disposal. Pick up the phone and tell us or write it up and fax it to us — we are here to serve you.

MEET

FAX FILE, inc.

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FAX FILE, INC. is a company developed by attorneys to offer the legal profession a filing service that is as fast as your facsimile machine. Your pleadings are telecopied from your office to **FAXFILE, INC.** along with an instruction sheet. **FAX FILE, INC.** then makes sufficient additional copies, files the pleadings, obtains hearing dates, secures TRO's, and has process issued. Process is then ready to be served according to your instructions. File-marked copies, receipts for court costs and a confirmation of work done is FAXed back to your office immediately. It's as easy as that! **FAX FILE, INC.** has offices in Austin, Dallas, Houston, Denton and Greenville. Other cities will be added soon.

COST

Only a fraction of what it is costing you now to use your time or your employees time.

PAYMENT

All services and court costs are charged on your credit card or contact us for other special payment arrangements.

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Call us to set up your account and begin processing your work within the hour.

Dallas	**(214) 748-0091**	**Greenville**	**(214) 455-3647**
Austin	**(512) 476-3967**	**Denton**	**(817) 566-0592**
		Houston	**(713) 880-8007**

SUBCHAPTER I. ELECTRONIC FILING OF CERTAIN DOCUMENTS

Law Review Commentaries

Annual survey of Texas law: Civil procedure. Ernest E. Figari Jr., Thomas A. Graves and A. Erin Dwyer, 38 Southwestern L.J. (Tex.) 421 (1984).

Library References

Clerks of Courts ⇐69.
C.J.S. Clerks of Courts § 39.

§ 51.801. Definition

In this subchapter, "electronic filing of documents" means the filing of data transmitted to a district or county clerk or a clerk of a court of appeals by the communication of information, displayed originally in written form, in the form of digital electronic signals transformed by computer and stored on microfilm, magnetic tape, optical disks, or any other medium.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 1(a).
Vernon's Ann.Civ.St. art. 29f, § 1(a).

§ 51.802. Place of Filing

The place of filing is the receiving station designated by the district or county clerk or the clerk of the court of appeals to which electronic information is transmitted.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 1(b).
Vernon's Ann.Civ.St. art. 29f, § 1(b).

§ 51.803. Supreme Court Regulation and Approval

(a) The supreme court shall adopt rules and procedures to regulate the use of electronic copying devices for filing in the courts.

(b) An instrument may only be filed as provided by this subchapter if the district, county, or court of appeals has established a system for receiving electronically transmitted information from an electronic copying device, and the system has been approved by the supreme court. A district or county clerk or clerk of a court of appeals who believes there is justification for use of an electronic filing system in the clerk's office must request approval of the system from the supreme court. The supreme court shall approve or disap-

prove the system and may withdraw approval any time the system does not meet its requirements.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 3(b), (c).
Vernon's Ann.Civ.St. art. 29f, § 3(b), (c).

§ 51.804. Completion of Electronic Filing

To complete an electronic filing:

(1) the person filing an instrument with the district or county clerk or the clerk of a court of appeals must transmit the instrument electronically;

(2) the receiving station must transmit acknowledgment to the sending party by encoding electronic receipt of the transmission;

(3) the sending station must encode validation of the encoded receipt as correct; and

(4) the receiving station must respond by encoded transcription into the computer system that validation has occurred and that the electronic transmission has been completed.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 1(c).
Vernon's Ann.Civ.St. art. 29f, § 1(c).

§ 51.805. Transmission or Distribution of Data

(a) A receiving station, on completion of an electronic filing, shall:

(1) transmit data to the appropriate court as required; and

(2) distribute data as required by statute or rule.

(b) Data must be distributed or transmitted from or through the medium of direct computer transmission, microfilm, magnetic tape, or optical disks, or any other medium approved by the supreme court.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 1(d).
Vernon's Ann.Civ.St. art. 29f, § 1(d).

§ 51.806. Signature on Original

(a) If the supreme court determines that each document filed by electronic transmission must be signed in the original, that requirement is satisfied if the sending station at the point of origin maintains a hard copy with the original signature affixed that, on order of the court, shall be filed in original hard copy medium. The electronic transmission of the data to be filed must bear a facsimile or printing of the required signature. The signature may be represented in numerical form. The electronically reproduced document must bear a copy of the signature or its representation in numerical form.

(b) The electronically reproduced document shall be accepted as the signature document for all court-related purposes unless the hard copy with the original signature affixed is requested by one or more parties to a suit or other agent required by statute, law, or other legal requirement. A request under this subsection must be made in the form of a motion to the court. If the court grants the motion, the court shall order that the original be filed with the court.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 3(a).
Vernon's Ann.Civ.St. art. 29f, § 3(a).

§ 51.807. Local Rules

(a) The courts of a county may adopt local rules that govern the transmission and receipt of documents or reports stored or created in digital electronic or facsimile form and that provide for recognition of those documents as the original record for file or for evidentiary purposes.

(b) The rules shall be submitted to the supreme court for review and adoption as a part of the overall plan or procedure for the electronic filing of documents.

Added by Acts 1987, 70th Leg., ch. 148, § 2.67(a), eff. Sept. 1, 1987.

Historical Note

Prior Law:

Acts 1983, 68th Leg., p. 4505, ch. 732, § 2.
Vernon's Ann.Civ.St. art. 29f, § 2.

TRCP 21b. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions

If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules 21 and 21a, the court may in its discretion, on notice and hearing order all or any part of such document stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the other parties the amount of reasonable costs and expenses including attorneys fees incurred as a result of the failure, or make such other order with respect to the failure as may be just pursuant to Rule 215.

[COMMENT TO 1990 CHANGE: Repealed provisions of Rule 73, to the extent same are to remain operative, are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties.]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

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FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

5. Rule 21(b). The comment raised the question of why the proposed amendment, which addresses the sanctions available for failure to comply with Rule 21 and Rule 21a, does not merely refer to the sanctions available in Rule 215. Doing so would be consistent with the notion of having only one sanctions rule. The apparent reason is that the new Rule 21(b) adds specific sanctions not expressly listed in Rule 215.

This subcommittee recommends *no* change in the proposed amendment.

MICHAEL LUCKSINGER

Attorney At Law

(512) 756-6050

Camp Longhorn - Ranch
Rt. 2, Box 38-R
Burnet, Texas 78611

21b

November 14, 1989

Honorable Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Tx 78711

Re: "Proposed Changes to Texas Rules of Civil Procedure," etc. as outlined in the November 1989 issue, Texas Bar Journal

Dear Justice Hecht,

Much ado has often been made about "de-legalizing" much of the verbiage in legal documents, and our laws, especially, and not surprisingly, by laymen.

I would propose that such a principle be applied in the drafting and amending of our Rules of Procedure and Evidence. Arguably no other body of law or rules is more deserving of being laid out in plain language, where possible, than the "how, when and where" codes of procedure for our courts.

Example 2: Proposed Rule 21b.

If a party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for any order in accordance with Rules 21 and 21a, the Court may, in its discretion, on notice and hearing:

(i) order any part of such document stricken;

(ii) direct that the failing party shall not be permitted to present grounds for relief or defense contained therein;

(iii) require the failing party to pay the other parties' reasonable costs, expenses and attorney fees incurred as a result of the failure; or

(iv) make any other order with respect to the failure which the court deems just pursuant to Rule 215.

E. Jack Lawrence, III
LEGAL ASSISTANT • EDUCATOR
5570 WINFREE DRIVE
BEAUMONT, TEXAS 77705
~~643-4049~~ (409) 833-0894
November 20, 1989

21
21b
166
1672
3082

Justice Nathan L. Hecht

Texas Rules of Court Conference

Dear Justice Hecht:

I would like to offer the following comments on the Proposed Amendments to the Texas Court Rules:

1. Suggested addition to TRCP Rule 21 or 21b:
It shall be within the court's discretion to strike illegible documentary attachments to pleadings or motions, on motion by an opponent, subject to the right to amend seasonably.

3. Query as to the purport of Rule 21b:
Will a party still be subject to sanctions if he can prove that the lack of notice to others was due to a postal delivery failure? One example is that postal carriers frequently allow supposed agents to sign for registered mail despite specification that delivery be restricted to addressee only. Will the presence in the file of the court of the pleading preclude sanctions?

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166
166 b
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221-279

POWELL POPP & IKARD

ATTORNEYS AT LAW

707 WEST TENTH STREET
AUSTIN, TEXAS 78701
TELEPHONE 512 473-2661
FACSIMILE 512 479-8013

M. FRANK POWELL
JAMES POPP
WILLIAM IKARD

G. WALTER McCOOL
PATRICIA L. SESSA

WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

2. TRCP 21b. By setting up a separate rule for sanctions the court is departing from the concept behind Rule 215, which was to lump all sanctions together. If you will refer to the advisory committee notes, prior to the adoption of Tex. R. Civ. P. 13, January 1, 1988, you will note that the advisory committee specifically provided in Rule 13 that the sanctions available would be those listed in Rule 215, with the idea being that they did not want various sanctions strung out all over the Rules of Civil Procedure. Rule 21b ought to simply authorize the trial judge to utilize the sanctions contained in Rule 215, for failure to serve or deliver a copy of the pleadings or motions.

Sincerely,

William W. Kilgarlin

Riddle & Brown

Phillip W. Gilbert
Board Certified — Civil Trial Law
Texas Board of Legal Specialization

21b 166 (a)(d) 215 273 296

November 22, 1989

Attorneys and Counselors

A Professional Corporation
2100 Olympia & York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 220-6300
263-6423 (Metro)
(214) 220-3189 (Telecopier)
(214) 220-6414 (Direct Dial)

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

Incidentally, I believe that the proposed rules changes which have been published are helpful and constructive, with only two exceptions. For the reasons discussed above, the suggested change to TRCP 21b, apparently permitting the extinction of grounds for relief or defense, and other Rule 215 sanctions, kills a gnat with a bomb. The failure to serve copies of pleadings and motions is very often due to secretarial error. Even when I have felt that my opponent was intentionally (and repeatedly) failing to copy me, this wrong could have been adequately remedied by a "fine" or by a brief postponement for response. Leaving the choice of sanctions to the unbridled discretion of a single judge permits the exercise of prejudice or bias (or lack of understanding) to be endorsed with the imprimatur of the Law. It does nothing to promote fairness or justice.

TRCP 57 Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, ~~and~~ telephone number[, and, if available, telecopier number]. A party not represented by an attorney shall sign his pleadings, state his address, ~~and~~ telephone number[, and, if available, telecopier number].

[COMMENT TO 1990 CHANGE: To supply attorney telecopier information with other identifying information on pleadings.]

February 1, 1990

TO: Supreme Court Advisory Committee: Subcommittee on Rules 15 to 165

FROM: David J. Beck

The following is a draft of my views with respect to the recent correspondence forwarded to us. Since I will be unable to attend the meeting of the full Committee, I defer to the judgment of the other members of our subcommittee with respect to the conclusions to be reached.

Proposed Rule 57

One comment raises the question of the meaning of the phrase "in his individual name." The specific issue is whether an attorney would be signing the pleading "individually" as required if he is signing the pleading on behalf of law a firm or a professional corporation. The language of concern has been in the rule for a substantial period of time and is not in any way being changed.

The subcommittee recommends no change.

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(9) TRCP57: Again I have a question. What does the phrase "in his individual name," mean? Is signing a pleading "law firm name by" a signature "in his individual name"? If that law firm is a professional corporation, the lawyer would not be signing the paper individually, but would be signing on behalf of the corporation. I believe that this phrase needs some clarification.

RONALD D. STEPHENS
Attorney-at-Law
P.O. Box 1269
GRAHAM, TEXAS 76046

Office Phone:
549-2165

Home Phone:
549-2084

3a
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November 24, 1989

Honorable Nathan L. Hecht, Justice
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Dear Justice Hecht:

In response to the invitation contained on Page 1147 of the November 1989 Texas Bar Journal, the following comments are offered with reference to the proposed changes in the Rules of Civil Procedure.

1. All reference to local rules be deleted, including TRCP 3a. Uniformity of rules cannot be accomplished if the different Courts are allowed to develop local rules.

2. TRCP 21a. and TRCP 57. are attempts to utilize current technology, but it appears that some safeguards are missing. Telecopiers are not always monitored, or may not be monitored in such a way to prevent a time limit lapse. In addition, the request to provide a telecopier number appears to be an invasion of privacy. I believe that the utilization of this should be voluntary. If provided with a State Bar of Texas identification number on a voluntary basis, then it could be utilized, but not otherwise. An alternative would be to require some type of confirmation on receipt of this type of communication in order to start the time for response.

Yours very truly,

Ronald D. Stephens

RDS/jk

TRCP 60. Of Intervenor

Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party; and such intervenor shall, in accordance with Rule 7~~2~~ [21 and 21a], notify the opposite party or his attorney of the filing of such pleadings within five days from the filing of same.

[COMMENT TO 1990 CHANGE: To revise rule reference to Rules 21 and 21a instead of repealed Rule 72.]

February 1, 1990

TO: Supreme Court Advisory Committee: Subcommittee on Rules 15 to 165

FROM: David J. Beck

The following is a draft of my views with respect to the recent correspondence forwarded to us. Since I will be unable to attend the meeting of the full Committee, I defer to the judgment of the other members of our subcommittee with respect to the conclusions to be reached.

Proposed Rule 60

The concern expressed is that the proposed rule would require an intervenor to notify the opposing party of the filing of a pleading in accordance with Rule 21 and Rule 21(a), which requires notice to be made contemporaneous with the filing, while at the same time it also allows an intervenor 5 days from its filing to notify the opposing party. The concern addresses the reason for the "5 day window" for the intervenor.

The subcommittee believes this is a valid comment and therefore the language "notify the opposite party or his attorney of the filing of such pleadings within five days from the filing of same" should be deleted from the proposed rule.

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(10) TRCP60: It seems a non sequitor to say that the intervenor shall, in accordance with Rule 21 and 21(a), notify the opposing party of the filing of a pleading, within five days from the filing of the same, when those rules would require notice to be made contemporaneous with filing. I do not understand the reason for a five day window for an intervenor. If we are changing so many rules, why not also eliminate this unnecessary time period.

TRCP 60

4. "Rules" should be plural.

TRCP 60. Of Intervenor

Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party; and such intervenor shall, in accordance with Rule ~~72~~ [21 and 21a], notify the opposite party or his attorney of the filing of such pleadings within five days from the filing of same. (4)

[COMMENT TO 1990 CHANGE: To revise rule reference to Rules 21 and 21a instead of repealed Rule 72.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 63. Amendments [and Responsive Pleadings]

Parties may amend their pleadings, [respond to pleadings on file of other parties,] file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any ~~amendment~~ [pleadings, responses, or pleas,] offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such ~~amendment~~ [filing] will operate as a surprise of the opposite party.

[COMMENT TO 1990 CHANGE: To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH

FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

6. Rule 63. The concern expressed about the proposed amendment raises the question of whether a counterclaim is a "response to pleadings" within the meaning of the proposed amendment. The subcommittee is of the view that it would be such a response and therefore *no* further change in the existing rule should be necessary.

February 1, 1990

TO: Supreme Court Advisory Committee: Subcommittee on Rules 15 to 165

FROM: David J. Beck

The following is a draft of my views with respect to the recent correspondence forwarded to us. Since I will be unable to attend the meeting of the full Committee, I defer to the judgment of the other members of our subcommittee with respect to the conclusions to be reached.

Rule 63

The concern expressed is that a party should not be permitted to amend his pleadings up to 7 days prior to trial. Dallas County, for example, apparently now uses a 14 day rule, and other jurisdictions have similar requirements. The comment urges the adoption of a 14 day rule.

The subcommittee recommends no change.

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(11) TRCP63: I strongly urge the court to reconsider the seven day prior to trial amendment rule. As your honor is aware, Dallas county has for some time used a fourteen day rule, which I believe has worked extremely well. From numerous conversations with attorneys from other states, we are, I believe, one of the few states which would allow amendments so close to trial. I would urge that a limit of at least fourteen days be set. (See comments below re: TRCP166b).

JUDGE JOSEPH B. MORRIS

ONE HUNDRED FIRST
JUDICIAL DISTRICT COURT

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166
245

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The following are my comments on the proposed amendments to three specific rules of civil procedure:

1. TRCP 63. The rule will be titled "Amendments and Responsive Pleadings." Is an original counterclaim a "responsive" pleading? The Court has previously decided such a counterclaim is not an amended pleading for purposes of the rule. By use of the phrase "... any pleadings, responses, or pleas offered for filing within seven days..." is an original counterclaim to be subject to the rule? It is unclear to me because of the new title for the rule. Given the number of such claims filed near trial dates, it would be helpful to be clear on this point.

2. TRCP 166. I applaud the revisions but remain concerned the rule does not expressly allow the trial court to enter a pre-trial order covering the various matters without first holding a conference, which, as you know, is a luxury not often available because of time. At least twice I have received arguments that this Court could not issue pre-trial discovery orders without first holding the conference described in Rule 166. I have relied on the inherent power of this Court and the last sentence of the rule to do so. I think it would be helpful to clarify this issue in Rule 166 by expressly providing the trial courts may issue such orders without the necessity of a conference.

3. TRCP 245. At least one appellate court has ruled that forfeiture cases must be set within 30 days after answer date. This rule creates a conflict with regard to any case that now or in the future by law must be set sooner than 45 days after answer date.

As I am sure you know, my comments about these rules originate from my perspective as a trial judge.

Cordially,

Joseph B. Morris

0019

Old Red Courthouse Dallas, Texas 75202 653-6937

TRCP 63

5. Surprise "to" the opposite party, not "of".

TRCP 63. Amendments [and Responsive Pleadings]

Parties may amend their pleadings, [respond to pleadings on file of other parties,] file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any ~~amendment~~ [pleadings, responses, or pleas,] offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such ~~amendment~~ [filing] will operate as a surprise ~~of~~ to the opposite party. (5)

[COMMENT TO 1990 CHANGE: To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 87. Determination of Motion to Transfer

1. Consideration of Motion. (No change.)

2. Burden of Establishing Venue

(a) (No change.)

(b) Cause of Action. It shall not be necessary for a claimant to prove the merit[s] of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings[.]//þψŧ/ψ [W]hen the [defendant specifically denies the] ¢ℓąίψąηŧ/$ venue allegations ąŗ¢ /$þ¢¢ίfίc¢ąllγ /ð¢ηί¢ð/ the þℓ¢ąð¢ŗ [claimant] is required, by prima facie proof as provided in paragraph 3 of this rule, to support ηί$ [such] pleading that the cause of action taken as established by the pleadings, or a part ŧηęŗ¢øf of such cause of action, accrued in the county of suit./þγ /þŗίψą /fą¢ί¢ þŗøøf /ą$ /þŗøγίðę ð /ίη /þąŗągŗąþη /ȝ /øf /ŧηί$ /ŗψί¢/ If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. A But the defendant ψηø $ę¢k$ /ŧø /ŧŗąη$fęŗ /ą /¢ą$¢ /ŧø /ą /¢øψηŧγ /ψηęŗ¢ /ŧηę /¢ąψ$¢ /øf /ą¢ŧίøη/ øŗ /þąŗŧ/ŧηęŗ¢øf//ą¢¢ŗψð shall be required to support his ψøŧίøη pleading, by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.

(c) (No change.)

3. Proof

(a) Affidavit and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact[; provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(b) The Hearing. (No change.)

(c) (No change.)

4. No Jury. (No change.)

5. No Rehearing. (No change.)

6. (No change.)

[COMMENT TO 1990 CHANGE: To clarify that no proof of any kind is required of any party to establish any element of a cause of action or part thereof; proof is restricted to place, if any, and

the pleadings establish all other elements and may not be controverted for venue purposes as to the existence of a cause of action or part thereof.]

FULBRIGHT & JAWORSKI
1301 MCKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI &
REAVIS MCGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

13. Rule 87(5). One suggested change to Rule 87(5), the venue hearing rule, was that the heading in that subsection "No Rehearing" is misleading. The suggestion was that the hearing should be changed to "Motions for Rehearing" because it more accurately describes the text of that section of Rule 87.

The subcommittee recommends that such change be made.

CRENSHAW, DUPREE & MILAM

ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
FIRST NATIONAL BUILDING
1500 BROADWAY
LUBBOCK, TEXAS 79401

(806) 762-5281
P. O. BOX 1499
79408-1499

Telecopier (806) 762-3510

CHAS. C. CRENSHAW, SR. (1886-1964)
GEO. W. DUPREE (1890-1973)
R.K. (Kim) HARTY (1911-1978)
J. ORVILLE SMITH (1912-1985)

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W. CHRIS BOYER, P.C.
ROBERT L. JONES, P.C.
MICHAEL L. BYRD
MARK W. HARMON
JERRI LYNN HAMMER
J. T. KELLEY
MARK O. BLANKENSHIP

OF COUNSEL:
MAX C. ADDISON

87
166

December 1, 1989

Honorable Nathan L. Hecht
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

You may not recall, but I appeared on behalf of the Texas Association of Defense Counsel in regard to the proposed rule changes, and, in particular, I spoke regarding Rule 87 and Rule 166.

I am very concerned that in regard to Rule 87, there appears to be a misconception that under present law you cannot go into the issue of the existence of a cause of action or part thereof, and that plaintiff's pleadings must be taken as conclusive on that issue. I beg to differ with anyone who takes the position that the proposed rule is simply a codification of existing case law. There are certainly circumstances and cases in which the existence of the plaintiff's cause of action can certainly be challenged on the motion to transfer venue. There are a number of cases specifically holding that the resident defendant (through whom venue as to all other defendants is sought to be maintained) must be a "real" defendant who is not named as a defendant simply for the purpose of establishing venue, but is a "real" defendant against whom the plaintiff does, in fact, have a cause of action. If that were not the case, then certainly the plaintiff could simply plead a non-meritorious cause of action for the purpose of establishing venue against one defendant and join other defendants who could not, thereafter, raise any objection to the cause of action pled and thereby preclude any challenge as to proper joinder. It certainly does not seem to be too onerous a burden to require the plaintiff to make a *prima facia* case against the resident defendant, since it must be remembered that the defendant no longer has an appeal from the court's decision on venue prior to a trial on the merits.

I want to keep this letter short, but I would respectfully urge the

Court to give careful consideration to this and, if need be, we will be happy to furnish authorities for the proposition that this is not merely a codification of existing case law.

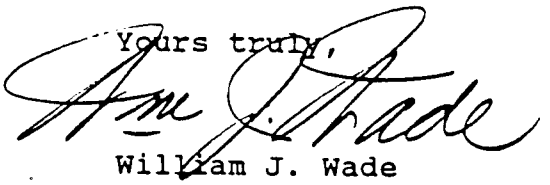
We are extremely concerned that such a rule would lead to forum shopping in the worse sense of the word.

I also spoke in regard to Rule 166. I fail to see the need to amend Rule 166. This amendment would do nothing but increase the cost of litigation and be counterproductive to any streamlining of the process. It would appear that the first sentence would make this mandatory upon request of any party, which is certainly objectionable and I think would meet with opposition from the judges. Most judges do not have the time to engage in this, except in very selected cases. I also feel that the suggestions in that rule are even broader than the Federal practice for which I see no reason. I am also concerned with the wording of paragraph (o), wherein the rule states that the court may encourage settlement. I do not know what the proposed rule means in that regard and I certainly feel that it can be abused. In short, I do not think we need this rule changed. The prior rule is certainly adequate and gives the court all the authority it needs to get the job done.

Speaking for me individually and, I am sure for other practicing throughout the State, I want to thank the Court for the opportunity to have input on these rules before the Court adopts them. Your openness and interest is genuinely appreciated.

With kindest regards for the holiday season, I remain

Yours truly,



WJW/ba

William J. Wade

cc: Mr. David M. Davis
Post Office Box 2283
Austin, Texas 78768-2283

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705 · (512) 471-5151
Telecopier Number (512) 471-6988

87J

168

November 27, 1989

Justice Nathan Hecht
P.O. Box 12248
Austin, TX 78711

Re: Proposed New Rules of Civil Procedure

Dear Justice Hecht:

Since I was unable to attend the last meeting of the Committee on the Administration of Justice, I was not able to make the following suggestions to them. Hence, I thought I would send them on to you without any imput or approval by the COAJ. They are simply my proposals.

The first has to do with a Motion to Transfer Venue. Under present Rule 87-5, most courts are holding that the trial court cannot reconsider motions already ruled on even in light of the trial on the merits. It seems to me this interpretation is based primarily on the heading to that section, "No Rehearing." I do not think the context of the section says that at all. To make it clear that the trial court can do what the appellate court must do, I have changed the name of the section and included a final paragraph addressing this question. I also include a copy of a case addressing this problem. A further matter in my addition is the wording "when brought to its attention." It is my hope that this will prevent sandbagging the other side by making no mention of this to the trial court and raising it on appeal for the first time.

The second proposal is to make clear what is to be done with interrogatories and answers to interrogatories. I believe it is clear that they are not to be filed. However, Rule 168 is not as clear about this as is Rule 167. I have simply borrowed some similar language from that rule.

Sincerely,

J. Patrick Hazel
Tiny Gootch Centennial
Professor of Trial
Practice

RULE 87. DETERMINATION OF MOTION TO TRANSFER

5. ~~No Rehearing~~ [Hearing New Motions]

(add)

[The trial court shall reconsider, in light of the trial on the merits, motions already ruled on when brought to its attention.]

TRCP 106. Method of Service.

(a) (No change.)

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place ~~of~~ of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempting under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) (No change.)

(2) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

TRCP 106

6. Attempted, not attempting.

TRCP 106. Method of Service.

(a) (No change.)

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place ~~or~~ [of] abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted ~~ing~~ under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) (No change.)

(2) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

(6)

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 107. Return of ~~Citation~~ [Service]

(No change.)

(No change.)

No default judgment shall be granted in any cause until the citation[, or process under Rule 108 or 108a,] with proof of service as provided by this rule [or by Rule 108 or 108a], or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

[COMMENT TO 1990 CHANGE: To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108 or 108a.]

TRCP 107

7. "Rules" should be plural both times as marked.

TRCP 107. Return of ~~Citation~~ [Service]

(No change.)

(No change.)

No default judgment shall be granted in any cause until the citation[, or process under Rule 108 or 108a,] with proof of service as provided by this rule [or by Rule 108 or 108a], or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment. (7)

[COMMENT TO 1990 CHANGE: To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108 or 108a.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 120a. Special Appearance

1. (No change.)

2. (No change.)

[3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.]

3/ [4.] If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

[COMMENT TO 1990 CHANGE: To provide for proof by affidavit at special appearance hearings, with safeguards to responding parties. These amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction.]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

7. Rule 120(a). The concern expressed about the proposed amendment is that a plaintiff may participate in a hearing on jurisdiction and then seek a continuance, thereby obtaining "two bites at the apple." The subcommittee was of the view that Rule 120(a) does not present such a problem because under the existing rule controverting affidavits are necessary before there is any matter to be heard. Also, the Rule provides for a continuance when a party is unable to obtain the necessary affidavits.

The subcommittee recommends *no* change in the proposed amendment.

120a
166
166(a)
271(4)
TRAP 100(5)

LAW OFFICES
OF
STANLEY G. SCHNEIDER
A PROFESSIONAL CORPORATION
Eleven Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed 1990 Rule Changes.

Dear Justice Hecht:

After reviewing the proposed rule changes, I offer the following comments and suggestions:

5. Texas Rules of Civil Procedure 120(a):

If the court is going to allow special appearance facts to be proved by affidavit, the rule should allow the party opposing the special appearance the absolute right, on request, to depose the affiant prior to the hearing on the special appearance.

The currently proposed rule charge would leave this matter totally within the discretion of the court.

As you are well aware, a party raising a special appearance has the burden of negating jurisidiction. It is extremely easy to do so in an affidavit by simply stating the negative of each element. Once the affiant has stated that he is aware of and has personal knowledge of the contacts that he (or his corporation) has with the State and that there are none, the simple statement that there are none is in this situation a factual statement rather than a conclusion.

When the results of the courts ruling may very well determine the continued existence of the lawsuit, a party that has to respond to an

affidavit that at the very least creates a fact issue justifying sustaining the special appearance, should have the absolute right, not subject to a courts discretion, to depose the affiant to test his knowledge and statements prior to the hearing on the special appearance.

It is important to remember that affidavits are useful in summary judgment practice because it is not necessary to make credibility decisions.

Leaving the availabilty of a deposition totally within the court's discretion would complicate rather than simplify litigation by producing a flurry of motions within the 7 days prior to a special appearance hearing. It will produce situations where trial courts, more interested in small dockets than anything else, will sustain special appearances based on nothing more than a self serving affidavit that creates a fact issue. This, in turn, will necessitate an entire round of appellate ball on technical, procedural issues that could be avoided by requiring a deposition if requested.

Alternatively, I suggest that there be restrictions on affidavits similar to those imposed in summary judgment situations. e.g. the affidavit is objectionable as self serving if not easily rebutted . . .

I hope that my comments and suggestions are useful. I, like many other small practictioners, join the court's desire to simplify and rationalize the litigation process.

Respectfully,

W. TROY McKINNEY

WTM/ag l

TRCP 166. Pre-Trial [Conference] Procedure; Formulating Issues

In any action, the court may in its discretion [, or on request of any party,] direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All [pending] dilatory pleas[,] and motions[,] and exceptions relating to a suit pending;

(b) The necessity or desirability of amendments to the pleadings;

[(c) Discovery schedule;]

[(d) Requiring written statements of the parties' contentions;]

(e) [Contested issues of fact and] The simplification of the issues;

(f) The possibility of obtaining admissions [stipulations] of fact and of documents which will avoid unnecessary proof;

(g) [g] The limitation of the number of expert [The identification of legal matters to be ruled on or decided by the court];

[(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;

(j) Agreed applicable propositions of law and contested issues of law;

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a non-jury case;

(l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(m) Written trial objections to the opposite party's exhibits, stating the basis for each objection;

~~(f)~~ [n] The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury.

[(o) The Settlement of the case. To aid such consideration, the court may encourage settlement.]

~~(g)~~ (p) Such other matters as may aid in the disposition of the action. The court shall make an order that recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions[,] ~~or~~ agreements of counsel[, or rulings of the court]; and such order when ~~entered~~ [rendered]

shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

[COMMENT TO 1990 CHANGE: To add new paragraphs to broaden the scope of the rule and to express the ability of the trial courts at pretrial hearings to encourage settlement.]

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

TRCP 166, Paragraph 1 states:

> In any action, the Court may in its discretion, ~~or on request of any party,~~ direct the attorneys for the parties and the parties of their duly authorized agents to appear before for a conference to consider:

The elimination of the words "or on request of any party" means that paragraph 1 of TRCP 166 would read exactly as it presently reads. We do not think it should be mandatory that a Court conduct a hearing on a pretrial order any time a party requests a hearing. Making a hearing mandatory increases the number of discovery hearings. These seems to be a consensus that there are too many discovery hearings.

The COAJ proposes that the pretrial order of TRCP 166 be limited to those cases the trial court deems complex. We do not believe that TRCP 166 should be limited to complex cases. Determining whether a case is complex or not would also require another hearing. In existing practice, many trial courts only apply this rule to complex cases anyway. Many times this occurs without hearing.

Proposed TRCP 166, paragraph (o) reads:

> The settlement of the case. ~~To aid such consideration the Court may encourage settlement.~~

The COAJ recommended that the words "to aid such consideration the Court may encourage settlement" should be stricken and we agree. The COAJ stated: "the proposed sentence expressly providing that the trial court may encourage settlement has been deleted, since this is partially duplicative of other portions of the rule, it may go too far toward implying a very active role by the judge in such endeavors. The court may force settlement but not 'encourage it'; this change response to input from lawyers who felt encouragement from the Courts has bordered on coercion."

STATE BAR OF TEXAS

4543.001

TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

The Committee on the Administration of Justice has reviewed the Supreme Court Advisory Committee's proposed rule changes. We believe that the vast majority of the proposals are sound and should be approved. We have a few suggestions to make, which fall into these four categories: (1) alternate proposals for rules 21a and 166, (2) criticism of proposed rules 271-275, (3) recommendation that TRAP 90 remain unchanged, and (4) the highlighting of various inadvertent errors in the wording of several of the rules.

1. Alternate proposals for TRCP 21a and 166.

We support the objectives of the proposed amendments to rules 21a and 166. Rule 21a would authorize FAX service of legal papers, and rule 166 would clarify and strengthen the trial court's powers at pre-trial conferences. Alternate proposed revisions of rules 21a and 166 are attached. Our suggested additions to the SCAC version are underlined twice; our suggested deletions from its version are stricken through with a slash (/) and a hyphen.

00219

B. Rule 166.

We have rewritten parts of rule 166 to tighten its wording and make explicit several concepts that we think the SCAC intended but did not make clear.

We believe that pre-trial conferences can often be a productive tool in achieving cost-effective disposition of cases. To encourage their use in appropriate cases, and to remove any uncertainty regarding the scope of the district court's authority under rule 166, we have recommended that the objectives of the rule be made explicit at the beginning of the rule. Compare Federal Rule of Civil Procedure 16, which devotes an entire paragraph to the purposes of pre-trial conferences. Conference by telephone is expressly authorized.

While pre-trial conferences are frequently invaluable in streamlining large cases, their benefit in smaller suits may be more than offset by the increased cost associated with the conference itself, and with the discovery and other deadlines often imposed at such a conference. The Committee has thus recommended that the rule be expressly limited to cases deemed by the trial court to be "complex." This restriction leaves the trial court with broad discretion to order pre-trial conferences in most cases, while at the same time it eliminates the reported proclivity of some judges to schedule repeated pre-trial conferences for each case on the court's docket, irrespective of the size of the case or the actual need for greater case control and management by the court.

In addition to the above (and in addition to several minor grammatical and other non-substantive changes not discussed herein), we recommend that the following modifications be made, which are incorporated in our attached draft of rule 166:

1(a)--Language has been added which explicitly allows the court to set a pre-trial schedule dealing with both discovery and non-discovery deadlines, such as for joining parties, filing motions and so forth.

1(c)--Language has been added which explicitly allows the judge to set a deadline for amendments to pleadings, thereby prohibiting the filing of radically altered pleadings shortly before trial.

1(j)[in original proposed rule]--This subsection in the original proposed rule has been deleted, since it is duplicative of subsections (e), (f) and (g).

1(n)--Language has been added which expressly allows the court during a pre-trial conference to consider and order the use of alternative dispute resolution procedures to facilitate settlement, in keeping with the new rules and statutes regarding ADR.

1(n)--The proposed sentence expressly providing that the trial court may encourage settlement has been deleted, since this is partially duplicative of other portions of the rule, and may go too far toward implying a very active role by the Judge in such endeavors. The court may explore settlement but not "encourage" it; this change responds to input from lawyers who have felt that encouragement from courts has bordered on coercion.

2--The phrase "for good cause" has been substituted for "to prevent manifest injustice" as the standard necessary to justify modifying a pre-trial order, in conformity with other rules pertaining to modification of procedural requirements.

TRCP 166. Pre-Trial [Conference] ~~Procedure; Formulating Issues~~

(1) To expedite timely disposition of cases, improve the presentation of evidence and issues at trial, and facilitate settlement where appropriate, ~~in any action~~ the court, when it deems a case to be complex, may in its discretion, [on its own initiative or on request of any party,] direct the attorneys for the parties and the parties or their duly authorized agents to appear before it, in person or by telephone, for a conference before trial to consider and take action with respect to any or all of the following matters:

[(a) The imposition of a discovery and/or pretrial schedule to control the subsequent course of the litigation, which schedule may include limitations on the time to join parties, file motions and complete discovery;]

(b) The disposition of all [pending] dilatory pleas[,] and all motions[,] and exceptions ~~relating to a suit~~ pending;

(c) The necessity or desirability of amendments to the pleadings, and any limitation regarding the time for filing such amendments;

[(d) The requirement of the filing of brief ~~statements~~ written summaries ~~of contentions~~ of the parties' factual and legal contentions;]

(be) The ~~[Clarification of] The~~ simplification of the issues;

(df) The ~~possibility of~~ obtaining of admissions [stipulations] of fact and of documents which will avoid unnecessary proof;

~~(e) [g] The limitation of the number of expert witnesses~~ [The identification of legal matters to be ruled on or decided by the court];

[(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their addresses and telephone numbers, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their addresses and telephone numbers, and the subject of the testimony and opinions that will be proffered by each expert witness;

(j) The filing of proposed jury charge questions, instructions, and definitions for a jury case (which may be by reference to Texas Pattern Jury Charges) or proposed findings of fact and conclusions of law for a non-jury case;

(k) The listing, marking and exchanging of all exhibits that any party may use at trial and stipulation to the

authenticity and admissibility of exhibits to be used at trial;

(l) The making of written ~~trial~~ objections to the opposite party's exhibits, stating the basis for each objection;

~~(l)~~ [m] The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

[(n) The possibility of settlement of the case and the use of alternative dispute resolution procedures to facilitate settlement; ~~To aid such consideration, the court may encourage settlement;~~]

~~(d)~~ (o) Such other matters as may aid in the disposition of the case ~~action~~.

(2) The court shall make an order that recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions[,] ~~or~~ agreements of counsel[, or rulings of the court]; and such order when ~~entered~~ [rendered] shall control the subsequent course of the action, unless modified by written agreement of the parties or by the court for good cause prior to trial or at the trial; and provided that no agreement of the parties shall change a trial date set by court order under this rule unless approved

by the court. ~~to prevent manifest injustice.~~

(3) The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

[COMMENT TO 1990 CHANGE: To add new paragraphs to broaden the scope of the rule. ~~and to express the ability of the trial courts at pretrial hearings to encourage settlement.~~]

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(12) TRCP166: The itemization contained in this rule, clearly implies that it is only to be used immediately prior to trial. Obviously, trial judges could use a type of pretrial conference much earlier to help control the progress of litigation. Such conferences could be very helpful in establishing meaningful deadlines, rather than having scheduling orders issued without any consultation with the parties. An alternative would be to establish a new rule governing scheduling orders, which would require some communication from the parties indicating the various lengths of time they believe needed for completion of discovery and filing of the various motions prior to the issuance of any scheduling order.

TRCP 10
TRCP 166

The District Court of the State of Texas
200th Judicial District

Paul R. Davis, Jr.
Judge

Jill Williams
Secretary
473-9303

Robert Phelps
Bailiff
473-9782

Patty Day
Official Court Reporter
473-9325

Tencha Damian
Court Clerk
473-9457

Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
512-473-9306

December 12, 1989

The Honorable Nathan Hecht
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Proposed TRCP Changes

Dear Judge Hecht:

I have reviewed the proposed changes to the Texas Rules of Civil Procedure and think they look very good. Here are some suggestions about a couple of them:

Rule 166

Again, I applaud the recommended changes to this rule about pre-trial conferences. I would suggest the inclusions of "referral to alternative dispute resolution" as one of the enumerated items the Court may consider at the pre-trial conference.

With best wishes for a happy holiday season, I remain

Very truly yours,

PAUL R. DAVIS, JR.
Judge, 200th District Court
Travis County, Texas

PRD/jw
enclosure

THORNE, GOLDEN & LAPIDUS
ATTORNEYS AT LAW
NCNB TOWER
SUITE 840
801 W. FREEWAY
GRAND PRAIRIE, TEXAS 75051

(214) 264-1614
METRO 263-516

KIM R. THORNE
BOARD CERTIFIED – PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

CARL "RANDY" GOLDEN
BOARD CERTIFIED – FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

DOUGLAS J. LAPIDUS

10
21a
166
166b

November 17, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

I have just had opportunity to review the proposed amendments as contained in the November edition of the Texas Bar Journal, and take this opportunity to accept your invitation for comment.

TRCP 166. PRETRIAL CONFERENCE

As I read this rule, I am concerned that it may provide authority for a trial court to order discovery processes not theretofore initiated by counsel. In particular, subsections (h) and (i) seem to grant authority to a court to require disclosure of expert and fact witnesses when no request has been made by counsel for such information. See, Employers Mutual Liability Ins. Co.v. Barter, 511 S.W.2d 323 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.).

Thank you for your time and consideration.

Respectfully submitted,

THORNE, GOLDEN & LAPIDUS

DOUGLAS J. LAPIDUS
State Bar No. 11942200
NCNB Tower
Suite 840
801 W. Freeway
Grand Prairie, TX 75051
(214) 264-1614 or 263-5163

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166b
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POWELL POPP & IKARD

ATTORNEYS AT LAW

707 WEST TENTH STREET
AUSTIN, TEXAS 78701
TELEPHONE 512 473-2661
FACSIMILE 512 479-8013

M. FRANK POWELL
JAMES POPP
WILLIAM IKARD
G. WALTER McCOOL
PATRICIA L. SESSA

WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

3. TRCP 166. I though I had gotten hold of a federal rules book by mistake when I read over this proposed rule. While I certainly understand that the "old order giveth away to the new", you should know that in 1983 thorough discussion was given to the proposal in paragraph "(h)". It was decided then it was too onerous a requirement on the parties to require them to provide a list of all direct fact witnesses, and that's why Rule 166b was written in its present form which only required the naming of persons having knowledge of relevant facts, testifying experts, and consulting experts whose opinions have been reviewed by the testifiers. I realize that the language of the rule is permissive but "(j)", requiring the parties to agree on applicable propositions of law and contested issues on law, is both premature and onerous. As far as "(k)", proposed jury charge questions, why require them if under proposed Tex. R. Civ. P. 271, et seq, failure to provide them cannot be grounds for an appeal.

Sincerely,

William W. Kilgarlin

E. Jack Lawrence, III
LEGAL ASSISTANT • EDUCATOR
5570 WINFREE DRIVE
BEAUMONT, TEXAS 77705
~~643-4049~~ (409) 833-0894
November 20, 1989

21
21b
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Justice Nathan L. Hecht

Texas Rules of Court Conference

Dear Justice Hecht:

I would like to offer the following comments on the Proposed Amendments to the Texas Court Rules:

4. Suggested addition to TRCP 166:

"...to appear before it for /one or more conferences/ to consider:".

Reason: The purpose of the pre-trial conference is to foster settlement and closure. Under liberalized discovery, some practitioners prefer that the agenda of pre-trial conferences be handled in more than one stage. The ability of the court to expand the number of interrogatories available to the parties while postponing the submission of the charge or proposed charge could foster settlement at this point in some types of litigation. Although the proposed rule does not set a rigid agenda for an eleventh hour conference, it could be interpreted that way if read literally.

JUDGE JOSEPH B. MORRIS

ONE HUNDRED FIRST
JUDICIAL DISTRICT COURT

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November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The following are my comments on the proposed amendments to three specific rules of civil procedure:

1. TRCP 63. The rule will be titled "Amendments and Responsive Pleadings." Is an original counterclaim a "responsive" pleading? The Court has previously decided such a counterclaim is not an amended pleading for purposes of the rule. By use of the phrase "... any pleadings, responses, or pleas offered for filing within seven days..." is an original counterclaim to be subject to the rule? It is unclear to me because of the new title for the rule. Given the number of such claims filed near trial dates, it would be helpful to be clear on this point.

2. TRCP 166. I applaud the revisions but remain concerned the rule does not expressly allow the trial court to enter a pre-trial order covering the various matters without first holding a conference, which, as you know, is a luxury not often available because of time. At least twice I have received arguments that this Court could not issue pre-trial discovery orders without first holding the conference described in Rule 166. I have relied on the inherent power of this Court and the last sentence of the rule to do so. I think it would be helpful to clarify this issue in Rule 166 by expressly providing the trial courts may issue such orders without the necessity of a conference.

3. TRCP 245. At least one appellate court has ruled that forfeiture cases must be set within 30 days after answer date. This rule creates a conflict with regard to any case that now or in the future by law must be set sooner than 45 days after answer date.

As I am sure you know, my comments about these rules originate from my perspective as a trial judge.

Cordially,

Joseph B. Morris

Old Red Courthouse Dallas, Texas 75202 653-6937

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CHAS. C. CRENSHAW, SR. (1886-1964)
GEO. W. DUPREE (1890-1973)
R.K. (Kim) HARTY (1911-1978)
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JOHN CREWS, P.C.
WILLIAM F. RUSSELL, P.C.
WILLIAM J. WADE
JACK McCUTCHIN, JR., P.C.

ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
FIRST NATIONAL BUILDING
1500 BROADWAY
LUBBOCK, TEXAS 79401

(806) 762-5281
P. O. BOX 1499
79408-1499

Telecopier (806) 762-3510

PHILIP W. JOHNSON, P.C.
W C BRATCHER, P.C.
DON C. DENNIS
LAYTON Z. WOODUL, SR.
JAMES L. GORSUCH, P.C.
ROBERT L. DUNCAN, P.C.
W. CHRIS BOYER, P.C.
ROBERT L. JONES, P.C.
MICHAEL L. BYRD
MARK W. HARMON
JERRI LYNN HAMMER
J. T. KELLEY
MARK O. BLANKENSHIP

OF COUNSEL:
MAX C. ADDISON

December 1, 1989

87
166

Honorable Nathan L. Hecht
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

You may not recall, but I appeared on behalf of the Texas Association of Defense Counsel in regard to the proposed rule changes, and, in particular, I spoke regarding Rule 87 and Rule 166.

I also spoke in regard to Rule 166. I fail to see the need to amend Rule 166. This amendment would do nothing but increase the cost of litigation and be counterproductive to any streamlining of the process. It would appear that the first sentence would make this mandatory upon request of any party, which is certainly objectionable and I think would meet with opposition from the judges. Most judges do not have the time to engage in this, except in very selected cases. I also feel that the suggestions in that rule are even broader than the Federal practice for which I see no reason. I am also concerned with the wording of paragraph (o), wherein the rule states that the court may encourage settlement. I do not know what the proposed rule means in that regard and I certainly feel that it can be abused. In short, I do not think we need this rule changed. The prior rule is certainly adequate and gives the court all the authority it needs to get the job done.

Speaking for me individually and, I am sure for other practicing throughout the State, I want to thank the Court for the opportunity to have input on these rules before the Court adopts them. Your openness and interest is genuinely appreciated.

With kindest regards for the holiday season, I remain

Yours truly,

William J. Wade

WJW/ba

cc: Mr. David M. Davis
Post Office Box 2283
Austin, Texas 78768-2283

120a
166
166(a)
271(4)
TRAP 100(f)

LAW OFFICES
OF
STANLEY G. SCHNEIDER
A PROFESSIONAL CORPORATION
Eleven Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed 1990 Rule Changes.

Dear Justice Hecht:

After reviewing the proposed rule changes, I offer the following comments and suggestions:

1. Texas Rules of Civil Procedure 166:

The court should consider inserting "shall" between "or" and "on" in the proposed amendment to the first line of Rule 166.

Pretrial conferences are highly effective when used properly and should be required if requested by either party. This would also be consistent with the spirit and letter of Rule 248.

Respectfully,

W. TROY McKINNEY

WTM/agl

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

166
166a
166(b)
166(b)6
167a
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169

November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Comm on

Dear Justice Hecht:

Rule 166 Pre-Trial Conference. I am concerned by the breadth of the amendment adding "fact witnesses," "expert witnesses," and "exhibits" to the list of things that a trial court can order parties to exchange (similar to the Federal rules). The reason is, since the other rules of discovery do not allow certain of this information (e.g., fact witnesses and exhibits listed before trial), it is going to encourage one or both parties in virtually every lawsuit to seek a pre-trial conference to obtain this otherwise unobtainable information, which, in many cases, the other party will oppose, which will turn case after case into contested cases involving pre-trial conferences. More court time will be taken and attorney time will be spent, and clients will pay. Plus, telling the other side the fact witnesses, expert witnesses and exhibits one intends to introduce at trial is a clear and disturbing infringement upon the ancient work-product privilege. It makes a lawyer tell, in essence, their trial strategy before a trial. Maybe this is good? But one thing is for sure: this change is going to, in my opinion, cause an increase in the number of contested pre-trial conferences which, in turn, is going to further clog the courts and cost the clients. If we are going to a rule which allows the discovery of fact witnesses who a party intends to call at trial and of exhibits which a party intends to introduce at trial (which I am not in favor of), then this should be done in the other discovery rules which authorize out-of-court discovery requests (without court intervention). For example, just amend Rule 166b(2)(d) to allow for the discovery of fact witnesses "who may be called as a witness," as is presently the rule for experts under Rule 166b(2)(e)(1).

TRCP 166a. Summary Judgment

(a) (No change)

(b) (No change)

(c) (No change)

[(d) Appendix~~es~~[ces], References and Other Use of Discovery Not Otherwise on File.]

Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the specific discovery or specific references or other instruments, is served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one (21) days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven (7) days before the hearing if such proofs are to be used to oppose the summary judgment.

~~(d)~~ (e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including

the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted.

(e) (f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(f) (g) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) (h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith

or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[COMMENT TO 1990 CHANGE: This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Paragraphs (d) through (g) are renumbered (e) through (h).]

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(13) TRCP166(a): Again, as I have previously noted in connection with Rule 63, I believe that seven days prior to a hearing is too short for in opposition papers to be filed. Since this period of time is longer than the five days mentioned in Rule 4, Saturdays and Sundays (and even legal holidays) are included. Unless a court makes a mistake in setting the hearing date, these three days would never be the last day. If a summary judgment hearing is set on a Friday, normal practice has allowed the response to be filed the preceding Friday seven days before the hearing. Most people mail such responses, which means they are not received until the following Monday at the earliest. This leaves only four days prior to the hearing date within which to react to the opposition papers. If the party moving for summary judgment needs to file a Motion to Strike an Affidavit or Special Exceptions to any of the papers, he must file those papers and obtain personal service by Tuesday in order to allow them to be heard immediately prior to or at the summary judgment hearing--or seek a postponement of the hearing. I believe this timetable shows clearly that seven days is inadequate and that a minimum of fourteen days should be provided.

DON E. WITTIG
JUDGE, 125TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002

(713) 221-5577

December 11, 1989

TRCP 273
276
278
166a ←

PERSONAL AND CONFIDENTIAL

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Allow me to express my profound and vehement objection to proposed changes to Rules 273, 276, and 278, Texas Rules of Civil Procedure, and a not so strenuous but significant objection to proposed changes to Rule 166a, T.R.C.P.

At this writing, the average civil trial court in Houston has 2167 cases pending. Each court tries between 30 and 100 jury trials per year, including mostly complex litigation. The negative impact of allowing a party in complex civil litigation to orally submit questions, instructions, and definitions (as is the practice in small claims court) cannot be overstated. There can be only two logical reasons for this rule change: First, the attorney is taking up the court and jury's time without knowing in advance what his proposed questions are going to be. The second group, to be more concerned with, is the "sharp" attorney who purposely presents an oral rendition of a needed question, instruction, or definition to a judge in the charge conference solely and purposefully for the intent of obtaining reversal. Neither of these methods should be condoned.

The Harris County civil trial judge, unlike his federal counterpart, has no secretary, no briefing attorney, and is grossly understaffed by district clerk personnel who are overwhelmed with thousands of documents to be filed on a weekly basis.

The proposed change potential for abuse is immense. It ignores decades of custom and practice and is designed to geometrically increase appellate case loads throughout the state. The proposal would lengthen the time and expense of trial. An oral submission is inherently ambiguous, inherently unintelligible, and, as is the well-known practice, will be buried in voluminous, some pertinent and some impertinent, objections by counsel.

We are not here dealing with the relatively simple criminal case or a simple fender bender.

Where in the charge will the oral submissions be placed? What will be the question numbers of the oral submissions? Must the wording be substantially correct? Must the oral question include correctly worded oral instructions and definitions? With the court and court reporter now working until 9:00 p.m. to redraft the charge in accordance with oral modifications, is the court to then give counsel a second opportunity to make further objections, make further oral modifications, ad infinitum?

My objections to proposed changes to 166a, though not as vehement, are serious. Once again, I'm sure your Court is aware of the volume that the metropolitan judges face. I hear approximately 10 summary judgments per week which together with discovery practice already take up close to 35 percent of my time. To allow summary judgment evidence to include by reference matters not on file with the clerk presents an onerous burden on the court and its staff, already taxed beyond reasonable limits. Why should the trial court be faced with rendering judgment on records less accurate than appellate courts? We need to leave most of these rules alone, and this one ain't broke and doesn't need fixing.

In closing, let me observe as a trial specialist with 24 years' experience, that we continue to create instability in the law and traps for the average and even above-average practitioner. The hardship it works on parties is incalculable. Change in the law and its rules should be a thoughtful, gradual, and a judicious process. The myriad of proposed changes has a tendency to bring disrepute to the law and the profession as unwise, whimsical, and unwarranted change for the sake of change.

~~Cordially~~ and fraternally yours,

Don E. Wittig

DEW:mm

cc: Thomas R. Phillips, Chief Justice
Justice Raul Gonzalez
Justice Eugene A. Cook

Riddle & Brown

Phillip W. Gilbert
Board Certified — Civil Trial Law
Texas Board of Legal Specialization

21b
166 a(d)
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Attorneys and Counselors

A Professional Corporation
2100 Olympia & York Towe
1999 Bryan Street
Dallas, Texas 75201
(214) 220-6300
263-6423 (Metro)
(214) 220-3189 (Telecopier)
(214) 220-6414 (Direct Dial)

November 22, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

Secondly, the proposed change to TRCP 166a(d) includes a vague reference to "a notice containing specific references to the specific discovery or specific reference or other instruments". Either this text was copied erroneously in the Texas Bar Journal or it is incredibly confusing. Summary judgments should not be based upon matter not already on file with the clerk unless that matter is actually filed with the motion for summary judgment. That appears to be the intention of the proposed amendment, except for the above-quoted phrase.

120a
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271(4)
TRAP 100(f)

LAW OFFICES
OF
STANLEY G. SCHNEIDER
A PROFESSIONAL CORPORATION
Eleven Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed 1990 Rule Changes.

Dear Justice Hecht:

After reviewing the proposed rule changes, I offer the following comments and suggestions:

2. Texas Rules of Civil Procedure 166(a):

The first and second lines contain a grammatical error:

"may be used as for summary judgment evidence. . . "

Respectfully,

W. TROY McKINNEY

WTM/agl

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

166
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November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Rule 166a. I applaud the suggested amendments ("or psychologist"). On the other hand, I have some concern about the definition of a psychologist as one who is "licensed by the State of Texas." If all other experts can be from any place in the world, see, e.g., Tex. R. Civ. Evid. 509(a)(2), why can't psychologists? .

[An aside. I believe all the rules should be amended to refer to a "discovery response" instead of a "discovery answer." This would apply to all of the different rules. We should implement standard language for "discovery requests" and "discovery responses" so as to avoid using conflicting terms throughout the rules.]

TRCP 166a

8. Delete either "as" or "for".

TRCP 166a. Summary Judgment

(a) (No change)

(b) (No change)

(c) (No change)

[(d) Appendix~~es~~[ces], References and Other Use of Discovery Not Otherwise on File.]

[Discovery products not on file with the clerk may be used ~~as~~ for summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the specific discovery or specific references or other instruments, ~~is~~ served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one (21) days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven (7) days before the hearing if such proofs are to be used to oppose the summary judgment.]

~~(d)~~ (e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. (No change.)

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. (No change.)

b. Documents and Tangible Things. (No change.)

c. Land. (No change.)

d. Potential Parties and Witnesses. (No change.)

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a[n expert] witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the

mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a[n expert] witness at trial is required if the ¢x¤¢rt/$/w¤rk/¤r¤¤uct/f¤rm$/a/b¤i/¢itn¢r/in wh¤l¢/¤r/in/¤art/¤f/tn¢/¤¤inion$/¤f/an/¢x¤¢rt/wh¤/i$/t¤ b¢/¢all¢d/a$/a/witn¢$$/ [consulting expert's opinion or impressions have been reviewed by a testifying expert.]

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial wh¢n/it/f¤rm$/a/b¤$i$/¢itn¢r/in/wh¤l¢/¤r/in/¤art/¤f/tn¢ ¤¤inion$/¤f/an/¢x¤¢rt/wh¤/i$/t¤/b¢/¢all¢d/a$/a/witn¢$$/ [if the consulting expert's opinions or impressions have been reviewed by a testifying expert.]

(3) Determination of Status. (No change.)

(4) Reduction of Report to Tangible Form. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as a[n expert] witness have not been recorded and reduced to tangible form, the trial judge may order these matters reduced to tangible

form and produced within a reasonable time before the date of trial.

f. Indemnity, Insuring and Settlement Agreements. (No change.)

g. Statements. (No change.)

h. Medical Records; Medical Authorization. (No change.)

3. Exemptions. The following matters are protected from disclosure by privilege:

a. Work Product. (No change.)

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tangible things containing such information if the expert will not be called as a[n expert] witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify [as an expert] and any documents or tangible things containing such impressions and opinions are discoverable if the [consulting] expert's ~~work product forms a basis either in whole or in part of the opinions of an expert who will be called as a[n expert] witness~~ [opinion or impressions have been reviewed by a testifying expert].

c. Witness Statements. The written statements of potential witnesses and parties, ~~if the statement was~~ [when] made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the

prosecution or defense of the claims made in [a part of] the pending litigation, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. [For purpose of this paragraph a photograph is not a statement.]

d. Party Communications. Written communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made in [a part of] the pending litigation. [C]ommunications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based/ and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made in [a part of] the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discover-

able.] For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. Any matter protected from disclosure by any other privilege.

Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempt from discovery by subparagraphs c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for hearing and determined by the court. Any party may at any reasonable time request a hearing on any objection or motion for protective order. The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion.] In ~~responding~~ [objecting] to an appropriate discovery request within the scope of paragraph 2, ~~directly/addressed/to/the/matter/~~ a party ~~who/seeks~~ [seeking] to exclude any matter from discovery on the basis of an exemption

or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and [at or prior to any hearing shall] produce [any] evidence [necessary to] support~~ing~~ such claim [either] in the form of affidavits [served at least seven days before the hearing] or [by] ~~live~~ testimony. ~~presented at a hearing requested by either the requesting or objecting party. When a party's objection concerns the discoverability of documents and is based on a specific immunity or exemption, such as attorney-client privilege or attorney work product, the party's objection may be supported by an affidavit or live testimony but~~ If the trial court determines that an ~~IN CAMERA inspection~~ [in camera inspection and review by the Court] of some or all of the ~~documents~~ [requested discovery] is necessary, the objecting party must segregate and produce the ~~documents~~ [discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained]. ~~The court's order concerning the need for an inspection shall specify a reasonable time, place and manner for making the inspection.~~ When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct ~~an inspection of the individual documents~~ [an inspection and review of the particular discovery] before ruling on the objection. [After the date on which answers are to be served, objections are waived unless an

extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

5. Protective Orders. (No change.)

6. Duty to Supplement. A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good cause exists for permitting or requiring later supplementation.

a. A party is under a duty ~~[r]~~easonably to supplement his response if he obtains information upon the basis of which:

(1) (No change.)

(2) (No change.)

b. (No change.)

c. (No change.)

[7. Discovery Motions. All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.]

[COMMENT TO 1990 CHANGE: To eliminate the contradiction between Rule 166b 2(e)(1) and (2) and corresponding Rule 166b 3(e), Rule 166b 2(e)(1) and (2) have been modified. As modified, Rule 166b 2(e)(1) and (2) now make discoverable the impressions and opinions of a consulting expert if a testifying expert has reviewed those opinions and material, regardless of whether or not the

opinions and material form a basis for the opinion of the testifying expert. The revisions keep the intent of Rule 166b 2(e)(1) and (2) and Rule 166b 3(e) consistent with regard to consulting experts. The amendments to Section 3 standardize language for the same meaning. New Section 7 was added to ensure that court time will not be taken to resolve discovery disputes unless the parties cannot resolve them without court intervention and provide that matters exempt under paragraph 3(c) are not made discoverable solely because the consultant may or is to be a fact witness only.The amendments to Section 4 expressly dispense with the necessity of doing anything more than serving objections to preserve discovery complaints in order to avoid unnecessary time and expense to parties and time of the courts, particularly where no party ever requests a hearing on the objection. The failure of any party to do more than merely object fully shall never constitute a waiver of any objection. The last sentence added to Section 4 was previously the second sentence of Rule 168(6) and was moved because it applies to all discovery objections.]

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

TRCP 166(b)(3)(b) reads:

> D. Party Communications. Communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives, or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made [a part of] the pending litigation. This exemption does not include communication prepared by or for experts that are otherwise discoverable. For purposes of this paragraph, a photograph is not a communication.

Paul Gold of Dallas proposes that the underlined "or" should be "and". Gold argues the use of or may change the holdings of Stringer, Turbodyne and Flores. He states:

> The proposed change in wording potentially subverts the "bright line test" outline of Flores. Rather than having to prove objectively and subjectively a legitimate basis for anticipating litigation, under the proposed change, one would merely have to seek protection under the portion of the provision that proceeds the newly substituted disjunctive, "or", in other words, all a respondent would have to show is that the communication was made subsequent to the occurrence in connection with the prosecution, investigation or defense of the particular suit.

We agree the use of "or" may cause confusion which can be avoided by changing "or" to "and".

Luke Soules proposes the following wording be added to TRCP 166b(4):

> The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion; but any matter that is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph 6.

The purpose of this addition is to make clear that a party cannot introduce evidence which has been concealed form discovery by an objection or motion. We agree.

Present TRCP 166(b)(2)(f) states: "A party may obtain discovery of the following: . . . (2) the existence and contents of any settlement agreement." Joanne Summerhays of Austin states the rule as written, "was used to support a request for production of all settlement agreements which the opposing party had entered into and all lawsuits" Ms. Summerhays suggests and the subcommittee agrees that the scope of such discovery should be limited. The subcommittee proposes TRCP 166(b)(2)(f)(2) be changed to read: "a party may obtain discovery of the following . . . (2) the existence of contents of any settlement agreement which are relevant to the pending action."

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

Proposals Made but Not Recommended. All written communications concerning the Rules were read and considered by the subcommittee. One comment was made by three different attorneys. It concerns the conflict between TRCP 21 and proposed TRCP 166(b)(4). Rule 21 allows a hearing to be held with three days notice. Proposed Rule 166(b)(4) would require that affidavits in support of exemption or immunity from discovery must be served on the opposing party at least seven days before hearing. If a hearing is scheduled with only three days notice, the party pleading an exemption or immunity may not be able to comply with Rule 166(b)(4) by serving any affidavits at least seven days before the hearing. This problem is more likely to arise when the discovering party sets the objecting party's objection for hearing. The subcommittee could not think of a cure for this conflict which would not cause problems which are worse than the existing problem.

Future.

The wording of TRCP 166(b)(4) is clumsy and may cause confusion. It needs to be redrafted. Steve McConnico will attempt to redraft this section and present a proposal for re-wording section 4.

We should consider going to the Federal Rules' numbering scheme for the discovery rules. We have done this with the Appellate Rules.

LAW OFFICES
OF
PAT MALONEY
PROFESSIONAL CORPORATION

December 4, 1989

Justice Lloyd Doggett
The Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

** PAT MALONEY
* PAT MALONEY, JR.
* GEORGE LeGRAND
JANICE MALONEY
* VIRGIL W. YANTA
PATRICIA MALONEY
TOM JONES
CHARLES NICHOLSON
AL M. HECK (1896-1977)
STEPHANI WALSH
ROGER G. BRESNAHAN
* GARY HOWARD
OF COUNSEL
T.J. SAUNDERS
OF COUNSEL

RE: Proposed Revisions to Texas Rules

Dear Mr. Justice Doggett:

After having reviewed the proposed changes to the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence, I wanted to point out the following less-than-salutary provisions in the rules, as well as the one exemplary provision, all of which are stated below:

The Texas Rules of Civil Procedure:

166b (4):

Finally, a party making objections to discovery will have to come forth with affidavits before its hearing. This is a wonderful, and quite salutary, change.

Very truly yours,

LAW OFFICES OF PAT MALONEY, P.C.

By: Virgil W. Yanta
VIRGIL W. YANTA

VWY:naj

cc: Chief Justice Thomas R. Phillips
Justice Franklin S. Spears
Justice C.L. Ray
Justice Raul A. Gonzalez
Justice Oscar H. Mauzy
Justice Eugene A. Cook
Justice Jack Hightower
Justice Nathan L. Hecht

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(14) TRCP166(b): Earlier amendments to this rule have created problems which have not been rectified by the currently proposed amendment. Paragraph 4 tells a party what to do when objecting "to an appropriate discovery request within the scope of Paragraph 2." I have often wondered how an appropriate discovery request could be objectionable, but that is not my main concern here. It seems to me, as worded, Paragraph 4 requires an objection when a discovery request is within the scope of Paragraph 2 and could, and perhaps should, be read to say that no objection is required with respect to discovery requests outside the scope of Paragraph 2. The scope of discovery under Paragraph 2 is obviously very broad, but it starts with what would appear from the wording to be an absolute exemption, which states "except as provided in Paragraph 3 of this Rule." Thus, as I read Paragraph 2, all of the items listed in Paragraph 3 are excluded from the description of the scope of "appropriate discovery" and thus could not be part of "an appropriate discovery request within the scope of Paragraph 2." Paragraph 3 makes this even clearer by stating that "the following matters are protected from disclosure by privilege--a seemingly absolute statement of privilege. In other words, if as the rule clearly seems to say, matters contained in Paragraph 3 are excepted out of the scope of discovery described in Paragraph 2, then no objection should be required under Paragraph 4, because by definition those matters exempt from discovery are not included within an appropriate discovery request within the scope of Paragraph 2. Under this analysis there would be no reason to specifically plead an exemption or immunity from discovery because by definition those exemptions and immunities would already be outside the scope of discovery authorized by Paragraph 2. This analysis seems also to be supported by the special proviso at the end of Paragraph 3 which provides a means to obtain certain materials "otherwise exempt from discovery."

A possible solution would be to provide in Paragraph 3 that a party responding to a document request must provide a list of all items not produced under a claim of exemption or privilege, so that the requesting party can evaluate the claim and decide whether to seek production under some exception, claim of waiver, or challenge the claim. This alternative might be much less cumbersome than the procedure set forth in Paragraph 4. Paragraph 4 could then be changed to eliminate the contradiction with the other paragraphs described above. Requiring a listing of privileged materials withheld rather than a mere objection should expedite discovery and eliminate unnecessary hearings, in camera reviews, and disputes. Under the court's proposed rule, the party objecting does not have to explain in any way until the hearing on the information withheld.

I have the same difficulty with the seven day service allowed in Paragraph 4 as I have expressed above in connection with other rules. I have some difficulty also in understanding the procedures suggested for producing objected to material "by answers made in camera to deposition questions." This seems like a mythical procedure which in practice would be very difficult to administer.

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

ERNEST REYNOLDS III

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-280
ATTORNEY'S DIRECT DIA
877-2852

166 b
200
~~614~~
271-279
208
305
TRCP 614
TRCE 703

November 21, 1989

Honorable Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Apparently, a proposed change for procedural rule 166b would allow reinstatement of the old practice under which parties could agree to extend discovery cut-off dates without having to first obtain a court order. I think this would be an excellent change, and would note that it would save a substantial amount of time for courts and parties because under the present practice even when an agreement is made between the parties they must draft documents and present them to the court and obtain entry of an order; and, since it is clear that public policy does not prohibit the parties from agreeing about discovery matters (indeed, public policy generally encourages this) it seems like there should be no reason to require the present cumbersome process of going to the court to get an order to permit the parties to make an agreement to extend time.

CLARK, THOMAS, WINTERS & NEWTON
POST OFFICE BOX 1148
AUSTIN, TEXAS 78767

1200 TEXAS COMMERCE BANK BUILDING
700 LAVACA STREET
AUSTIN, TEXAS 78701

TELEPHONE
(512) 472-8800

TELECOPIER
(512) 474-1129

166b(f)

looks proper to me.

November 15, 1989

Honorable Nathan L. Hecht
Texas Supreme Court
Post Office Box 12248
Austin, Texas 78711

Re: Proposed Changes for Rules of Civil Procedure

Dear Justice Hecht:

I am writing in response to the invitation for comments on Proposed Rules of Procedure published in the November Texas Bar Journal. I would like to point out an issue which was raised recently in one of this firm's cases regarding Rule 166(b)(f), which deals with settlement agreements. The Rule states that any settlement agreement is discoverable without any further qualifications. The Rule was used to support a request for production of all settlement agreements which the opposing party had entered into in all lawsuits. In discussing this Rule with a judge and several lawyers, the general consensus was that the Rule was not intended to provide blanket authority to obtain all settlement agreements, but rather only those settlement agreements entered into by the parties to the same suit. However, because the Rule does not on its face limit the scope of the discovery, it is subject to misinterpretation and abuse. I would ask the Court to consider adding the following or similar language to the Rule:

> The existence and contents of any settlement agreement entered into by any party to the action with any other party or potential party to the pending action.
>
> or
>
> The existence and contents of any settlement agreement involving claims arising out of the circumstances which gave rise to the pending action.
>
> or

The existence and contents of any settlement agreement which constitutes or contains matters which are relevant to the subject matter in the pending action.

The other subheadings in Rule 166b all contain some language limiting scope to matters relevant to the pending action. It seems likely that this Court intended such qualification to be included in (f).

I urge the Court to consider adding some limiting language to avoid further misinterpretation. Thank you for your consideration of this matter.

Respectfully,

Joanne Summerhays

JS:lr
117:753

TRCP 166b

9. A plural verb should be used with a list combining singular and plural nouns.

TRCP 166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. (No change.)

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. (No change.)

b. Documents and Tangible Things. (No change.)

c. Land. (No change.)

d. Potential Parties and Witnesses. (No change.)

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a[n expert] witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a[n expert] witness at trial is required if the ~~expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a~~

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

THE LAW OFFICES OF
FRANK L. BRANSON, P.C.
18TH FLOOR
HIGHLAND PARK PLACE
4514 COLE AVENUE
DALLAS, TEXAS 75205-4185

214-522-0200
D/FW METRO: 214-263-7452
FAX: 214-521-5485

FRANK L. BRANSON
PAUL N. GOLD
DEBBIE DUDLEY BRANSON
RICHARD K. BERGER
GEORGE (TEX) QUESADA
JERRY M. WHITE
J. STEPHEN KING

TED Z. ROBERTSON
OF COUNSEL

November 27, 1989

21a
166b(2)(b)
167a

VIA FEDERAL EXPRESS

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: 1990 Proposed Changes to
Texas Rules of Civil Procedure

Dear Justice Hecht:

Thank you for the open invitation that appeared in the November State Bar Journal to comment upon the 1990 proposed changes to the Texas Rules of Civil Procedure. I would have liked to have appeared at the November 30 hearing; however, I will instead be out of state taking depositions. This, then, will outline my observations, which focus exclusively on the changes to the Rules pertaining to discovery.

RULE 166b(2)(d)

My primary concern is with the change in wording of Rule 166b(2)(d), Party Communications. Specifically, I am troubled by the replacement of the conjunctive, "and" with the disjunctive, "or" in the following phrase:

> When made subsequent to the occurrence or transaction upon which the suit is based, and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of claims made a part of the pending litigation.

I believe the wording is a substantive change and will cause more, not less, confusion regarding discovery in this area, particularly if more explanation for the change is not provided in the comment.

The comment states that the amendment was to "standardize language for the same meaning." The only other place such language appears is in the preceding section, dealing with witness statements. The language in that section was only added in 1988 and there have as yet been no cases interpreting it. The language that presently appears in subsection "d" has been thoroughly and often interpreted by the Texas Supreme Court, the last and most illuminating decision being Flores v. The Fourth Court of Appeals, 32 Tex.S.Cr.Journ. 497 (June 25, 1989).

The proposed change in wording potentially subverts the "bright line test" outlined in Flores. Rather than having to prove objectively and subjectively a legitimate basis for anticipating litigation, a litigant, under the proposed change, would merely have to seek protection under the portion of the provision that precedes the newly substituted disjunctive, "or." In other words, all a respondent would have to show is that the communication was made subsequent to the occurrence and in connection with the prosecution, investigation or defense of the particular suit.

On closer reading, the problem may not, however, be with the newly proposed wording, but rather with the cryptic and misleading comment that accompanies it. The proposed language would not be particuarly distasteful or a significant departure from the Court's prior precedents, if the comment were to explain that in order for the protection of the first part of the phrase to be activated, there must actually be a pending lawsuit. As I read the following proposed additional phrase--"and in connection with the prosecution, investigation or defense of the particular suit"--it would only pertain if a suit were actually pending, since otherwise, there would be no "particular suit." This would also help better explain the insertion of the disjunctive. Either a suit is pending and the communications were generated in connection with such pending claim or there was an objective and subjective basis for anticipating that a suit would be filed. In the latter instance, communications generated prior to the pendency of such suit would be protected.

The comment should explain that the change in wording does not change the holding in Flores, or explain precisely how it does.

OSTER & KAUFMAN

ATTORNEYS AND COUNSELORS

SUITE 2424

ONE MAIN PLACE

DALLAS, TEXAS 75250

HAROLD M. OSTER (1901-1962)
STANLEY M. KAUFMAN
AARON S. KAUFMAN*
HERBERT GARON, JR.

*BOARD CERTIFIED-PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELEPHONE
214-748-5671

TELECOPIER
214-742-1100

P. O. BOX 50029

November 28, 1989

166 b(2)(I)

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

I would like to suggest a proposed amendment to the Texas Rules of Civil Procedure in addition to those published in the November 1989 Texas Bar Journal to Rule 166b, by adding subpart 2i, as follows:

Other records; authorization form. Where relevant to the subject matter in the pending action, any party shall be required, upon written request, to produce, or furnish an authorization permitting the full disclosure of other records not theretofore furnished to the requesting party. Copies of all other records obtained by virtue of an authorization furnished in response shall be furnished by the requesting party, without charge, to the party who furnished the authorization in response to the request and copies of all other records obtained by virtue of the written request or by virtue of the authorization shall be made available by the requesting party for inspection or copying to all parties to the action under reasonable terms and conditions (similar to Rule 166b subpart 2h for medical records).

This proposed rule change would encompass authorization forms to obtain records from the Industrial Accident Board (such as for other injury occurrences of a personal injury plaintiff), authorization forms for income tax records from the Internal Revenue Service, an authorization form for records from the Texas Employment Commission, or bank records of a party where relevant.

I believe this rule is needed to give the trial courts authority to order the furnishing of authorizations other than medical authorizations.

OSTER & KAUFMAN
ATTORNEYS AND COUNSELORS

In an actual personal injury case arising out of a motor vehicle accident, I tried to subpeona the plaintiff's records from the Industrial Accident Board of two prior on the job injuries where plaintiff had taken an inconsistent position that he was totally and permanently disabled following each on the job injury before the auto accident in question. This was to be done by a deposition on written questions upon the custodian of records for the Industrial Accident Board. The Industrial Accident Board records custodian refused to produce any records without an authorization signed by the plaintiff, which the plaintiff and his attorney refused to voluntarily produce. I then filed a Motion to Compel on authorization. At the hearing, the judge indicated that the rules of civil procedure specifically require medical authorizations, but do not specifically require any other kind of authorization, and therefore he could order signing a medical authorization but not an authorization for records from the Industrial Accident Board. While in many cases, I have been routinely furnished with authorization forms for employment records or records from the IRS or records from the Industrial Accident Board, in this instance, the opposing lawyer refused to furnish the authorization needed to complete the deposition by written questions of the records custodian.

By expanding the authority of the trial courts to order other authorization forms be furnished where relevant, it would promote the general policy of full disclosure and liberal discovery, and encourage voluntary furnishing of authorization forms without much trial court involvement (such as with medical authorizations where the voluntary practice is well established).

I appreciate your committee on rule changes giving this proposed amendment consideration.

Respectfully yours,

Aaron S. Kaufman

ASK/cgg

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

December 8, 1989

TRCP 166b(4)
TRCP 167
TRCP 168
TRCP 169
TRCP 201

Re: Comments Regarding Proposed Amendments to Texas Court Rules

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

> Rule 166b(4). Presentation of Objections. The new Rule provides that evidence which is to be considered by the court must be served at least seven (7) days before the hearing. One problem I can foresee in this regard is that some district courts allow a hearing to be set with less than seven (7) days' notice. Accordingly, it is conceivable that a party could set the hearing and not allow the responding party seven (7) days to file their evidence. The Rule could include a provision that the hearing must be set with at least ten (10) days' notice or, a separate Rule could require that no motion be set for hearing with less than ten (10) days' notice.

I hope these suggestions are of some benefit.

Yours very truly,

/Keith S. Dubanevich

KSD/lc

THORNE, GOLDEN & LAPIDUS
ATTORNEYS AT LAW
NCNB TOWER
SUITE 840
801 W. FREEWAY
GRAND PRAIRIE, TEXAS 75051

KIM R. THORNE
BOARD CERTIFIED – PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

CARL "RANDY" GOLDEN
BOARD CERTIFIED – FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

DOUGLAS J. LAPIDUS

(214) 264-1614
METRO 263-5163

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21a
166
166b(4)

November 17, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

I have just had opportunity to review the proposed amendments as contained in the November edition of the Texas Bar Journal, and take this opportunity to accept your invitation for comment.

TRCP 166b. FORMS AND SCOPE OF DISCOVERY; PROTECTIVE ORDERS; SUPPLEMENTATION OF RESPONSES

With respect to subsection 4 entitled: "Presentation of Objections", there is a new requirement to the effect that affidavits supporting a claim of privilege, exemption, or immunity from discovery must be served at least seven days prior to the hearing. I suggest that there be some minimum notice period with respect to setting such hearings so that the preparation and service of affidavits is made possible. As the rule is now written, it would seem that the party seeking discovery could set a hearing on three-days' notice, and the responding party would be hard put to prepare and serve affidavits within the prescribed seven-day period.

Thank you for your time and consideration.

Respectfully submitted,

THORNE, GOLDEN & LAPIDUS

DOUGLAS J. LAPIDUS
State Bar No. 11942200
NCNB Tower
Suite 840
801 W. Freeway
Grand Prairie, TX 75051
(214) 264-1614 or 263-5163

21
166b(4)

DAVIS & MCFALL
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2500 TWO HOUSTON CENTER
909 FANNIN STREET
HOUSTON, TEXAS 77010-1003

TELEPHONE (713) 951-1000 TELECOPIER (713) 951-1199

JOANN STOREY
DIRECT LINE (713) 951-1032

November 14, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to the Texas Rules of Civil Procedure, 52 Tex. Bar J. 1147, *et. seq.*, (November, 1989)

Dear Justice Hecht:

I believe that there is a conflict between the provisions of Texas Rule of Civil Procedure 21 and the proposed amendment to Texas Rule of Civil Procedure 166b(4). Pursuant to Rule 21, a hearing may be held with three days notice. As I understand the amendment to Rule 166b(4), the affidavits in support of an exemption or immunity from discovery must be served at least seven days before the hearing. Therefore, if a hearing is scheduled and three days notice is given pursuant to Rule 21, the party pleading an exemption or immunity will not be able to comply with Rule 166b(4) by serving any affidavits at least seven days before the hearing.

I would suggest that the rule require that the affidavits be served at the hearing. This would eliminate the conflict between the two rules and is consistent with the practicalities of civil trial practice.

Thank you for the opportunity to comment on the proposed changes before they are made.

Very truly yours,

JoAnn Storey

JAS:cb

DANIEL A. KROHN
ATTORNEY AT LAW

Suite 1305 • Niels Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0707

166 b(4)

November 21, 1989

The Honorable Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Dear Judge Hecht:

This letter is written in response to the solicitation of comments regarding proposed changes to the Texas Rules of Civil Procedure published in the November edition of the Texas Bar Journal. I welcome this opportunity to offer a suggestion or two.

My comments will be limited to TRCP 166b, and a comment or two on discovery generally. Let me state initially that I am most gratified to see the changes in that rule and heartily recommend the adoption of those changes. I would like to suggest one addition to subsection 4 "Presentation of Objections" of that rule. The second to last sentence of that paragraph lists a number of specific grounds for objection to discovery where an in camera inspection will be not required. I would suggest that in addition to the grounds for objection which are listed in that sentence, an objection based on the discovery sought being beyond the scope of permissible discovery be included. I have been involved in cases where discovery has been sought of matters which are neither relevant nor conceivably able to lead to the discovery of relevant evidence, and where this can be determined from the pleadings of the very party seeking discovery. This seems to occur most frequently in litigation between business competitors when a party is using the lawsuit in an effort to gain an unfair trade advantage over his competitor. For example, production is sought of irrelevant documents that were not created until long after the occurrence of all of the events forming the basis of the litigation. Situations such as this can be ruled upon quickly by the trial court, leading to court efficiency and a lighter burden on the party justifiably opposing the improper discovery.

I am pleased to see that the new TRCP 166b(4) clearly states that documents or other items need not be produced for in camera inspection unless so requested by the trial court. At least I believe that is the correct interpretation, one cannot be too sure because it has been a subject of some ambiguity over the past few years. When read with the prior sentence requiring the production of "any" evidence necessary to support the claim at or prior to any

hearing, one could conclude that indeed an in camera production of the requested documents or other exhibits is required prior to the trial court's examination of the objections. This is often very expensive. Some form of evidence short of actual production for in camera inspection should be adequate until and unless the trial court determines that court inspection is needed.

I have heard several trial court judges complain about the tremendous amount of time spent in performing in camera inspections. In turn, this has led to the more frequent use of special masters for discovery. All of this has served to greatly increase the expense of litigation. In my view, the added expense impedes justice more than a return to the days before Peoples would.

Undoubtedly one of the most frequent subjects of discussion among attorneys and jurists today is alternate dispute resolution. Too rarely is it frankly admitted that the reason for that interest is the fact that our traditional method of dispute resolution has become flawed. I very much appreciate the Supreme Court's efforts to address some of these problems with the proposed amendments to the Rules of Civil Procedure. However, I feel strongly that a greater step towards curing the problems in our traditional dispute resolution mechanism must be taken.

The trend over the past several years has been to broaden and increase the scope of discovery in the hope that parties once fully aware of the strengths and weaknesses of their respective cases would resolve disputes prior to trial. Unfortunately, aggressive and creative attorneys have transmuted discovery from an inquiry into a weapon, and turned civil litigation into a war of attrition to be won by the side with the greatest resources.

I have tremendous confidence and respect for our court system and particularly our trial courts as dispensers of justice. Though not perfect, ours is a system which has been refined by many years of experience and experimentation, making it a far better method of resolving disputes than the alternate dispute resolution methods being experimented with today. Furthermore, I feel very strongly that the right of every person, rich or poor, to seek redress of grievances through our court system is a cornerstone of our democracy. It would be a severe blow to our society were we to develop a two-tier system where our courts were reserved for large disputes between the wealthy, and smaller dollar amounts and smaller players (small only when measured by their purses) were relegated to some pale abbreviated version of our trial courts. As people working inside this system it is often too easy for us to forget that disputes of $5,000, $10,000 or $20,000 affect the

lives of the majority of our citizens more dramatically than multi-million dollar disputes affect the dividends of our large corporations.

Though I have substantial concerns I believe that they can be adequately addressed without major modification of our court system. To begin, contention interrogatories should not be used nor required as a substitute for adequate pleadings and special exceptions. Interrogatories should be limited to inquiries as to specific facts. So called "contention interrogatories" are all too often a trap should some item be unwittingly omitted then evidence excluded at time of trial when the answering party had made a good faith effort to answer the interrogatories. In almost all cases they are overly burdensome.

Litigants should be limited to three depositions each, except upon agreement of all parties or court order upon good cause shown. Amount in controversy should be a factor in the determination of good cause. Depositions are indeed wondrous things in that they allow us to run up large numbers of billable hours, while being actively engaged in battle before the eyes of our clients. Consequently, they are sorely abused. In large complex cases, modifications of the limit will be routinely granted by the trial judge as is now the case with interrogatories. With a pretrial conference, the trial judge could both modify the number of depositions and limit the scope of certain depositions so as to compromise the need to know and the cost to the litigants.

Lastly, all litigants should be required automatically to designate all witnesses, expert and fact, save rebuttal witnesses, at some reasonable time prior to trial. The need for this information is so standard that no interrogatory should be required.

In making these suggestions I fully realize that I run counter to the trend towards greater discovery that has been instituted in Texas over the last ten years. I also realize that placing limits on discovery would on occasion result in some surprises at trial that could affect the result. However, I am more disturbed by the attrite parties who are forced to accept an unjust settlement under the burden of discovery cost. I am offended by the attorneys, and there are many, whom I have heard say "we are not looking to try this case, we are just trying to get a settlement". I share the frustration of the clients who are told that their lawsuit though meritorious can not be handled because their resources are too small and the amount in controversy will not tempt a contingency effort.

I thank you for the attention being given to my thoughts. If there is anyway in which I might be of service in these matters, please do not hesitate to call me.

Yours truly,

Daniel A. Krohn

DAK:lr

SUSMAN GODFREY
ATTORNEYS AT LAW
1500 SAN JACINTO TOWER
2121 SAN JACINTO STREET
DALLAS, TEXAS 75201-6701
(214) 754-1900
TELECOPY (214) 754-1933

5100 FIRST INTERSTATE BANK PLAZA
1000 LOUISIANA
HOUSTON, TEXAS 77002-5096
(713) 651-9366

166b(4)

November 21, 1989

WRITER'S DIRECT DIAL NUMBER
(214) 754-1903

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Proposal to Amend Texas Rule of Civil Procedure 166b(4)

Dear Justice Hecht:

While applauding the Court's effort to clarify the steps necessary to preserve objections to discovery requests, I respectfully suggest a further clarification. The version of Rule 166b(4) under consideration retains the requirement that the objecting party "specifically plead" the exemption or immunity on which he relies. That requirement first appeared in the Peeples opinion, and the Court there apparently intended to require a pleading in the form of a motion for protection. In the pre-McKinney days, at least one court of appeals held that the "specifically plead" language in Peeples required the objecting party to file a motion for protection. See National Union Fire Insurance Company v. Hunter, 714 S.W.2d 592, 594-95 (Tex. App.--Corpus Christi 1987, no writ). Since the 1988 amendment adding paragraph (4), one could argue that "specifically plead" means to file a pleading with the trial court, whether in the form of a motion for protection or a response to a motion to compel. I think that changing "specifically plead" to "specifically state" would avoid any ambiguity and make crystally clear that the new rule requires no pleading at all.

Incidentally, nobody seems to know exactly how to cite to the Texas Rules of Civil Procedure that contain subdivisions. Most people do as I have done--they put parentheses around the number of the paragraph they want to cite. They do that in part, I think, because they feel a need to separate the rule number from the paragraph number. No such similar problems arise in citing the Federal Rules of Civil Procedure, which use letters already in parentheses to designate the particular paragraph of the rule and

numbers again already in parentheses to identify sub-paragraphs. I would suggest doing it the federal way. We could then all sing from the same hymnal, citation-wise.

Respectfully submitted,

Barry C. Barnett

BCB-9041-clj

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT CORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
ELIZABETH P. HOLBERT
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
JUDITH RAMSEY SALDAÑA
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

166 b (4)
(proposal attached)

November 29, 1989

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Bldg.
Austin, Texas 78701-2494

Re: Texas Rule of Civil Procedure 166b and 168

Dear Steve:

I'm not sure that McKinney 1 or McKinney 2 are either good law. It seems to me that we need to work into the discovery rules a sanction that information withheld pursuant to assertion of objection may not be used at trial whether or not the objection ever is set by either party. The question has arisen as follows: a party receives an interrogatory for identification of documents (or experts), that party objects, however some documents (or experts) are nonetheless identified, neither party sets the objection. At trial is the party who made the objection precluded from offering other documents (or experts)? The objection was never heard by the court, the objection party is not charged with having waived the objection, but, since the party confronted with the objection never had it heard, does the objection protect information from discovery but not preclude its use at trial? It seems to me that if information is not contained in answers, whether or not the subject of an objection never set, the information should not be usable at trial.

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

Please submit this to your subcommittee and I will put it on the next meeting agenda for the SCAC.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
cc: Judge David Peeples
Chairman,
Committee on Administration of Justice
Justice Nathan L. Hecht

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
ELIZABETH P. HOLBERT
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
JUDITH RAMSEY SALDAÑA
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5434

December 6, 1989

Honorable Nathan L. Hecht, Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: Texas Rule of Civil Procedure 166b(4)

Dear Justice Hecht:

After our discussions in Austin concerning the possible extensions of McKinney II, i.e. that there might arise a contention that an unset and not ruled upon objection, pursuant to which discovery product was concealed, might not preclude that discovery product from being used at trial, I propose that we clarify that to cause a party who conceals discovery product by objection or motion to be precluded from using the discovery product unless the objection or motion is later waived in such manner as to accomplish "timely" supplementation by disclosure of the discovery product within the concepts of the Onion case. The clause that I propose to add follows the semicolon in the next sentence. The material preceding the semicolon has already been adopted by the committee:

> "The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion; but any matter which is withheld from discovery pursuant to any objection or motion for protective order, whether or not ruled upon prior to trial, shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production of the matter pursuant to paragraph 6."

Also, it has been suggested that we add in the first sentence the following underscored material:

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

"Either an objection or a motion for protective order made by a party to discovery shall preserve that objection or motion for protective order without further support or action by the party unless the objection or motion for protective order is set for hearing and determined by the court."

I believe both of these suggestions are simply matters of clarifying what was already intended, but I certainly want the committee and debate.

As always, it is an honor and a privilege to work with you on the important business of rules modernization.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
cc: Mr. Steve McConnico
Honorable David Peeples, COAJ

VINSON & ELKINS
ATTORNEYS AT LAW
3300 FIRST CITY TOWER
1001 FANNIN
HOUSTON, TEXAS 77002-6760
TELEPHONE 713 651-2222 TELEX 762146

THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVE. N.W.
WASHINGTON, D.C. 20004-1007
TELEPHONE 202 639-6500 TELEX 89660

47 CHARLES ST. BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 01 441 491-7236
CABLE VINELKINS LONDON W1-TELEX 24140

FIRST CITY CENTRE
816 CONGRESS AVENUE
AUSTIN, TEXAS 78701-2496
TELEPHONE 512 495-8400

3700 TRAMMELL CROW CENTER
2001 ROSS AVENUE
DALLAS, TEXAS 75201-29
TELEPHONE 214 220-7700

166 b (4)
166 b (7)

November 16, 1989

Justice Nathan L. Hecht
Supreme Court, Supreme Court Building
P.O. Box 12248
Capital Station
Austin, Texas 78711

Dear Judge Hecht:

The purpose of this letter is to comment on and to offer a suggestion concerning one of the proposed changes in the Texas Rules of Civil Procedure ("TRCP").

It is proposed that TRCP 166b, 4 be changed to provide:

> [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for hearing and determined by the court. Any party may at any reasonable time request a hearing on any objection or motion for protective order. The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive any such objection or motion.]

A problem we are having with litigation discovery in Harris County is that the parties from whom discovery is sought regularly file broad form objections to every discovery request; fail to produce or specifically identify requested materials which are being withheld from production on claim of privilege; force the party seeking discovery to request a hearing on a Motion to Compel Discovery or Identification of Withheld Materials; and the courts are failing or refusing to set hearings on discovery motions or decide such motions. As a consequence, legitimate discovery is being frustrated.

For example, I recently represented the plaintiff is a serious, hotly contested piece of commercial litigation involving substantial document discovery. The Defendants filed broad form objections to our discovery requests. We filed numerous motions to compel discovery which the trial court failed to hear or decide despite numerous requests to do so. None of such motions to compel

were ever heard or decided by the trial court. For numerous reasons, mandamus proceedings are not a practical or efficient remedy for the trial court's failure to rule. Such experiences are not infrequent.

I suggest that TRCP 166b, 7, be supplemented to add a provision to the effect that once a certificate is made and filed that efforts to resolve the discovery dispute without the necessity of Court intervention have been attempted and failed, the Court must conduct a hearing on the discovery motions to which such certificate relates and decide the matter. Such an addition to TRCP 166b, 7, would, I believe: (1) encourage trial counsel to make meaningful efforts to resolve the discovery dispute in order to avoid the necessity of court intervention, (2) insure that legitimate discovery is not improperly frustrated or delayed, and (3) insure that legitimate discovery disputes are decided prior to trial.

Very truly yours,

John B. Holstead

John B. Holstead

0193:2242

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

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166a
166(b)
166(b)6
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November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Comm on

Dear Justice Hecht:

Rules 166b(6) and 215(5) = "Good Cause" Exception. With respect to the "good cause" exception to admit untimely disclosed evidence, Rule 166b(6) states that supplementation is required not less then 30 days before trial "unless the court finds that a good cause exists for permitting or requiring later supplementation," and Rule 215(5) states that late-supplemented evidence is excluded "unless the trial court finds that good cause sufficient to require admission exists." First, these two rules should be made to read exactly the same, or confusion will arise. I prefer the wording in Rule 215(5). Second, and more importantly, the wording in the present rules has caused several recent cases to expressly or impliedly hold that the "good cause" which must be shown only encompasses evidence related to whether the late-supplemented evidence should be or is required to be admitted into evidence. Most courts, including the Supreme Court, have expressly or impliedly held, and I believe correctly, that the "good cause" which must be shown must relate to why the discovery request was not timely supplemented. But, the rules are not clear on this point. I suggest clarifying the issue by the following amendments. Amend Rule 166b(6) to read as follows:

> A party. . . unless the court finds good cause exists for the late supplementation and that good cause exists for requiring late supplementation.

Then, amends Rule 215(5) to read as follows:

> A party . . . unless the court finds good cause exists for the failure to initially respond or for late supplementation and that good cause exists for requiring the admission of the undisclosed, improperly disclosed or untimely disclosed evidence.

Thus, the rules will read more like each other, and the "good cause" exception would expressly apply to (1) why the evidence was not properly/timely disclosed and (2) why such evidence is required to be admitted. This should settle any conflicting case law.

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

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November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Comm on

Dear Justice Hecht:

Rule 166b Forms and Scope of Discovery; . . . I applaud the elimination of the contradiction regarding the discoverability of a consulting expert's opinion.

I generally applaud the additions and deletions to Rules 166b(4). I have some concern about the serving of affidavits "at least 7 days before the hearing," in that pre-trial hearings can be had upon 3 days notice. See Tex. R. Civ. P. 21. Perhaps the provision should be modified to read "served at least 2 days before the hearing." Regarding the in camera inspection and review, I believe it should be made clear that the production of the "sealed" document may be made to a court at a date later than the hearing being held to determine if an in camera inspection is necessary. Perhaps this could be remedied by stating that "the objecting party must, at a time designated by the court, segregate and produce . . . " In the last sentence, I would change the word "answers" to "discovery responses," to avoid any confusion that "answers" means "answer day" or the filing of an "original answer" to a petition.

One of my pet peeves is that nowhere in the rules is there one overall rule regarding the "duty to initially respond." We have a specific rule regarding the "duty to supplement," but we have no one, single rule regarding a party's duty to respond. Several individual rules address a duty to respond (e.g., Rule 167a, 168, etc.) and some have expressed statements that a party must respond within certain time limits, but it seems that one hard and fast rule regarding a "duty to initially respond" should be implemented. As you know, unfortunately, many attorneys "hide behind the log" and do not initially respond, but wait until the 31st day before trial to supplement their discovery responses. This is true, even if they have the required information at the

time the initial response is due. Thus, I believe the court would be doing the bar and the bench a service by setting out a detailed rule regarding the "duty to initially respond" to appropriate discovery requests. The rule would contain, inter alia, the following provisions. First, upon the receipt of a discovery request, a party has a duty to initially respond within the time mandated by rule for a response to a particular discovery request. With the exception of spontaneous answers at depositions, absent proper objection, a party must seek out and determine an appropriate response. The initial response (e.g., answers to interrogatories due thirty days after receipt of the interrogatories) must be full and complete, and must contain any and all information then known to or available to the responding party. Failure to properly "initially respond" would be made subject to the same sanctions under Rule 215 as a failure to supplement. Although I realize that Rule 215 was amended to allow the exclusion of evidence for the failure "to respond," I do not believe this covers the problem. The bar unfortunately looks at the "duty to supplement" as, practically speaking, a substitute to the initial duty to respond. Thus, for example, even though a party knows who they "may" call as an expert at trial at the time their initial response is due, too often attorneys "hide behind the log" and wait until the thirty-first day before trial to "supplement" by inserting a long list of experts as a "supplement" to their initial response (the initial response, of course, often says "none at this time"). Such a single and tightly drawn rule regarding the "duty to initially respond" could help take a lot of the game playing out of the discovery process. In this respect, I would direct you to my enclosed article at pages 238 through 243, wherein I discussed the duty to initially respond.

Derrel Luce
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

Board Certified - Personal Injury Trial Law
Texas Board of Legal Specialization
State Bar No. 12664800

4600 Bosque Blvd. - Suite 2B
Waco, Texas 76710
817 / 772-6853

166 b(6)(6)

November 28, 1989

Honorable Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed 1990 Amendments to Texas Rules of Court

Dear Justice Hecht:

I have noticed an inconsistency in the Rules of Civil Procedure regarding discovery for a number of years now. Although the duty to supplement interrogatory answers thirty days prior to trial to include experts was first contained in old Rule 168, and that duty has now been brought forward in Rule 166b(6)(b), all the case law has construed the rules to require supplementation of fact witnesses as well. I think experienced practitioners will all realize this and are familiar with case law, but I think this is a trap for the beginning lawyer. I think the rule could be brought in conformity with the current state of the case law if Rule 166b(6)(b) were amended to read as follows:

> If the party expects to call an expert witness or **other witness with knowledge of relevant facts** when the identity or subject matter of such witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the witness and the substance of the testimony concerning which the witness is expected to testify, as soon as is practical, but in no event less than thirty days prior to the beginning of trial except on leave of Court.

I know that some lawyers will scream that being required to reveal the substance of the fact witness' testimony will involve revealing their work product, but I think that is just antiquated grousing. All modern decisions say that we are moving away from trial by ambush. I see a growing practice of the naming of extremely large numbers of "persons with knowledge of relevant facts". Some of these attorneys will then refuse to indicate even the most general area of knowledge of these witnesses and they will instruct the witness not to talk to opposing counsel. All this does is encourage the taking of many needless and exceedingly expensive depositions to find out what the witness might know about. This amendment would allow attorneys to simply look at the designated witnesses, know who they are going to be and make an intelligent decision as to whether or not to depose them.

Thank you for your consideration in this matter.

Sincerely,

Derrel Luce

Derrel Luce

DL/rm

00285

VINSON & ELKINS
ATTORNEYS AT LAW
3300 FIRST CITY TOWER
1001 FANNIN
HOUSTON, TEXAS 77002-6760
TELEPHONE 713 651-2222 TELEX 762148

THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVE. N.W.
WASHINGTON, D.C. 20004-1007
TELEPHONE 202 639-6500 TELEX 89680

47 CHARLES ST., BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 01 441 491-7236
CABLE VINELKINS LONDON W1-TELEX 24140

FIRST CITY CENTRE
816 CONGRESS AVENU
AUSTIN, TEXAS 78701-2
TELEPHONE 512 495-8400

3700 TRAMMELL CROW CE E
2001 ROSS AVENUE
DALLAS, TEXAS 75201-291
TELEPHONE 214 220-7700

November 16, 1989

166 b (4)
166 b (7)

Justice Nathan L. Hecht
Supreme Court, Supreme Court Building
P.O. Box 12248
Capital Station
Austin, Texas 78711

Dear Judge Hecht:

The purpose of this letter is to comment on and to offer a suggestion concerning one of the proposed changes in the Texas Rules of Civil Procedure ("TRCP").

I suggest that TRCP 166b, 7, be supplemented to add a provision to the effect that once a certificate is made and filed that efforts to resolve the discovery dispute without the necessity of Court intervention have been attempted and failed, the Court must conduct a hearing on the discovery motions to which such certificate relates and decide the matter. Such an addition to TRCP 166b, 7, would, I believe: (1) encourage trial counsel to make meaningful efforts to resolve the discovery dispute in order to avoid the necessity of court intervention, (2) insure that legitimate discovery is not improperly frustrated or delayed, and (3) insure that legitimate discovery disputes are decided prior to trial.

Very truly yours,

John B. Holstead

John B. Holstead

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POWELL POPP & IKARD

ATTORNEYS AT LAW

707 WEST TENTH STREET
AUSTIN, TEXAS 78701
TELEPHONE 512 473-2661
FACSIMILE 512 479-8013

M. FRANK POWELL
JAMES POPP
WILLIAM IKARD

G. WALTER McCOOL
PATRICIA L. SESSA

WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

4. TRCP 166b. I certainly like paragraph 7, providing for an affidavit that efforts to resolve the discovery dispute have been made prior to seeking court intervention. The court should think twice before overruling Justice Spears unanimous opinion for the court in Coates v. Whittington, 758 S.W.2d 749 (Tex. 1988), by adding the word "psychologist" to the rule. First, there are many types of psychologists. Only clinical psychologists would be remotely qualified to express opinions as to an individual after an examination. Also, what then, does this do to the current rule that opinions should be within reasonable medical probabilities? As the court observed in Coates, psychologists do not qualify as practitioners of medicine, because they are not physicians.

Sincerely,

William W. Kilgarlin

TRCP 167a. Physical and Mental Examination of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical ~~or mental~~ examination by a physician[, or a mental examination by a physician or psychologist] or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician[or Psychologist].

(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician [or psychologist] setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain

it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician [or psychologist] fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician [or psychologist] or the taking of a deposition of the physician [or psychologist] in accordance with the provisions of any other rule.

c. [No Comment.]

If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on his willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

[d. Definitions.

For the purpose of this rule, a psychologist is a psychologist licensed by the State of Texas.]

[COMMENT TO 1990 CHANGE: To provide for court-ordered examination by certain psychologists.]

E. Jack Lawrence, III
LEGAL ASSISTANT • EDUCATOR
5570 WINFREE DRIVE
BEAUMONT, TEXAS 77705
~~643-4049~~ (409) 833-0894
November 20, 1989

21
21b
166
1672
3082

Justice Nathan L. Hecht

Texas Rules of Court Conference

Dear Justice Hecht:

I would like to offer the following comments on the Proposed Amendments to the Texas Court Rules:

5. TRCP 167a. The term "licensed therapist" would have the advantage of including family therapists, some of whom are neither physicians or full-fledged psychologists.

47TH DISTRICT COURT

167a

SUITE 3-A
POTTER COUNTY COURTS BUILDING
AMARILLO, TEXAS 79101
806 / 379-2350

DAVID L. GLEASON
JUDGE

POTTER, RANDALL AND
ARMSTRONG COUNTIES

October 31, 1989

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

Re: Possible Amendment of Rule 167a

May It Please the Court:

Rule 167a of the Rules of Civil Procedure authorizes a trial court to order physical or mental examinations. The Rule, though, as emphasized by the decision in Coates v. Whittington, 758 SW2d 749, requires the examination to be conducted "by a physician." When mental condition is in controversy there could be times when a psychological evaluation would suffice, as opposed to a complete psychiatric examination.

The Texas Psychological Association has presented a proposal that Rule 167a be amended to permit a court to authorize a mental examination by a licensed and certified psychologist who possesses a doctor's degree. I urge you to consider that proposal when the matter of Rules changes comes before the Court.

Very truly yours,

David L. Gleason

DAVID L. GLEASON

DLG:jb
CC: Texas Psychological Association
Attention Rule 167a
6633 East Highway 290, Suite 305
Austin, Texas 78723

THE LAW OFFICES OF
FRANK L. BRANSON, P.C.
18TH FLOOR
HIGHLAND PARK PLACE
4514 COLE AVENUE
DALLAS, TEXAS 75205-4185

214-522-0200
D/FW METRO: 214-263-7452
FAX: 214-521-5485

FRANK L. BRANSON
PAUL N. GOLD
DEBBIE DUDLEY BRANSON
RICHARD K. BERGER
GEORGE (TEX) QUESADA
JERRY M. WHITE
J. STEPHEN KING

TED Z. ROBERTSON
OF COUNSEL

November 27, 1989

21a
166b(2)(b)

167a

VIA FEDERAL EXPRESS

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: 1990 Proposed Changes to
Texas Rules of Civil Procedure

Dear Justice Hecht:

Thank you for the open invitation that appeared in the November State Bar Journal to comment upon the 1990 proposed changes to the Texas Rules of Civil Procedure. I would have liked to have appeared at the November 30 hearing; however, I will instead be out of state taking depositions. This, then, will outline my observations, which focus exclusively on the changes to the Rules pertaining to discovery.

RULE 167a

I very much object to psychologists being added as an entity that may conduct physical or mental examinations. It is predicable that, without adding provisions for protection, defendants will abuse this provision by seeking a mental examination of a claimant anytime a claim of mental anguish is asserted.

Of even more concern, however, is that psychologists, because of the very nature of their evaluation, will be able to conduct ex parte cross-examinations of the claimants. I believe that if Texas is going to depart from the Federal rule, by adding psychological examinatons, we should concommitantly provide the trial court discretion to limit the scope and manner of examination, including allowing recordation of the examination by audio or videotape and allowing the claimant's attorney to be present during the examination.

TRCP 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.

1. (No change.)

2. (No change.)

3. (No change.)

4. (No change.)

5. (No change.)

6. Objections. On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. ~~Objections served after the date on which answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.~~ Answers only to those interrogatories or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the court may direct. Either party may request a hearing as to such objections at the earliest possible time.

[COMMENT TO 1990 CHANGE: The previous second sentence in Section 6, which read, "Objections served after the date on which answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period," was and is applicable to all discovery objections and therefore has been moved to Rule 166b 4, last sentence.]

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

Rule 168 does not address whether interrogatories and their responses should be filed with the court. In contrast, Rule 167 clearly states that requests for production and their responses are not to be filed with the court. To remedy this, Pat Hazel of Austin proposes the following addition to TRCP 168(7):

> **Custody of Originals by Parties.** The original of such interrogatories or responses shall be maintained by the party or attorney receiving same and shall be available for copying and inspection by other parties to the suit. A party serving interrogatories or responses under this rule shall not file such interrogatories or responses with the clerk of the Court unless the Court upon motion, and for good cause, permits the same to be filed.

The subcommittee agrees.

Coats v. Whittington 758 SW2d 749 (Tex. 1988) holds that psychologists cannot do independent mental examinations. TRCP 167a proposes that psychologists be allowed to conduct court-ordered independent mental examinations. The COAJ does not question this proposal. FRCP 35 allows psychologists to make independent medical examinations. In present practice, a plaintiff can be examined by a psychologist who his attorney selects and that psychologist can then testify as an expert. On the

other hand, the defendant cannot have his own psychologist do an independent medical examination of the plaintiff to use as rebuttal to the plaintiff's psychological expert. Nevertheless, there is substantial opposition to allowing psychologists to make independent medical examinations. Paul Gold states, "Psychologists because of the very nature of their evaluation, will be able to conduct ex parte cross examination of claimants." William Kilgarlan states: "First, there are many types of psychologists. Only clinical psychologists would be remotely qualified to express opinions as to an individual after an examination. Also, what then does this do to the current rule that opinions should be within reasonable probabilities? As the court observed in Coates, psychologists do not qualify as practitioners of medicine because they are not physicians." The subcommittee did not reach a consensus on what recommendation to make to the full Advisory Committee on this point.

167
TRCP 168 ←
200
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ERNEST L. SAMPLE
ATTORNEY AT LAW
POST OFFICE BOX 553
BEAUMONT, TEXAS 77704

TELEPHONE
(409) 899-2515

OFFICE LOCATION
2855 EASTEX FREEWAY
SUITE "I"

December 11, 1989

Texas Supreme Court
Rules Committee
P. O. Box 12248
Austin, Tx 78711

In Re: Recent Discovery Rules Changes

Gentlemen:

I respectfully recommend changes in discovery rules as follows:

1. Limit written interrogatories to 10 single questions, except upon leave of court. (Rule 168(5)

2. Followup or clarification interrogatories: 2 each for any interrogatory imperfectly answered, to which the answer is not understood, or needs clarifying.

3. File discovery papers. Presenty rules dispense with filing. This results in disorder and irresponsibility. Anything important enough to consume a lawyer's time should be kept on record, (including opinions of the Court of Appeals).

4. Limit depositions to one each per attorney per witness, except upon leave of court.

5. Provide for the party taking the depositions to make a deposit to cover time and expense of witness and the attorney representing the witness if the deposition requires more than one day. This should be a requirement in all multiple party or extended depositons where a client and his lawyer are held in a vice grip for several days for a long, long, deposition. Particularly where the witness is a party-witness, and his lawyer's expenses are mounting uncontrollably anyway.

6. Go back to the requirement that the deposition be taken in the county where the witness resides, except by agreement or special leave of court. Should apply to party witnesses as well as others. This is not an unreasonable requirement.

7. Require the party giving notice to take the deposition to also give notice of the subject matter or zone of inquiry, and require the same thing of the opposite attorney if he intends to pursue an independent line of questioning. Allow "free for all" depositions only on leave of court, if at all, and with

limitations. Each deposition notice, whether for oral depositions or interrogatories, should contain the name of the individual court reporter, and the phone number of the court reporter.

8. Require 10 days notice when the witness is required to produce documentary material. "Reasonable notice" is probably adequate in other situations.

Yours very truly,

Ernest L. Sample

Ernest L. Sample

FULBRIGHT & JAWORSKI
1301 MCKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS MCGRATH
NEW YORK
LOS ANGELES

December 8, 1989

TRCP 166b(4)
TRCP 167
TRCP 168
TRCP 169
TRCP 201

Re: Comments Regarding Proposed Amendments to Texas Court Rules

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

Rules 167, 168 and 169. The proposed change to Rule 169 gives a Defendant fifty (50) days after service of the citation and petition to respond to requests for admission. However, Rules 167 and 168 allow a defendant fifty (50) days to respond to requests for production and interrogatories only if such discovery requests accompany the citation. I have recently been party to a situation where after the citation is served, the plaintiff has issued discovery requests upon the defendant prior to the time the party appears but after the citation is issued. In such a situation, the defendant may only have thirty (30) days to respond to the discovery request since the request did not accompany the citation.

I would suggest that Rules 167, 168 and 169 be re-drafted so that they are consistent in allowing a defendant fifty (50) days after service of the citation to respond to any discovery requests. In other words, the defendant should not need to respond to any discovery requests for fifty (50) days after citation has been served upon him.

I hope these suggestions are of some benefit.

Yours very truly,

Keith S. Dubanevich

KSD/lc

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166a
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POWELL POPP & IKARD

ATTORNEYS AT LAW

707 WEST TENTH STREET
AUSTIN, TEXAS 78701
TELEPHONE 512 473-2661
FACSIMILE 512 479-8013

M. FRANK POWELL
JAMES POPP
WILLIAM IKARD
G. WALTER McCOOL
PATRICIA L. SESSA

WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

5. TRCP 168. Depending upon what you decide in Rule 167a, the word "psychologist" must be examined.

Sincerely,

William W. Kilgarlin

168-5

Gwinn & Roby
ATTORNEYS AND COUNSELORS
4100 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 698-4100

Direct Dial Number
698-4101

Telecopier 747-2904

November 16, 1989

Honorable Nathan L. Hecht, Justice
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

RE: Texas Rules of Civil Procedure

Dear Nathan:

T.R.C.P. 168-5 should be amended to require that the parties submitting Interrogatories leave space after each interrogatory for objections and responses. This is a relatively simple requirement but eliminates the need of the receiving parties' redrafting the Interrogatories as submitted, in order to comply with that portion of Rule 168 requiring that the answers be preceded by the interrogatory.

At one time, this was a requirement of Rule 168, and I would like to see it re-instituted in the Revised Rules.

Sincerely,

Robert A. Gwinn

RAG:as

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street • Austin, Texas 78705 • (512) 471-5151
Telecopier Number (512) 471-6988

87J

168

November 27, 1989

Justice Nathan Hecht
P.O. Box 12248
Austin, TX 78711

Re: Proposed New Rules of Civil Procedure

Dear Justice Hecht:

Since I was unable to attend the last meeting of the Committee on the Administration of Justice, I was not able to make the following suggestions to them. Hence, I thought I would send them on to you without any imput or approval by the COAJ. They are simply my proposals.

The first has to do with a Motion to Transfer Venue. Under present Rule 87-5, most courts are holding that the trial court cannot reconsider motions already ruled on even in light of the trial on the merits. It seems to me this interpretation is based primarily on the heading to that section, "No Rehearing." I do not think the context of the section says that at all. To make it clear that the trial court can do what the appellate court must do, I have changed the name of the section and included a final paragraph addressing this question. I also include a copy of a case addressing this problem. A further matter in my addition is the wording "when brought to its attention." It is my hope that this will prevent sandbagging the other side by making no mention of this to the trial court and raising it on appeal for the first time.

The second proposal is to make clear what is to be done with interrogatories and answers to interrogatories. I believe it is clear that they are not to be filed. However, Rule 168 is not as clear about this as is Rule 167. I have simply borrowed some similar language from that rule.

Sincerely,

J. Patrick Hazel
Tiny Gootch Centennial
Professor of Trial
Practice

RULE 168. INTERROGATORIES TO PARTIES

(add)

[7. Custody of Originals by Parties. The original of such interrogatories or answers shall be maintained by the party or attorney receiving same and shall be available for copying and inspection by other parties to the suit. A party serving interrogatories or answers under this rule shall not file such interrogatories or answers with the clerk of the court unless the court upon motion, and for good cause, permits the same to be filed.]

TRCP 169. Request for Admission

1. Request for Admission. At any time after [commencement of the action] ~~the defendant has made appearance in the cause or~~ a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, [or as otherwise agreed by the parties,] the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the

time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five (45)~~ [fifty (50)] days after service of the citation and petition upon ~~him~~ that defendant. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. (No change.)

[COMMENT TO 1990 CHANGE: The rule is amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

The rule is also amended to permit service of a Request for Admission at any time after commencement of the action but extends responses to no less than 50 days after service of the citation and petition on the responsive parties.]

FULBRIGHT & JAWORSKI
1301 McKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

December 8, 1989

TRCP 166b(4)
TRCP 167
TRCP 168
TRCP 169
TRCP 201

Re: Comments Regarding Proposed Amendments to Texas Court Rules

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

Rules 167, 168 and 169. The proposed change to Rule 169 gives a Defendant fifty (50) days after service of the citation and petition to respond to requests for admission. However, Rules 167 and 168 allow a defendant fifty (50) days to respond to requests for production and interrogatories only if such discovery requests accompany the citation. I have recently been party to a situation where after the citation is served, the plaintiff has issued discovery requests upon the defendant prior to the time the party appears but after the citation is issued. In such a situation, the defendant may only have thirty (30) days to respond to the discovery request since the request did not accompany the citation.

I would suggest that Rules 167, 168 and 169 be re-drafted so that they are consistent in allowing a defendant fifty (50) days after service of the citation to respond to any discovery requests. In other words, the defendant should not need to respond to any discovery requests for fifty (50) days after citation has been served upon him.

I hope these suggestions are of some benefit.

Yours very truly,

/Keith S. Dubanevich

KSD/lc

169

HENNESSY & ZITO
ATTORNEYS AT LAW
THE COTTON BUILDING
502 CAROLINE
HOUSTON, TEXAS 77002

EDWARD J. HENNESSY*
NICHOLAS E. ZITO* **
VAN GARDNER
SANDRA N. EIDSON

BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW*
CIVIL TRIAL LAW**
TEXAS BOARD OF LEGAL SPECIALIZATION

(713) 224-5066
WATS (800) 327-6047
FAX (713) 224-5055

November 16, 1989

Re: Proposed Amendments to Texas Court Rules

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Dear Judge Hecht:

I have some concern with the proposed change to Rule 169 involving Requests for Admission. The current proposal calls for a change that will allow Requests for Admission to be served "at any time after commencement of the action". The current rule provides that requests can only be served after the defendant has made an appearance in the cause or the time, therefore, has elapsed. In other words, from a practical standpoint, after the defendant has hired a lawyer and filed an answer, Requests for Admission would be served upon that attorney. As I see it, the proposed change will be a pitfall for the unwary. As an example, I have already seen some plaintiff attorneys sending Requests for Admission along with the Original Petition. The petition may get served by the Secretary of State or through some other form of alternative service. Typically, many lawsuits involve personal injury cases where there is insurance coverage. An insured may send in the lawsuit to an agent or directly to an insurance company, but may not send the Requests for Admission. It may also be that an insurance company is not aware of the attached discovery and may either just call in the lawsuit to a lawyer or not send the entire pack of papers received. Also, a problem can occur when an extension of time is given to answer the suit. What I have seen being done already, despite what the current rule says, is for some plaintiff lawyers to send out Requests for Admission that include things such as: admit that you were negligent, admit that the accident was entirely your fault; admit that the plaintiff was negligent free; admit that the plaintiff was damaged; etc. and so forth. What I can foresee happening is that in a lawsuit, that is one that would be clearly defensible or a frivolous case that some unscrupulous lawyer will send a similar set of Requests for Admission that these facts can inadvertently be deemed admitted, thereby subjecting some unknowing, naive individual to a judgment which he would not necessarily owe.

The original purpose underlying the rule regarding Requests for Admission is to cause another party to admit facts which should not be in dispute or to admit the genuineness of various documents. However, this rule

is currently being abused and will be further abused if it is amended, by lawyers who insist on sending requests that require a party, in essence, to admit liability and damages in personal injury cases. These types of Requests for Admission are most frequently seen in your frivolous lawsuits where liability is hotly disputed or there is a question as to whether or not a plaintiff was even injured. If this proposed rule is enacted, I foresee an escalation in this type of activity on the part of the plaintiffs bar as well as an increase in appellate proceedings regarding whether or not a defendant had good cause for not responding in time when requests had been deemed admitted against him. I can guarantee you that this is going to occur on a very frequent basis.

Finally, I think Rule 169 may also need some clarification in regards to the mechanics of serving the requests and the written response. There seems to be some confusion among members of the bar regarding who gets served with the original, the opposing lawyer or the clerk of the court in regards to the Requests for Admission and the responses thereto. If it is the intent of the rule that the original request be served upon the other lawyer, signed by the counsel and only a copy filed with the clerk of court, then the rules should so state. This should likewise be true for the response.

Sincerely yours,

HENNESSY & ZITO

Nicholas E. Zito

NEZ/cg

TRCP 169

Kivell & Rader

Attorneys At Law

Gary B. Kivell *Marvin L. Rader*

July 13, 1989

Supreme Court of Texas
Rules Committee for
Texas Rules of Court
Austin, Texas

Dear Sirs:

I am writing concerning Rule 169 of the Texas Rules of Civil Procedure, Request for Admission. I believe that this rule is seriously in need of modification because of the potential for damage to litigants by virtue of the automatic invocation of sanctions for failure to answer a request for admission. I believe that this rule has created and continues to create hardship to litigants because of inadvertent failures to respond properly to those requests. No rule should be automatically invoked to render a forfeiture or a default condition. In operating an active law practice, it is very easy to overlook a Request for Admission or other discovery request. I have experienced situations with the post office where green cards were signed by my personnel and no documents actually delivered. Occasionally, as humans, we attorneys also forget something or may misplace it in a file. One can only imagine the terror that an attorney would go through at a final trial when he discovers, after he has rested his case, that there was a request for admission that was unanswered through inadvertence or otherwise.

I would propose that the rule be modified so that a motion to deem matters admitted be required, as was done under the prior rule. This certainly would be more just and would prevent attorneys and litigants from being blindsided by a technical rule. I have recently added to my standard set of interrogatories, a question which asks the opposing party whether or not they have mailed any request for admissions which have not been answered. At any rate, the Bar certainly needs to eliminate such traps in the rules.

Respectfully submitted,

Marvin L. Rader
T.B.A. No. 16452800

MLR/dk

510 Hwy. 3 North *P.O. Drawer 917* *League City, Texas 77573* *(713) 332-6620*

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

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November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Rule 169. I believe it should be made expressly clear that a court may allow the extension of time to answer requests for admissions after the deadline for those requests have passed. The second sentence of the second paragraph of Subsection 1 of Rule 169 states that the "matter is admitted without necessity of a court order unless, within thirty (30) days after service of the requests, or within such time as the court may allow . . . . " Some attorneys believe that the phrase "within such time as the court may allow" means at such time within the 30 days (not after the 30 days). This could be clarified rather simply.

TRCP 200. Depositions Upon Oral Examination

1. When Depositions May Be Taken. (No change.)

2. Notice of Examination: General Requirements; Notice of Deposition of Organization

a. Reasonable notice must be served in writing by the party, or his attorney, proposing to take a deposition upon oral examination, to every other party or his attorney of record. The notice shall state the name of the deponent, the time and the place of the taking of his deposition and, if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity. [The notice shall also state the identity of other persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have such other persons attend, that party must give reasonable notice of the identity of such other persons.]

b. (No change.)

[COMMENT TO 1990 CHANGE: Rule 200(2)(a) was amended to provide for persons who may attend deposition without notification and to provide for notice, to be given a reasonable number of days in advance of the deposition, of any party's intent to have any other persons attend.]

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TRCP 168
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ERNEST L. SAMPLE
ATTORNEY AT LAW
POST OFFICE BOX 553
BEAUMONT, TEXAS 77704

TELEPHONE
(409) 899-2515

OFFICE LOCATION
2855 EASTEX FREEWAY
SUITE "I"

December 11, 1989

Texas Supreme Court
Rules Committee
P. O. Box 12248
Austin, Tx 78711

In Re: Recent Discovery Rules Changes

Gentlemen:

I respectfully recommend changes in discovery rules as follows:

1. Limit written interrogatories to 10 single questions, except upon leave of court. (Rule 168(5)

2. Followup or clarification interrogatories: 2 each for any interrogatory imperfectly answered, to which the answer is not understood, or needs clarifying.

3. File discovery papers. Presenty rules dispense with filing. This results in disorder and irresponsibility. Anything important enough to consume a lawyer's time should be kept on record, (including opinions of the Court of Appeals).

4. Limit depositions to one each per attorney per witness, except upon leave of court.

5. Provide for the party taking the depositions to make a deposit to cover time and expense of witness and the attorney representing the witness if the deposition requires more than one day. This should be a requirement in all multiple party or extended depositons where a client and his lawyer are held in a vice grip for several days for a long, long, deposition. Particularly where the witness is a party-witness, and his lawyer's expenses are mounting uncontrollably anyway.

6. Go back to the requirement that the deposition be taken in the county where the witness resides, except by agreement or special leave of court. Should apply to party witnesses as well as others. This is not an unreasonable requirement.

7. Require the party giving notice to take the deposition to also give notice of the subject matter or zone of inquiry, and require the same thing of the opposite attorney if he intends to pursue an independent line of questioning. Allow "free for all" depositions only on leave of court, if at all, and with

limitations. Each deposition notice, whether for oral depositions or interrogatories, should contain the name of the individual court reporter, and the phone number of the court reporter.

8. Require 10 days notice when the witness is required to produce documentary material. "Reasonable notice" is probably adequate in other situations.

Yours very truly,

Ernest L. Sample

Ernest L. Sample

WHITE, HUSEMAN, PLETCHER & POWERS
ATTORNEYS AT LAW

2100 THE 600 BUILDING
CORPUS CHRISTI, TEXAS 78473
(512) 883-3563

MAILING ADDRESS:
P.O. BOX 2707
CORPUS CHRISTI, TEXAS 78403-2707

FAX (512) 883-0210

'ANCEY WHITE
AN HUSEMAN
ANTHONY E. PLETCHER
BRYAN POWERS
JOHN O. MILLER III
MARGERY HUSTON
MARK DEKOCH
PAUL DODSON

TRCP 200

November 14, 1989

TRC-614

Hon. Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Changes to the Rules of Civil Procedure

Dear Justice Hecht:

Please note my opposition to the proposed change to TEX. R. CIV. P. 200. The proposed change would simply create problems in taking depositions; the change would not cure any problems which may now exist.

The amendment appears to deal obliquely with the question of which persons may properly appear at a deposition. The amendment, however, provides no guidance on the question, and the proposed amendement to TEX. R. CIV. EVID. 614 would expressly make "the rule" inapplicable to depositions. Instead the proposed change to Rule 200 simply creates another needless battleground for issues such as who constitutes "employees of counsel," what constitutes reasonable notice of identity of other persons, and the nature of the notice that is required. The question of sanctions for violations of this rule also should be interesting.

This aspect of the rules is not broken. Please don't fix it.

Sincerely,

Paul Dodson

PD:jd

WATTS LAW OFFICE
1313 The Six Hundred Building
(600 Leopard At Broadway)
Corpus Christi, Texas 78473

Guy Leland Watts

AC 512/884-1000

200

November 17, 1989

Justice Nathan Hecht
Supreme Court of Texas
P.O. BOX 12248
Austin, Texas 78711

RE: Proposed Amendments To Texas Court Rules

Dear Justice Hecht:

The Supreme Court via the Texas Bar Journal of November, 1989 encouraged comments from the bar with respect to proposed Amendments to the Texas Court Rules. My concern centers on TRCP 200 "Depositions Upon Oral Examination" and specifically the language "reasonable notice" as versus the former rule language that required a set number of days.

I would encourage that the Supreme Court revert back to requiring a set number of days such as ten days or fourteen days because of the following reasons, to-wit:

(a) "Reasonable Notice" to my experience has boiled down to "three days;" and
(b) "Reasonable Notice" as versus a set number of days makes it most difficult on a solo practioner to plan any vacations, whether the same be in the summer, during Christmas or during Spring Break.

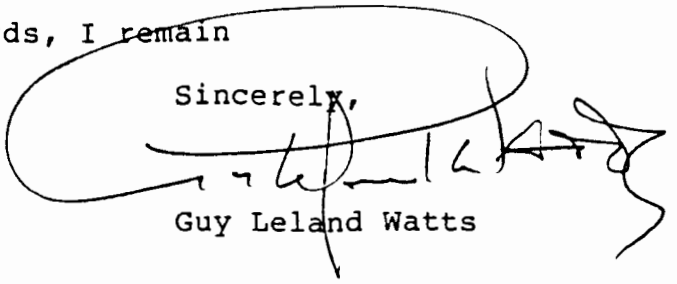
Formerly, one could plan a vacation limited to ten days and know that you were not subject to leaving on vacation without knowing of a deposition that was scheduled during the vacation because you knew that you were allowed ten days advance notice. If you got the notice prior to leaving, you had an opportunity to call counsel and arrange a post-vacation date or even obtain a Court Order. However, the practical results of "reasonable notice" means that if a Secretary signs the green certified card, the attorney is subject to a deposition taking place while he or she is on a ten day or less vacation trip.

The inconvenience and potential mal-practice exposure to solo practioners has become a very serious situation as a result of the rule change from a set number of days to reasonable notice and the rule should be changed back to a required number of days, preferably a minimum of ten days.

I might add that I discussed this matter with Justice William Kilgarlin while he was still on the bench and was told of his understanding that "reasonable notice" got put in at the end of a long day of work by the Rules Advisory Committee and members simply did not fully consider the ramification of the change to "reasonable notice." Nevertheless, the time has come to correct the situation on behalf of solo practioners in the State of Texas.

With kindest regards, I remain

Sincerely,



Guy Leland Watts

GLW:jmc

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

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November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Rules 200 and 208. I believe we will cause a great deal of headache by the addition of the rule changes allowing who may attend depositions without notification. I believe this is going to cause a great deal of litigation. If "the rule" is good for trial, why is it not good for pre-trial discovery? I cannot emphasize how much this new amendment bothers me. The application of "the rule" is laudable. It keeps witnesses from "molding" their testimony to the prior testimony of other witnesses. This leads to the truth, and it discourages fabrication and the "swaying" of testimony. I strongly believe the Court should go in the opposite direction, and expressly state that "the rule" applies to depositions. The result would be the application of a very laudable rule to pre-trial discovery, and a simple statement that "the rule" applies to pre-trial discovery would cut out all questions on the matter and would cause virtually no litigation. I am quite frankly baffled by why the Court wants to go the other direction. Perhaps a compromise position would be that "the rule" applies to all depositions unless the party seeking to bring other potential witnesses requests and is allowed to do so by agreement or court order. I do, however, think that if "the rule" is adopted for depositions, it should not include a full-time employee (e.g. secretary, paralegal, clerk) of the lawyer.

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

ERNEST REYNOLDS III

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-2807
ATTORNEY'S DIRECT DIAL
877-2852

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November 21, 1989

Honorable Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The proposed added language to procedural rule 200.2.a. should not be adopted. Court proceedings, and the various ancillary proceedings relating to them, including discovery proceedings under the procedural rules, should be open proceedings. Indeed, it is interesting to note that one of the proposed rule changes would modify evidence rule 614 to clearly state that "The Rule" does not apply to discovery proceedings; and, incidentally, I applaud this concept although I question whether the added language should be placed in the body of rule 614 and would personally favor having the added language included as a comment appearing immediately below rule 614. I can personally see no good reason to add the proposed new language to procedural rule 200. If somebody has suggested that this is to prevent disruption at depositions, my reply would be that attorneys as officers of the court should try to make sure that depositions are run without unnecessary disruption; and, further, should improper disruptions occur the Court already would have ample power to take appropriate action. I would request that the new language proposed for procedural rule 200 not be adopted.

TRCP 201. Compelling Appearance; Production of Documents and Things; Deposition of Organization

Any person may be compelled to appear and give testimony by deposition in a civil action.

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the county of suit subject to the provisions of paragraph ~~4~~ [5] of Rule 166b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

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ERNEST L. SAMPLE
ATTORNEY AT LAW
POST OFFICE BOX 553
BEAUMONT, TEXAS 77704

TELEPHONE
(409) 899-2515

OFFICE LOCATION
2855 EASTEX FREEWAY
SUITE "I"

December 11, 1989

Texas Supreme Court
Rules Committee
P. O. Box 12248
Austin, Tx 78711

In Re: Recent Discovery Rules Changes

Gentlemen:

I respectfully recommend changes in discovery rules as follows:

1. Limit written interrogatories to 10 single questions, except upon leave of court. (Rule 168(5)

2. Followup or clarification interrogatories: 2 each for any interrogatory imperfectly answered, to which the answer is not understood, or needs clarifying.

3. File discovery papers. Presenty rules dispense with filing. This results in disorder and irresponsibility. Anything important enough to consume a lawyer's time should be kept on record, (including opinions of the Court of Appeals).

4. Limit depositions to one each per attorney per witness, except upon leave of court.

5. Provide for the party taking the depositions to make a deposit to cover time and expense of witness and the attorney representing the witness if the deposition requires more than one day. This should be a requirement in all multiple party or extended depositons where a client and his lawyer are held in a vice grip for several days for a long, long, deposition. Particularly where the witness is a party-witness, and his lawyer's expenses are mounting uncontrollably anyway.

6. Go back to the requirement that the deposition be taken in the county where the witness resides, except by agreement or special leave of court. Should apply to party witnesses as well as others. This is not an unreasonable requirement.

7. Require the party giving notice to take the deposition to also give notice of the subject matter or zone of inquiry, and require the same thing of the opposite attorney if he intends to pursue an independent line of questioning. Allow "free for all" depositions only on leave of court, if at all, and with

limitations. Each deposition notice, whether for oral depositions or interrogatories, should contain the name of the individual court reporter, and the phone number of the court reporter.

8. Require 10 days notice when the witness is required to produce documentary material. "Reasonable notice" is probably adequate in other situations.

Yours very truly,

Ernest L. Sample

Ernest L. Sample

FULBRIGHT & JAWORSKI
1301 MCKINNEY
HOUSTON, TEXAS 77010

TELEPHONE: 713/651-5151
TELEX: 76-2829
TELECOPIER: 713/651-5246

HOUSTON
WASHINGTON, D.C.
AUSTIN
SAN ANTONIO
DALLAS
LONDON
ZURICH
FULBRIGHT JAWORSKI & REAVIS MCGRATH
NEW YORK
LOS ANGELES

December 8, 1989

TRCP 166b(4)
TRCP 167
TRCP 168
TRCP 169
TRCP 201

Re: Comments Regarding Proposed Amendments to Texas Court Rules

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

Rule 201(3). This provision allows a party to require another party to produce documents at the time of the deposition. No time frame is provided although reference to Rule 200(2)(a) would seem to require reasonable notice. These Rules allow a party to circumvent the provisions of Rule 167 and require the deponent to produce documents in less than thirty (30) days. Rule 201(3) should be amended so that a document request is made pursuant to the procedures of Rule 167. See e.g. Fed. R. Civ. P. 30(b)(5).

In addition, no provision is made for the procedure to be followed for a party resisting a document request pursuant to Rule 201(3). For example, the responding party does not know whether he should a) file a motion to quash the deposition or document request, b) file or serve objections to the document request prior to the deposition, or c) simply not produce the requested documents and object at the time of the deposition. This gap in the Rule should be resolved.

I hope these suggestions are of some benefit.

Yours very truly,

/Keith S. Dubanevich

0032

TRCP 206. Certification by Officer; Exhibits; Copies; Notice of Delivery

1. Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:

(i) (No change.)
(ii) (No change.)
(iii) (No change.)
(iv) (No change.)
(v) (No change.)
(vi) (No change.)

(vii) that the original deposition transcript, or a copy thereof in event the original was not returned to the officer, together with copies of all exhibits, ~~was delivered or mailed in a proper package properly addressed with postage prepaid to~~ [is in the possession and custody of] the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial;

(viii) (No change.)
2. Delivery. (No change.)
3. Exhibits. (No change.)
4. (No change.)
5. Copies. (No change.)
6. Notice of Delivery. (No change.)

[COMMENT TO 1990 CHANGE: To permit court reporters to certify custody of the custodial attorney of the original deposition transcript and related exhibits based upon the court reporter's delivery or other confirmation from the custodial attorney obtained in writing or otherwise.]

FELTON & ASSOCIATES
Attorneys at Law

Dale W. Felton
Board Certified
Personal Injury Trial Law
Texas Board of Legal Specialization

One Sterling Plaza
10101 Southwest Freeway, Suite 350
Houston, Texas 77074
713/988-8800

TRCP 20

December 8, 1989

The Honorable Justice Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

Dear Sir:

This correspondence regards an apparent void which presently exists in Rule 206 of the Texas Rules of Civil Procedure regarding the submission of an original deposition.

The rule does not address the event in which the custodial attorney, for whatever reason, (e.g. he dies, closes his practice, or his client settles out of the case) becomes unavailable at trial and therefore cannot submit the original of the deposition.

May I suggest that the rule allow for any other attorney involved in the dispute to submit a copy of the original transcript which shall have the same force and effect unless cause be shown why it should not.

Respectfully submitted,

FELTON & ASSOCIATES

Thomas J. Wallace, Jr.

Thomas J. Wallace, Jr.

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

Local Rules Suke
TRAP
TRCP 13
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November 22, 1989

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

TRCP 206

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell

WHH:wh cc: Ret.

00326

TRCP 208. Depositions Upon Written Questions

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. [Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.] Attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and, if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity. [The notice shall also state the identity of other persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have such other persons attend, that party must give reasonable notice of the identity of such other persons.]

A party may in his notice name as the witness a public or private corporation or a partnership or association or

governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

2. Notice by Publication. (No change.)

3. Cross-Questions, Redirect Questions, Re-cross Questions and Formal Objections. (No change.)

4. Deposition Officer; Interpreter. (No change.)

5. Officer to take Responses and Prepare Record. (No change.)

[COMMENT TO 1990 CHANGE: Rule 208 was silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court. As modified, Rule 208 conforms to Rule 200 and permits the deposition on written questions of a defendant prior to appearance date with permission of the court. Rule 208 was also amended to provide for persons who may attend deposition without notification and to provide for notice, to be

given a reasonable number of days in advance of the deposition, of any party's intent to have any other persons attend.]

DAN R. PRICE
ATTORNEY AT LAW
3001 LAKE AUSTIN BLVD., SUITE 205
AUSTIN, TEXAS 78703-4204
(512) 476-7086

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November 28, 1989

Honorable Nathan L. Hecht
P.O. Box 12248
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Comm on

Dear Justice Hecht:

Rules 200 and 208. I believe we will cause a great deal of headache by the addition of the rule changes allowing who may attend depositions without notification. I believe this is going to cause a great deal of litigation. If "the rule" is good for trial, why is it not good for pre-trial discovery? I cannot emphasize how much this new amendment bothers me. The application of "the rule" is laudable. It keeps witnesses from "molding" their testimony to the prior testimony of other witnesses. This leads to the truth, and it discourages fabrication and the "swaying" of testimony. I strongly believe the Court should go in the opposite direction, and expressly state that "the rule" applies to depositions. The result would be the application of a very laudable rule to pre-trial discovery, and a simple statement that "the rule" applies to pre-trial discovery would cut out all questions on the matter and would cause virtually no litigation. I am quite frankly baffled by why the Court wants to go the other direction. Perhaps a compromise position would be that "the rule" applies to all depositions unless the party seeking to bring other potential witnesses requests and is allowed to do so by agreement or court order. I do, however, think that if "the rule" is adopted for depositions, it should not include a full-time employee (e.g. secretary, paralegal, clerk) of the lawyer.

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

ERNEST REYNOLDS III

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-2807
ATTORNEY'S DIRECT DIAL
877-2852

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TRCP 614
TRE 703

November 21, 1989

Honorable Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The proposal for new language at procedural rule 208, dealing with depositions upon written questions appears to be unnecessary and potentially quite problematic. There is already, if I recall correctly, is a procedure to allow a party to come to court and ask for approval to take a deposition prior to the time when it might otherwise be allowed under the generally applicable rules. What is going to result, I fear, if the proposed new language is adopted for rule 208 will be a situation where some aggressive attorneys will file lawsuits, immediately (under existing rules) file interrogatories and requests for production so that they can get answers as quickly as possible, then go to a nearby friendly trial judge and get an order "without notice" allowing the initiation of depositions on written questions; and the result will be that other parties who are later served in the lawsuit will experience substantial confusion and will have substantial difficulty in obtaining access to discovery obtained under the rules and which, under the general principals we have been operating under in this state for about 50 years or more now, should therefore be made equally available to all parties to the litigation. Further, this confusion during the discovery stage will inevitably lead to confusion, prejudice, unreasonable delay, and unfair results when cases come to trial. I urge the supreme court to refrain from adopting the proposed new language which would appear at the first paragraph of procedural rule 208. Also, for reasons discussed above in connection with the proposed changes to procedure rule 200, I urge the supreme court to refrain from adopting the proposed language which appear at the end of the second paragraph of procedural rule 208.

TRCP 216. Request and Fee for Jury Trial

1/ [a.] (No change.)

2/ [b.] Jury Fee. [Unless otherwise provided by law, a] A fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

[COMMENT TO 1990 CHANGE: Additional fees for jury trials may be required by other law. E.g., Texas Government Code § 51.604.]

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1
BEN F. VAUGHAN, III, P
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5629

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRCP 237a. Cases Remanded From Federal Court

When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. [No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.]

[COMMENT TO 1990 CHANGE: To preclude a default judgment in a case remanded from federal court if an answer was filed in federal court during removal.]

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-19
BEN F. VAUGHAN, III, P.
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5629

TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

3. Is there a typographical error in the *Bar Journal* where the word "is" is used instead of "in" in the comment to Texas Rule of Civil Procedure 237a?

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRCP 245. Assignment of Cases for Trial

The Court may set contested cases on ~~motion~~ [written request] of any party, or on the court's own motion, with reasonable notice of not less than forty five ~~[ten]~~ days to the parties [of a first setting for trial], or by agreement of the parties/[; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties.] Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

[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.]

[COMMENT TO 1990 CHANGE: First paragraph, to harmonize a first time non-jury setting with the time for jury demand. Second paragraph, to eliminate impediments to continuing case preparation and discovery after a trial setting is requested in a pending case.]

SMEAD, ANDERSON, WILCOX & DUNN
ATTORNEYS AT LAW
425 NORTH FREDONIA, SUITE 100
P. O. BOX 3343
TELEPHONE (214) 757-2868
FACSIMILE (214) 757-4612
LONGVIEW, TEXAS 75606-3343

H. P. SMEAD, JR.
BOB ANDERSON
MELVIN R. WILCOX, III
MICHAEL L. DUNN

KYLE KUTCH
PETER L. BREWER

December 8, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
Rules Advisory Committee
P.O. Box 12248
Austin, Texas 78711

Re: Tex. R. Civ. P. 245

To The Committee:

In response to the Court's invitation in the November, 1989 issue of the Texas Bar Journal, the following suggestion regarding the Rules of Civil Procedure is made. Rule 245 of the Texas Rules of Civil Procedure states:

> The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than 10 days to the parties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

This Rule allows a court to issue notice to the parties of an impending trial within a period as short as 10 days. I submit that this rule is fundamentally unfair to the parties in light of the new strict guidlines set out by the court regarding the supplementation of discovery in general and the designation of experts in particular.

The current proposed rule change is to require 45 days notice. While this is a step in the right direction, it is still to short considering the practical problems faced by the practicioner with a heavy trial docket. My suggestion is that the rule require 60 days notice unless agreed to otherwise by the parties. One particular evil this would avoid is the practice of some lawyers of designating their expert 31 days before trial. Providing 60 days notice would allow all parties to supplement discovery and designate experts in a good faith effort to meet discovery deadlines, and would avoid the necessity of many motions for continuance. To this end, I would point out that Rule 166b(6)(b) regarding the supplementation of discovery to name experts "as soon as practical" does not always cure the problem. This Rule could be changed to provide that "counter-experts" may be designated within 20 days of the designation of the primary expert regardless of any trial setting.

Thank you for your attention.

Sincerely,

SMEAD, ANDERSON, WILCOX AND DUNN

BY: _____
Peter L. Brewer
Former Briefing Attorney,
Texas Supreme Court
1987-88 term

dl

Stephen D. Fox
Attorney & Counselor at Law
4814 Caroline Street
Houston, Texas 77004
(713) 529-9261

December 6, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

REGULAR MAIL
UNITED STATES POST OFFICE

Re: Proposed TEX. R. CIV. P. 245.

Dear Justice Hecht:

Please do not change TEX. R. CIV. P. 245!

The reason is that if the proposed rule is adopted, it will become almost impossible to go to trial on a case. Requiring forty five (45) days notice of the first trial setting and not telling the Courts what "reasonable" notice is, will cause additional confusion and delay.

Presently, Rule 245 requires ten (10) days notice of the trial setting. 90 % of my practice is in the County Civil Courts at Law of Harris County, Texas. In County Civil Number 4, Judge Charles Coussons' court, one may not set a case for trial until after sixty (60) days after the case has been filed. In the event that a Defendant desires a jury trial, that Defendant should file the written request and jury fee at the time that they file an Answer; otherwise, if a Defendant files the written request for a jury and the jury fee after the case has been set for trial, it is usually in the interest of delay. Many times, these same Defendants will waive a jury right before trial. They ask for a jury trial because they know that it is harder for the Judge to try a jury case than a trial to the Judge; therefore, cases set for jury trials many times are passed or continued. This aids a Defendant in further delay.

During this last week, I have so far had three (3) cases set for trial in County Civil Number 3, Judge Hobson's court. All three (3) cases were continued. On one particular case, this is the third time that the case has been passed or continued. On another case, it is the second time.

I believe that it is clear from some of the events which I have been relating to you that a Plaintiff's attorney has a very difficult time "getting to trial." Judges readily grant continues based, not for sufficient cause as required by TEX. R. CIV. P. 251, but for every flimsy excuse imaginable.

A case in point is one Defendant, who is also an attorney, who has had notice of the trial setting date since September 12, 1989. He had his attorney friend appear in Court yesterday with a Motion for Continuance stating that the Defendant had purchased non refundable plane tickets for his vacation and was not in town for trial. I argued that he should have moved for and obtained a continuance before he bought the tickets. Judge Hobson told me, "Mr. Fox, you know I'm not going to put him to trial when he's in Europe." His continuance, brought at the last minute, was granted.

I could relate many more such stories to the Court; however, the point is that a Defendant can readily obtain a continuance to set a case for a jury trial or for any other reason.

I practice commercial litigation (collections). Many times I am suing Defendants who are in the process of going out of business. If I am to have, at least, a chance to collect some money for my clients, I must be able to get to trial. I already have tremendous hurdles to overcome with all of the flimsy excuses people dream up for continuances and all the tricks they pull, such as requesting a jury trial, only for delay. It is apparent that most Judges fall for them.

If the Court approves the proposed TEX. R. CIV. P. 245, my chances of getting to trial on any particular case will become slight to none. I am already having a hard time getting to trial.

Please do not change TEX. R. CIV. P. 245. Anyone who wants a jury trial may readily obtain one. Remember that Defendants (Debtors) are simply attempting to avoid paying their debts or are stalling so that they can secrete or transfer their assets to a new corporation. I must be able to get to trial quickly to collect debts.

Please note that I do not file my cases in the District Courts because they will not set a case for trial until it has been on file for at least a year.

Laws that encourage the payment of a just debt are the pillars of our economic system. If everyone could avoid the payment of a just debt, our economic system will fall.

Yours very truly,

STEPHEN D. FOX

JUDGE JOSEPH B. MORRIS

ONE HUNDRED FIRST
JUDICIAL DISTRICT COURT

63
166
245

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The following are my comments on the proposed amendments to three specific rules of civil procedure:

1. TRCP 63. The rule will be titled "Amendments and Responsive Pleadings." Is an original counterclaim a "responsive" pleading? The Court has previously decided such a counterclaim is not an amended pleading for purposes of the rule. By use of the phrase "... any pleadings, responses, or pleas offered for filing within seven days..." is an original counterclaim to be subject to the rule? It is unclear to me because of the new title for the rule. Given the number of such claims filed near trial dates, it would be helpful to be clear on this point.

2. TRCP 166. I applaud the revisions but remain concerned the rule does not expressly allow the trial court to enter a pre-trial order covering the various matters without first holding a conference, which, as you know, is a luxury not often available because of time. At least twice I have received arguments that this Court could not issue pre-trial discovery orders without first holding the conference described in Rule 166. I have relied on the inherent power of this Court and the last sentence of the rule to do so. I think it would be helpful to clarify this issue in Rule 166 by expressly providing the trial courts may issue such orders without the necessity of a conference.

3. TRCP 245. At least one appellate court has ruled that forfeiture cases must be set within 30 days after answer date. This rule creates a conflict with regard to any case that now or in the future by law must be set sooner than 45 days after answer date.

As I am sure you know, my comments about these rules originate from my perspective as a trial judge.

Cordially,

Joseph B. Morris

Old Red Courthouse Dallas, Texas 75202 653-6937

TRCP 271 Charge ~~to~~ [of] the ~~Jury~~ [Court]

[1. The court may order any party to submit proposed jury questions, instructions, and definitions at any reasonable time for the convenience of the court.]

[2. In all jury cases,] ~~U~~[u]nless expressly waived by the parties, [at the conclusion of the evidence,] the trial court shall prepare and ~~in open court~~ deliver a written charge to the ~~jury~~ [parties, signed by the court, and filed with the clerk, and the charge so filed shall be a part of the record of the case.]

[3. The court shall submit the questions and instructions and definitions raised by the written pleadings and the evidence. The court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The placing of the burden of proof may be accomplished by instruction rather than by inclusion in the question.

4. Inferential rebuttal questions shall not be submitted in the charge.

5. The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

6. The court shall not submit other and various phases or different shades of the same question.

7. In any cause in which the jury is required to apportion the loss among the parties, the court shall submit a question or questions inquiring what percentage, if any, of the negligence or

causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the parties found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the party injured. The court may predicate the damage question or questions upon affirmative findings of liability.

8. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party.

9. The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

10. Nothing herein shall change the burden of proof from what it would have been under a general denial.]

[COMMENT TO 1990 CHANGE: The jury charge rules are entirely rearranged to follow better the order of proceedings in the trial court, to provide means for counsel to assist the court in preparing the charge, to place together the formal requisites of

the charge, and to provide that the charge prepared by the court be signed and filed prior to objections. The court may modify its prepared charge as provided by Rule 272(5).]

LAW OFFICES
OF
PAT MALONEY
PROFESSIONAL CORPORATION

December 4, 1989

Justice Lloyd Doggett
The Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

** PAT MALONEY
* PAT MALONEY, JR.
* GEORGE LeGRAND
JANICE MALONEY
* VIRGIL W. YANTA
PATRICIA MALONEY
TOM JONES
CHARLES NICHOLSON
AL M. HECK (1896-1977)
STEPHANI WALSH
ROGER G. BRESNAHAN
* GARY HOWARD
OF COUNSEL
T.J. SAUNDERS
OF COUNSEL

RE: Proposed Revisions to Texas Rules

Dear Mr. Justice Doggett:

After having reviewed the proposed changes to the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence, I wanted to point out the following less-than-salutary provisions in the rules, as well as the one exemplary provision, all of which are stated below:

The Texas Rules of Civil Procedure:

271 (7):

Conditioning or predicating the damages issue should be mandatory upon request by the party having the burden of proof on the damages issue. That is, the party having the burden of proof sometimes may want to have damages unconditionally submitted, as when that party knows that there is liability as a matter of law, but the liability issues still are submitted to the jury. In such a case, it behooves the party having the burden of proof on liability to have damages submitted unconditionally, so that he can pursue a motion for judgment non obstante veredicto. However, by not making it mandatory as aforementioned, too many trial judges will be reluctant to streamline the trial and prevent the jury from answering immaterial damages issues, merely because they never have had that opportunity before. Therefore, the rule should make such a predicated or conditional submission mandatory upon request by the party having the burden of proof on damages.

Very truly yours,

LAW OFFICES OF PAT MALONEY, P.C.

By: /s/ Virgil W. Yanta
VIRGIL W. YANTA

00

Rachel Littlejohn
District Judge, 156th Judicial District
P. O. Box 82
Beeville, Texas 78102

COUNTIES:
Aransas
Bee
Live Oak
McMullen
San Patricio

December 1, 1989

TRCP 271

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas and
Chairman of Committees on Rules of Procedure
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Re: Revisions to Rules of Civil Procedure in Trial Courts

Dear Justice Hecht:

I write to express some concern that District Court Judges have with the proposed rules for charging the jury in civil cases. I note that the burden of submitting a correct charge to the jury has shifted somewhat from the attorneys involved and placing it upon the trial court unless some prior orders are in effect. I would deplore this change of the burden for correct submission. In these days of word processors and computers it could be that it will not affect many Judges who have those facilities. In many courts, including those in rural areas such as mine, we do not have access to such gadgetry and are dependent upon lawyers to furnish us with substantially correct definitions, instructions and jury questions. Speaking for myself and, I believe, other District Judges, I would suggest that this burden should be borne by the attorneys who should have submitted a correct definition, instruction or jury question prior to the preparation of the charge. My Docket Control Orders usually include a requirement for correct definitions, instructions and questions to be submitted. However, it is my belief that the Rules should place that burden upon the attorneys.

Accordingly, I would suggest that the new TRCP 271, Charge of the Court, be amended by adding to Subsection 1 the following:

"In the absence of such Order, the omission or failure to submit a definition, instruction or question shall not be grounds for complaint on appeal unless the same has been requested in substantially correct form in writing prior to the preparation of the Charge." (This is similar to the instruction in the last sentence of present Rule 278.)

Whether this sentence or other is used, I would urge the Committee to consider placing the burden of proper and correct submission upon the attorneys rather than on the Judge preparing the Charge.

Respectfully submitted,

Rachel Littlejohn

RACHEL LITTLEJOHN
District Judge

RL:cw

xc: Honorable John Cornyn
Presiding Judge
Fourth Administrative Judicial Region
37th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Professor J. Hadley Edgar
Robert H. Bean Professor of Law
Texas Tech University School of Law
Lubbock, Texas 79409

121ST JUDICIAL DISTRICT
Terry County
Yoakum County

RAY D. ANDERSON
District Judge
Terry County Courthouse
Office Phone (806) 637-7742
Brownfield, Texas 79316

OFFICIAL COURT REPORTER
Jamie Altum
806 / 637-6958

COURT ADMINISTRATOR
Tammy Boen
806 / 637-7742

271
273

November 22, 1989

Honorable Nathan L. Hecht
Justice of Supreme Court
P.O. Box 12248, Capitol Station
Austin, Tx 78711

Dear Justice Hecht:

After reviewing the proposed amendments to the Texas Rules of Civil Procedure which appeared in the November issue of the Bar Journal, I did note one proposed change which I hope you will reconsider.

The proposed Rule 273, subparagraph one eliminates the requirement of submitting in writing any question, instruction or definition in order to preserve error in the court's charge. This rule has always been a big help to me as a trial judge, particularly in complicated cases, and I would hate to see it change.

Most trial judges have limited, if any, clerical help and do not have briefing attorneys to assist them in preparing charges. In my opinion this change would increase the number of appeals and greatly increase the backlog in our appellate courts. It would probably also cause more reversals and retrials in the trial court.

It might be argued that Rule 271, subparagraph one eliminates the problem, however, proposed Rule 273 subparagraph five expressly provides that noncompliance with proposed Rule 271 subparagraph one shall not form the basis for preservation of error. This seems to take the meat out of 271, subparagraph one.

HAZEL M. PIKE
COURT REPORTER

CHERYL ROSSON
COURT COORDINATOR

LARRY W. STARR, JUDGE
188TH JUDICIAL DISTRICT COURT
GREGG COUNTY
LONGVIEW, TEXAS 75606

P. O. BOX 3651
214-758-6181

21a

271(1)

273

996-998

November 27, 1989

Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to the Texas Rules of Civil Procedure

Dear Judge Hecht:

Please let me plead with you about two aspects of the proposed changes to the Texas Rules of Civil Procedure covered in the latest bar journal. The first concerns the court's charge in jury cases. In proposed Rule 273 we find:

> "...no party is required to submit in writing any question, instruction or definition in order to preserve error in the court's charge....Failure of any party to submit a question, instruction, or definition in writing shall never be a waiver of any objection made in compliance with Rule 272."

Further, although proposed Rule 271(1) provides:

> "The trial court may order any party to submit proposed jury questions, instructions, and definitions at any reasonable time for the convenience of the Court."

the statutory effect of this provision is wiped out in proposed Rule 273, as follows:

> "...Compliance or noncompliance with Rule 271(1) shall never constitute waiver of any objection to the court's charge..."

I submit that this change in our practice would be counterproductive and ill advised. Charge preparation time is "crunch" time for the trial judge. The jury is waiting. The word processing capability of trial judges in Texas is limited. The trial judge really needs something to look at and ponder. I suggest that this change will allow the parties and their attorneys (even the ones relying on a submission) to sit back and shoot at the trial judge orally rather than to organize their own approach by making written requests in substantially correct form. In the long run litigants will lose from this change. The luckiest litigant is one who has an attorney who prepares his jury questions, instructions, and definitions before he drafts his first petition or answer, before he does his discovery, before he selects a jury, and before he closes his evidence. Certainly no one would fault an attorney for making some modifications in his charge material before or during "crunch" time. But to inspire young attorneys to sit back and orally shoot from the hip while the trial judge presents his masterpiece is sheer nonsense.

The second aspect of my plea to you has to do with the trial judge's time, access and availability to receive documents and instruments. Increasingly, we see "ten dollar" envelopes brought into our offices and courtrooms which have to be receipted for. I get more and more "certified" and "registered" mail which must be signed for, sometimes with restricted delivery. Proposed Rules 296, 297 and 298 provide:

> "...A copy of the notice shall also be provided to the judge who tried the case by any method allowed in Rule 21a."

Please don't encourage people to send things to a judge under Rule 21a. Judges are not mail clerks or even filing clerks and ordinary mail should suffice.

Sincerely,

Larry W. Starr

Larry W. Starr

LWS:cr

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166(a)
271(4)
TRAP 100(f)

LAW OFFICES
OF
STANLEY G. SCHNEIDER
A PROFESSIONAL CORPORATION
Eleven Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed 1990 Rule Changes.

Dear Justice Hecht:

After reviewing the proposed rule changes, I offer the following comments and suggestions:

3. Texas Rules of Civil Procedure 271(4):

This rule could be misconstrued to exclude inferential rebuttal issues from the instructions and/or definitions.

The court should consider modifying it to read:

shall not be submitted [as questions] in the charge, [but shall be included as or within definitions or instructions as appropriate.]

Respectfully,

W. TROY McKINNEY

WTM/agl

TRCP 272 Requisites [Objections to the Charge of the Court]

The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause.//It shall be submitted to the respective attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury.//All objections not so presented shall be considered as waived.//The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal, and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time, and excepted to the ruling thereon.

[1. The charge, prepared by the court and filed pursuant to Rule 271, shall be submitted to the respective parties or their attorneys for their inspection and the court shall allow them reasonable time in which to examine and present objections to the charge and to assign error pursuant to Rule 273 outside the presence of the jury.

2. Each party may object to the charge. A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that clearly points out the portion of the charge to which complaint is made and is specific enough to support the conclusion that the trial court was fully aware of the ground of complaint and chose to overrule the objection.

3. When the complaining party's objection to a question, definition, or instruction is obscured or concealed by voluminous unfounded objections, minute differentiations, or numerous unnecessary requests, such objection or request shall be a nullity.

4. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

5. The court may modify the charge of the court at any time before it is read to the jury or as provided in Rule 286.]

[COMMENT TO 1990 CHANGE: To provide procedures and requisites for objecting to the charge of the court.]

RULE 272 COMPLAINTS TO THE COURT'S CHARGE

(1) Time

All complaints to the court's charge must be made before the charge is read to the jury.

(2) Type of Complaint

A complaint to the court's charge is either made by objection or request.

(3) An Objection

(a) May be made in writing or dictated to the court reporter in the presence of the court and opposing counsel;
(b) Must point out clearly the portion of the charge to which the objection is made and the matter specifically complained of;
(c) Must state specific grounds;
(d) Must not be obscured or concealed by voluminous unfounded objections or minute differentiations; and
(e) Must be complete in itself and not adopt any other objection by reference.

(4) A Request

(a) Must be in writing and substantially correct; and
(b) Must not be obscured or concealed by numerous unnecessary requests or requests with minute differentiations.

(5) Preserving Error for Appeal and Right to Jury Finding

(a) An objection is required when the matter complained of is contained in the court's charge but claimed to be defective;
(b) A request is required when the court's charge completely omits a definition, special instruction, or entire ground of recovery or defense; except
(c) When the court's charge can be cured either by amending what is submitted or by adding to the definition, special instruction, or question, then either an objection or request is proper.

(6) Court's Ruling on Complaints

The court shall announce its rulings on the complaints before reading the charge to the jury either by endorsing the rulings on written complaints or by dictating the rulings to the court reporter in the presence of counsel.

Any complaint not expressly ruled on by the court shall be deemed overruled if not cured by modification of the charge submitted to the jury.

4543.001

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street • Austin, Texas 78705 • (512) 471-5151
Telecopier Number (512) 471-6988

2-5-90

February 5, 1990

Mr. Luke Soules,
Chair
Supreme Court Advisory Committee
Tenth Floor, Republic of Texas Plaza
175 E. Houston St.
San Antonio, TX 78205-2230

Re: Proposed Changes to Rules 272 and 273

Dear Luke,

You may recall that the Committee on the Administration of Justice (COAJ) recommended AGAINST adopting a rule allowing an objection to preserve error for all complaints to the court's charge. It was the decision of our committee that the bench and bar would prefer to retain the present "objection/request" dichotomy for complaints to the court's charge.

We did, however, like the proposed Rule 271 incorporating in one rule the various rules for framing the court's charge. We further felt that there also ought to be one rule setting forth the requirements for complaining to the court's charge. Hence, on Saturday, February 3, 1990, we unanimously voted to recommend the enclosed attempt at such a rule.

If your committee and the Supreme Court believe that paragraphs 1 and 5 of proposed Rule 272 need to be retained, we recommend they be moved to proposed Rule 271.

Our recommended Rule 272 attempts to place into one, organized rule the present law concerning making complaints to the court's charge and the court's ruling on those complaints.

You will notice in reading this rule that there is no mention of the present requirement that a party relying upon an omitted question must request that question. We believe that under our present broad-form practice that rule no longer has any viability. If the omitted question is an entire ground of recovery or of defense, then the party wanting it must

request, or it is waived. Hence, the "reliance" rule only had meaning when one or more elements of a ground of recovery or of defense were omitted. However, even if a trial court submits such a ground in the older "separate and distinct" fashion, under present practice an objection would both preserve the error and prevent any judge or deemed finding. Why? Simply because the error can be corrected by amending one of the questions submitted to contain the omitted elements. The old "multifarious" objection to doing this is no longer a good objection. Hence, either party may object or may request either a separate and distinct question on the missing element or an instruction which would make one of the submitted questions include the missing element. So, an objection or request by either party preserves the complaint.

The bottom line is that the COAJ recommends that the Supreme Court not adopt a rule or rules allowing an objection to be the sole method of complaining to the court's charge. Rather, we recommend that the present law concerning complaining to the court's charge by request/objection be retained. Further, we recommend the adoption of the enclosed proposal for Rule 272 in order to give the bench and bar a single rule containing the requirements for complaining to the court's charge.

Sincerely,

J. Patrick Hazel
by direction of the COAJ

cc: Justice Nathan Hecht, Supreme Court Liason
Justice David Peeples, Chair of the COAJ

TRCP 273 Jury/Submissions [Preservation of Error In the Charge of the Court]

Each party may present to the court and request written questions, definitions, and instructions to be given to the jury, and the court may give a party them or refuse to give them, as may be proper. Such requests shall be presented and submitted to the court and submitted for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination, and before the charge is read to the jury. A request by either party for any questions, definitions, or instructions shall be made separately and apart from such party's objections to the charge.

[1. An objection made in compliance with Rule 272 shall preserve error in the court's charge, and no party is required to submit in writing any question, instruction, or definition in order to preserve error in the court's charge. No failure by the court to submit a question, instruction, or definition, nor any defect therein, shall be a ground for reversal of a judgment unless the party complaining on appeal made an objection in compliance with Rule 272. Failure of any party to submit a question, instruction, or definition in writing shall never be a waiver of any objection made in compliance with Rule 272.

2. The objections shall be presented to the court in writing or be dictated to the court reporter in the presence of the court and opposing counsel before the charge is read to the jury. All objections not so presented shall be considered waived. It shall be presumed, unless otherwise noted in the

record, that any objections made by a party were presented at the proper time.

3. The court shall announce its rulings on the objections before reading the charge to the jury and shall endorse the rulings on the objections or dictate same to the court reporter on the record in the presence of counsel.

4. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a record for appeal of the rulings of the court on the objections.

5. Compliance or noncompliance with Rule 271(1) shall never constitute waiver of any objection to the court's charge made in compliance with Rules 272 and 273.

6. For purposes of appeal, objections shall be deemed overruled if not ruled on by the court or cured by modification in the court's charge, and no waiver of any objection shall result solely from the absence of an express ruling in the record.]

[COMMENT TO 1990 CHANGE: To place in a single rule all requisites and predicates for appellate review of error in the charge of the court and to eliminate any necessity to request questions, instructions, or definitions in writing for purposes of appeal.]

DAVID G. LEWIS
JUDGE
CARRIE THOMAS
COURT COORDINATOR
SHELLY C. BURNETT
COURT REPORTER

Moore County
Court At Law

P. O. BOX 495
DUMAS, TEXAS 79029
TELEPHONE (806) 935-2440

273

WJH - per my original draft w/ this ltr.

November 20, 1989

Honorable Nathan L. Hecht
Justice, Texas Supreme Court
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, Texas 78711

RE: Proposed change in Rule 273, Texas Rules of Civil Procedure

Dear Justice Hecht:

I have been advised that the above referenced rule is the subject of a substantial change which I view as not in the best interest of justice. As I understand the proposal, the requirement of a tender in writing in substantially correct form to preserve court charge error will be eliminated to some extent. This poses a serious problem for trial judges at a crucial point in the trial.

During this period of time while we are truly in transition to broad form submission of jury questions, a specific written record is vital. Issues that were at one time broken down into component parts are now being "condensed", making requested issues being reduced to writing and submitted to the trial court for ruling essential.

The time when the charge is being prepared has traditionally been one of the least organized periods during the trial. The proposed change would make this already chaotic time an even more impractical stage at which to produce an effective appellate record.

If the only saving grace for the change is to align Texas rules with federal rules, then I suggest and urge that we not change the rule in that manner. I cannot conceive of a reasonable rationale where Texas appellate courts would want a less specific record to review.

We have had a local rule in this district for quite some time that counsel tender to the Court in writing their requested questions and instructions prior to trial. While this does not eliminate all problems in this area, it at least puts us on the same page when we argue.

From the point of view of a judge in the trenches, please do not change Rule 273.

Very truly yours,

David G. Lewis

DGL/ct

xc: Honorable Ray D. Anderson
Presiding Judge
Ninth Administrative Region

Prof. J. Hadley Edgar
Professor of Law
Texas Tech School of Law
Lubbock, Texas

LAW OFFICES OF
PAT MALONEY
PROFESSIONAL CORPORATION

December 4, 1989

Justice Lloyd Doggett
The Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

RE: Proposed Revisions to Texas Rules

Dear Mr. Justice Doggett:

After having reviewed the proposed changes to the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence, I wanted to point out the following less-than-salutary provisions in the rules, as well as the one exemplary provision, all of which are stated below:

The Texas Rules of Civil Procedure:

273 (1):

By not requiring a substantially correct instruction or definition to be submitted in writing by a party desiring the same to be included in the court's charge, this rule would allow sandbagging of the trial court, and permit reversals on inarticulately worded objections, paraphrasings, and attempted quotations of such definitions or instructions to cloud the record. As it currently stands, requiring the tender in writing, in substantially correct form, makes it readily apparent that the trial court had before it had the means available by which to construct a correct charge. This provision and practice should be preserved.

273 (6):

Perhaps the most alarming proposal is the one which would obviate the necessity of obtaining a ruling on all objections and requests. As it is now so very easy to obtain the same, there is absolutely no good reason to delete this requirement. The proposal would allow an appellate court to reverse the trial court based upon something upon which the trial court had never ruled. That practice should be the same to protect trial judges.

Very truly yours,

LAW OFFICES OF PAT MALONEY, P.C.

By: Virgil W. Yanta

TRCP 273

WILLIAM S. LOTT
DISTRICT JUDGE
26TH JUDICIAL DISTRICT
P. O. BOX 45
GEORGETOWN, TEXAS 78627

December 29, 1989

Honorable Nathan L. Hecht
Justice, Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The proposed Amendments to the Texas Rules of Civil Procedure regarding the Court's Charge were discussed by the appellate judges at the September Judicial Conference, but they were not presented to the trial judges. The elimination of the present requirement of submitting in writing in substantially correct form a proposed question or instruction in order to preserve error will create a real hardship on trial judges.

The pressure on the judge at this stage of the trial, with a jury waiting in the jury room, is great enough without the additional burden this will cause. The proposed change will require the judge to rely solely upon objections to the charge rather than being able to consider a proper request as required by the current rules.

Please review these proposed Amendments and, in particular, proposed Rule 273, Subparagraph 1, before they are actually adopted. Every trial judge in Texas will strenuously object to this Amendment in all probability. Your consideration of this will be appreciated.

Sincerely yours,

William S. Lott
District Judge

WSL/djs

CALHOUN COUNTY
DEWITT COUNTY
GOLIAD COUNTY

WHAYLAND W. KILGORE
DISTRICT JUDGE
267TH JUDICIAL DISTRICT
VICTORIA COUNTY COURTHOUSE
VICTORIA, TEXAS 77901

JACKSON COUNTY
REFUGIO COUNTY
VICTORIA COUNTY

TRCP 273

December 5, 1989

Honorable Nathan L. Hecht
Judge, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, TX 78711

Dear Judge Hecht:

I am enclosing herewith a letter that was written by J. Hadley Edgar to Judge Clawson which expresses my sentiments with regard to proposed Rule 273, sub-paragraph 1.

I would like to emphasize that I do not have a law clerk, secretary, or any briefing attorneys. When we reach the stage of the trial regarding preparation of the Charge to the Jury, it would be most unfair to the trial judge not to have the attorneys submit proper questions and definitions. The Court has twelve jurors sitting in the jury room waiting and in my case, I have six counties, and do not know which case is going to trial until the morning of the trial when I have a number of cases set for trial and have not had a opportunity or time to brief the law applicable to the cases, whereas, on the other hand, the attorneys have had the case 6, 12, 18 months and had ample opportunity to brief the case and the law and have proper questions and definitions ready for trial and should be prepared to submit proper jury issues and definitions to the Court at the beginning of trial.

To require the judge to prepare the entire charge and then be sandbagged by verbal objections only as to the charge will cause more reversals, more appeals, and creates problems instead of solving problems, therefore I respectfully request that the rule remain the same and strongly oppose the new change.

Sincerely,

Whayland W. Kilgore

WWK:stw

Enclosure

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

November 14, 1989

TRCP 273

Honorable James F. Clawson, Jr.
Presiding Judge
Third Administrative Judicial Region
Courthouse
P.O. Box 747
Belton, TX 76513-0747

Dear Judge Clawson:

In your capacity as a presiding administrative judge, I urge you to take up the following matter with the trial judges in your region as soon as possible.

On pages 1148-1165 of the November issue of the Texas Bar Journal appear proposed amendments to the Texas Rules of Civil Procedure. Specifically, you will note Rules 271-279 on pages 1157-1162. These specific rules have been reorganized to comply with the actual process employed and I believe that the reorganization and rewording are worthwhile endeavors.

There is one substantive change, however, to which I believe every trial judge would object. It appears in proposed Rule 273, sub-paragraph 1. Basically, it eliminates the requirement of tender in writing in substantially correct form to preserve court charge error to the extent now required. If this provision is adopted, the trial judge will have to rely upon the objections to the charge as the basis for correcting any errors before the case is submitted to the jury. Because of the stage of the trial at which the objections occur, I believe this puts too much pressure on the trial judge. There is no substitute for an instrument in writing to call error to the Court's attention. You might say that my concern is eliminated by the provisions of proposed Rule 271, sub-paragraph 1. However, proposed Rule 273, sub-paragraph 5, expressly provides that non-compliance with proposed Rule 271 [1] shall not form the basis for preservation of error.

The system of requiring tender in writing to complain of error relating to a proponent's question or the failure to submit a definition or instruction has served us well for many years and should not be disregarded without adequate reason.

As a member of the Supreme Court's Advisory Committee, I objected strenuously to this specific change. The only reason which I heard in its favor was to more closely parallel the federal system. With all due respect, the federal district judge has a deputy clerk, secretary, court reporter, and two or three briefing attorneys at constant call while our states judges most often ave to rely upon only a court reporter who frequently has to double as a secretary. Also, the federal system has never taken the charge as seriously as we have.

While the pattern jury charges are of great assistance, we are confronted with many cases that fit no traditional mold--complex business litigation and construction cases to name but two. Also, the relationship between broad form questions and accompanying instructions is still unsettled. To superimpose upon these problems the requirement that the trial judge must rely solely upon the objections to the charge is, in my opinion, unwarranted and will simply increase the existing backlog in our appellate courts and the likelihood of retrials.

This matter was discussed by the appellate judges at the recent judicial conference and certainly should have been presented to the trial judges because they are most directly involved.

After this matter has been studied by the trial judges in your administrative region, I hope that they either attend the November 30, 1989 meeting in Austin or join me in writing each member of the Supreme Court expressing their objection to this specific proposal. Absent any strenuous objections by January 1, this rule will probably become effective April 1, 1990. Therefore, the time is short.

Sincerely yours,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

HAZEL M. PIKE
COURT REPORTER

CHERYL ROSSON
COURT COORDINATOR

LARRY W. STARR, JUDGE
188TH JUDICIAL DISTRICT COURT
GREGG COUNTY
LONGVIEW, TEXAS 75606

P. O. BOX 3651
214-758-6181

21a
271(1)
273
296-298

November 27, 1989

Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to the Texas Rules of Civil Procedure

Dear Judge Hecht:

Please let me plead with you about two aspects of the proposed changes to the Texas Rules of Civil Procedure covered in the latest bar journal. The first concerns the court's charge in jury cases. In proposed Rule 273 we find:

> "...no party is required to submit in writing any question, instruction or definition in order to preserve error in the court's charge....Failure of any party to submit a question, instruction, or definition in writing shall never be a waiver of any objection made in compliance with Rule 272."

Further, although proposed Rule 271(1) provides:

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the statutory effect of this provision is wiped out in proposed Rule 273, as follows:

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I submit that this change in our practice would be counterproductive and ill advised. Charge preparation time is "crunch" time for the trial judge. The jury is waiting. The word processing capability of trial judges in Texas is limited. The trial judge really needs something to look at and ponder. I suggest that this change will allow the parties and their attorneys (even the ones relying on a submission) to sit back and shoot at the trial judge orally rather than to organize their own approach by making written requests in substantially correct form. In the long run litigants will lose from this change. The luckiest litigant is one who has an attorney who prepares his jury questions, instructions, and definitions before he drafts his first petition or answer, before he does his discovery, before he selects a jury, and before he closes his evidence. Certainly no one would fault an attorney for making some modifications in his charge material before or during "crunch" time. But to inspire young attorneys to sit back and orally shoot from the hip while the trial judge presents his masterpiece is sheer nonsense.

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> "...A copy of the notice shall also be provided to the judge who tried the case by any method allowed in Rule 21a."

Please don't encourage people to send things to a judge under Rule 21a. Judges are not mail clerks or even filing clerks and ordinary mail should suffice.

Sincerely,

Larry W. Starr

Larry W. Starr

LWS:cr

Riddle & Brown

Phillip W. Gilbert
Board Certified — Civil Trial Law
Texas Board of Legal Specialization

21b 166 6a(d) 213 223 296

November 22, 1989

Attorneys and Counselors

A Professional Corporation
2100 Olympia & York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 220-6300
263-6423 (Metro)
(214) 220-3189 (Telecopier)
(214) 220-6414 (Direct Dial)

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

Finally, I would like to applaud the proposed revisions to the rules related to "findings of fact and conclusions of law" and related to "objections to the court's charge". These changes should promote the review of genuine error by "removing traps for the unwary". Our system should discourage erroneous rulings and promote substance over form. Most of these proposals work to that end.

Sincerely,

Phillip W. Gilbert

PWG/vlb1036

OLIVER S. KITZMAN
DISTRICT JUDGE
155th JUDICIAL DISTRICT
836 AUSTIN - Rm. 307
HEMPSTEAD, TEXAS 77445
AREA CODE 409/826-3357 - EXT. 132

REPORTER
M. A. BAKER, JR.

WALLER COUNTY
HEMPSTEAD, TEXAS

AUSTIN COUNTY
BELLVILLE, TEXAS

ADMINISTRATOR
LOIS R. RAFFERTY

FAYETTE COUNTY
LaGRANGE, TEXAS

November 27, 1989

273
Original proposed
language attached

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Rule 273

Dear Justice Hecht:

This is to urge the continued requirement of Rule 273 that requested questions, definitions and instructions be in writing.

Charge preparation, in final form, calls upon all the skill of the judge. Without the candid and clearly stated proposals of the trial attorneys the possibility of error in the charge is, of course, increased. The availability of trial counsels' best efforts on the charge necessarily reduces the time required for charge preparation.

When attorneys prepare anticipated charge requests in writing, they simultaneously become better prepared for trial. That, of course, benefits everyone having an interest in the case.

Sincerely,

Oliver S. Kitzman

OSK:lrr

ascosa County
Jourdanton

Wilson County
Floresville

nty
Pearsall

Karnes County
Karnes City

La Salle County
Cotulla

218th Judicial District
Robert Lee Eschenburg II
DISTRICT JUDGE

WILSON COUNTY COURTHOUSE
P.O. BOX 236
FLORESVILLE, TEXAS 78114

OFFICE 512-393-7326

HOME 512-393-6800

273(1)

November 22, 1989

The Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments to the Texas Rules of Civil Procedure

Dear Sirs:

I am writing in regard to the proposed amendment to Rule 273, sub-paragraph 1. I object to the elimination of the requirement of a tender in writing of any requested matter in the court's charge. I believe that a trial judge has enough problems in trying to conduct an errorless trial, without having the increased burden of trying to understand an oral objection to the charge.

Yours truly,

Robert Lee Eschenburg, II

RLE/jg

Third Administrative Judicial Region

OF TEXAS

REPLY TO:
Judge Robert C. Wright
Senior Judge 137th District Court
538 Pecan Creek Drive
Oak Ridge Estates
Marble Falls, Texas 78654

Telephone
512-598-6692

Nov 22, 1989

273(1)

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Proposed Amendment to Rule 273 Sub para 1 TRCP.

Dear Judge Hecht-

If you have not already received a letter in the nature of a "position paper" from Professor Hadley Edgar of the Texas Tech School of Law, you may rather soon. The other Justices of the Court will do so shortly.

Professor Edgar points out, with particularity, the flaw in the proposed change of Rule 273 Sub paragraph 1 TRCP.

I do not feel it necessary to repeat what the professor says in his letter of objection to the Court; of course however you find him in the said objection and adopt his reasoning and likewise strenuously object to its passage.

Please list me in the column opposing any change to the present rule.

Very truly yours,
Robert C Wright
Senior Dist Judge

00371

PAT BOONE, JR.
JUDGE 154TH JUDICIAL DISTRICT
P. O. BOX 632
LITTLEFIELD, TEXAS 79339
BOBBY G. ROGERS, COURT REPORTER
TELEPHONE 385-3313

November 17, 1989

273

The Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Re: Proposed Rule 273, TRCP

Dear Justice Hecht:

Please do not, with the new rules, abandon the very workable system requiring a litigant to submit substantially correct written instructions or questions for the court's charge, to the extent that the same arise from his burden of proof, as a predicate to assignment of error in the Court's charge.

While the proposal takes justification as a step bringing the State practice closer to the Federal one, I do not bow before the Federal system, and see only that the effect would be a widening of the field for reversible error.

If the aim is to require trial judges to undertake more in preparation of charges, the new rule might well be effective. But I do wonder who is better equipped to prepare what may be a very complex and detailed charge: the trial judge whose get-acquainted time starts running with the answer of "ready" to the call for trial, or the trial attorney who has studied the case for months?

Please don't do it.

Yours very truly,

Pat Boone Jr.

Pat Boone, Jr.

/s

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

November 14, 1989

273 (1)

The Honorable Nathan L. Hecht
Justice, Supreme Court
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Nathan:

Re: Proposed Tex.R.Civ.P. 273, paragraph 1

I regret that I will be unable to attend the meeting to be held on November 30, 1989, at which time a conference on the proposed rules will be held (Texas Bar Journal, November 1989, p. 1147). However, I wish to take this opportunity to object strenuously to the adoption of paragraph 1 of proposed Rule 273.

Basically, this provision would eliminate the requirement of tender in writing in substantially correct form to preserve court charge error to the extent now required. If it is adopted, the trial judge will have to rely upon the objections to the charge as the sole basis for correcting any errors before the case is submitted to the jury. Because of the stage of the trial at which the objections occur, I believe this puts too much pressure on the trial judge. There is no substitute for an instrument in writing to call error to the court's attention. You might say that my concern can be eliminated by the provisions of proposed Rule 271, paragraph 1. However, proposed Rule 273, paragraph 5, expressly provides that non-compliance with proposed Rule 271 [1] shall not form the basis for preservation of error.

The system of requiring tender in writing to complain of error relating to a proponent's question or the failure to submit a definition or instruction has served us well for many years and should not be disregarded without adequate reason.

As a member of the Supreme Court's Advisory Committee, I objected strenuously to this specific change. The only reason which I heard in its favor was to parallel more closely the federal system. With all due respect, the federal district judge has a deputy clerk, secretary, court reporter, and two or three briefing attorneys at constant call while our state judges most often have to rely upon only a court reporter who frequently has to double as a secretary.

While the pattern jury charges are of great assistance, we are being confronted with more and more cases that fit no traditional mold--complex business litigation and construction cases to name but two. Also, the relationship between broad form questions and accompanying instructions is still unsettled. To superimpose upon these problems the requirement that the trial judge must rely solely upon the objections to the charge to be protected from reversals is, in my opinion, unwarranted and will simply increase the existing backlog in our appellate courts and the likelihood of retrials.

I urge the court to reject this specific proposal.

Sincerely yours,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

Antonio A. Zardenetta
DISTRICT JUDGE
[illegible] JUDICIAL DISTRICT
LAREDO, TEXAS

P. O. Box 29 - 78042
A/C (512) 721-2670

November 28, 1989

273

Hon. Nathan L. Hecht
Justice, State Supreme Court
Supreme Court Building
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

In reviewing the cover issue of the November Texas Bar Journal, pages 1148-1165, I noticed that there were some proposed amendments to the Texas Rules of Civil procedure; specifically, Rules 271-279 on pages 1157-1162. The reorganization and rewording of these Rules is certainly worthwhile and commendable. There is, however, one substantive change as it appears in proposed Rule 273, sub-paragraph 1, which essentially eliminates the requirement of tender in writing in substantially correct form to preserve court charge error to the extent now required. If this provision is adopted, trial judges will have to rely upon the objections to the charge as the basis for correcting any errors before the case is submitted to the jury. Under the proposed Rule, there would be no instrument in writing to call error to the Court's attention.

It could be said that this concern is eliminated by the provisions of proposed Rule 271, sub-paragraph 1. However, proposed Rule 273, sub-paragraph 5 expressly provides that non-compliance with proposed Rule 271 (1) shall not form the basis for preservation of error. The system of requiring tender in writing to complain of error relating to a proponent's question or the failure to submit a definition or instruction has served us well for many years, and I feel that this system should not be disregarded without an adequate reason to do so.

I respectfully recommend and suggest that the requirement of tender in writing in substantially correct form to preserve Court

charge error should be retained and that any attempt to eliminate it should be disregarded without in any way affecting the reorganization and rewording of Texas Rules of Civil Procedure 271-279.

Sincerely,

ANTONIO A. ZARDENETTA

Z/eem.

CHARLES E. LANCE
DISTRICT JUDGE
P.O. BOX 728
CAMERON, TEXAS 76520
(817) 697-2651

LEOLA L. KOMAR
DISTRICT CLERK
P.O. BOX 999
CAMERON, TEXAS 76520
(817) 697-3952

TWENTIETH JUDICIAL DISTRICT

COUNTY OF MILAM

CAMERON, TEXAS
76520

NANCY L. HANCOCK
COURT REPORTER
P.O. BOX 742
CAMERON, TEXAS 76520
(817) 697-2651

BUDDY SHIPP
COURT COORDINATOR
P.O. BOX 742
CAMERON, TEXAS 76520
(817) 697-2651

November 27, 1989

The Honorable Nathan L. Hecht
Justice, Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Proposed Amendments to the Rules of Civil Procedure

Dear Justice Hecht:

I am writing to voice my objection to the proposed change to the Rules of Civil Procedure, Rule 273, sub-paragraph 1. This change would eliminate the requirement to tender in writing, in substantially correct form, a proposed court charge in order to preserve error to the extent now required.

If this provision is adopted, I would have to rely upon the oral objections made at trial to correct any errors before the case is submitted to the jury. Frankly, this would put undue additional pressure on me. As a small country town district judge, I do not have a secretary or bailiff much less a briefing attorney.

The system of requiring tender in writing to complain of error in a jury question or the failure to submit a definition or instruction has served us well for many years and should not be changed.

Thanking you for your kind consideration, I remain

Very truly yours,

Charles E. Lance
District Judge

19TH DISTRICT COURT
McLENNAN COUNTY COURTHOUSE
WACO, TEXAS 76701

BILL LOGUE, JUDGE

STANLEY A. SANDERS
OFFICIAL COURT REPORTER

November 28, 1989

273

Justice Nathan Hecht
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

By this time I'm sure you have received letters from many of the trial court judges of Texas expressing their opposition to the proposed change in Rule 273 of the Texas Rules of Civil Procedure.

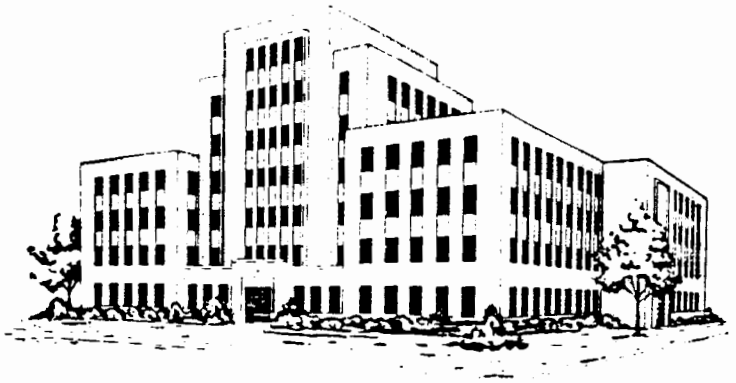
I, too, want to express my opposition to the proposed change. I don't think there's any question that if the change were adopted the possibility of error in the Court's charge would be greatly increased. Most of the trial court judges have limited staff to assist them at this very vital stage in the trial of a lawsuit.

It would appear to me that it is not asking too much to require an instrument in writing to set forth any alleged error in the Court's charge. My feeling is that "if it ain't broke don't fix it". Rule 273 "ain't broke".

Sincerely,

Bill Logue

BL/mew



LUBBOCK COUNTY

LUBBOCK, TEXAS

273

November 30, 1989

The Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

RE: Proposed Rule 273

Dear Sir:

We, the Board of Judges of Lubbock County, Texas, are writing to you to voice our opposition to proposed Rule 273 of the Texas Rules of Civil Procedure. By taking out the requirement that each side may present their instructions or questions in writing before the charge is read to the jury, you are placing an additional burden on the trial judges and their limited staff.

In Lubbock County we do not have secretaries for each court, law clerks or personnel to prepare our charges for us. Our court reporters have the responsibility of preparing the civil charges, and this change would place additional responsibilities on an already overtaxed system.

The charge is a very important part of any civil trial; and to change a system that seems to be working, unless there is a problem with that system, does not seem to be efficient. Please reconsider the changes to Rule 273 from the standpoint of trial judges who have a very limited staff.

Sincerely,

BRADLEY S. UNDERWOOD, JUDGE
364th District Court

JOHN R. McFALL, JUDGE
237th District Court

WILLIAM R. SHAVER, JUDGE
140th District Court

CECIL G. PURYEAR, JUDGE
137TH District Court

THOMAS L. CLINTON, JUDGE
99th District Court

J. BLAIR CHERRY, JR., JUDGE
72nd District Court

00379

COUNTY COURT AT LAW NO. 2
SECOND FLOOR
McLENNAN COUNTY COURTHOUSE
501 WASHINGTON AVENUE
WACO, TEXAS 76701

PHONE (817)757-5030

MARYTOM ECHTERHOFF
OFFICIAL COURT REPORTER

KIMBERLY REINKE
COURT ADMINISTRATOR

MICHAEL B. GASSAWAY
JUDGE

November 22, 1989

273

Justice Nathan Hecht
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

I am writing to you in regard to the proposed changes of the Rules of Civil Procedure, more specifically the change suggested in Rule 273, Subparagraph 1. It is my understanding that this change would eliminate the requirement of a civil attorney to propose in writing in substantially correct form any suggested changes to the Court's charge.

I am sure that you understand that the trial courts of the State of Texas are not provided with any type of support staff to brief the proper wording of charge issues, nor are they provided any type of secretarial support. Because of this, it is impossible to expect the trial judges of the State of Texas to prepare correct charging instruments without the requirement that the attorneys submitting the issues do so in written form.

I am sure that you share with me the belief that the trial system in Texas should be formulated so that issues are tried fairly and correctly without undue gamesmanship. Your suggested change which would allow civil attorneys to "lay behind the log" would do nothing but increase appellate court burdens, and would do nothing toward insuring that each side receive a fair trial in an economical fashion.

I urge you to reconsider this change, and I believe it is an extremely important issue that you should consider fully before allowing this change to take effect.

Sincerely yours,

Michael B. Gassaway

MBG/me

74TH DISTRICT COURT
McLENNAN COUNTY COURTHOUSE
WACO, TEXAS 76701

DERWOOD JOHNSON, JUDGE

LILLIAN BRUCE McDONALD
OFFICIAL COURT REPORTER

November 21, 1989

JB

Justice Nathan Hecht
Supreme Court building
P. O. Box #12248
Austin, Texas, 78711

Dear Justice Hecht:

I would like to express my opposition to a proposed change to Rule 273 of the Texas Rules of Civil Procedure. This change would eliminate the present requirement that attorneys tender to the trial judge in writing in substantially correct form any question, definition or instruction which the attorney seeks to have included in the courts charge.

If this change were adopted it would increase the possibility of error in the preparation of the charge and it would increase the pressure on the trial judge at a critical stage of the trial. There is no substitute for an instrument in writing to call error to the court's attention.

I am sending letters to each member of the Supreme Court expressing my opposition and I urge that you and the other Justices reject this proposed change.

Sincerely yours,

Derwood Johnson

DJ:LBW

RAY D. ANDERSON
District Judge
Terry County Courthouse
Office Phone (806) 637-7742
Brownfield, Texas 79316

121ST JUDICIAL DISTRICT
Terry County
Yoakum County

OFFICIAL COURT REPORTER
Jamie Altum
806 / 637-6958

COURT ADMINISTRATOR
Tammy Boen
806 / 637-7742

271
273

November 22, 1989

Honorable Nathan L. Hecht
Justice of Supreme Court
P.O. Box 12248, Capitol Station
Austin, Tx 78711

Dear Justice Hecht:

After reviewing the proposed amendments to the Texas Rules of Civil Procedure which appeared in the November issue of the Bar Journal, I did note one proposed change which I hope you will reconsider.

The proposed Rule 273, subparagraph one eliminates the requirement of submitting in writing any question, instruction or definition in order to preserve error in the court's charge. This rule has always been a big help to me as a trial judge, particularly in complicated cases, and I would hate to see it change.

Most trial judges have limited, if any, clerical help and do not have briefing attorneys to assist them in preparing charges. In my opinion this change would increase the number of appeals and greatly increase the backlog in our appellate courts. It would probably also cause more reversals and retrials in the trial court.

It might be argued that Rule 271, subparagraph one eliminates the problem, however, proposed Rule 273 subparagraph five expressly provides that noncompliance with proposed Rule 271 subparagraph one shall not form the basis for preservation of error. This seems to take the meat out of 271, subparagraph one.

TRCP ~~279~~. [275. Grounds or Elements] ~~Omi$$i$$[tted]~~ From the Charge

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted are waived unless objected to in compliance with Rule 272. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without objection in compliance with Rule 272, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

[COMMENT TO 1990 CHANGE: Former Rule 279 has been renumbered Rule 275.]

275

MEMORANDUM

To: Justice Hecht

From: Rob Gilbreath and Geno Borchardt

Date: November 9, 1989

Re: Proposed changes to Tex. R. Civ. P. 275

We respectfully suggest that Rule 275 be changed by deleting the underlined words in the following sentence: "A claim that the evidence is legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict. . . ." A properly requested question must be submitted in the charge even if the evidence upon which it is based is factually insufficient. Strauss v. LaMark, 366 S.W.2d 555 (Tex. 1964); Imperial Insurance Co. v. Ellington, 498 S.W.2d 368 (Tex. Civ. App. -- San Antonio 1973, no writ); Smith v. Christley, 755 S.W.2d 525 (Tex. App. -- Houston [14th Dist.] 1988, writ denied). One commentator has leveled an especially cogent criticism at the language in question:

> The addition of "or factually" is unfortunate, and will contribute to confusion, and perhaps, lead some into making spurious objections. As observed, one can complain that there is no evidence to warrant submission, but not that there is factually insufficient evidence to do so. The trial court must submit, even though the answer will be against the great weight and preponderance of the evidence or supported by factually insufficient evidence. This being true, objections to submission on those bases are meritless, and may contribute to a charge of "numerous, unfounded" objections. It is most unfortunate, therefore, that the new rule itself now suggests that such objections have merit, but may be made for the first time after verdict . . .

Muldrow, Objections to the Charge, in State Bar of Texas, Advanced Appellate Advocacy D-14 (Oct. 1987). The Texas Supreme Court Advisory Committee meeting minutes indicate that no change to the established law was intended by the insertion of "or factually" into the rule. Minutes at 5-8 (Sept. 13, 1986). As such, our proposed change would reform Rule 275 to reflect the current status of the law.

TRCP 271 Charge ŧø [of] the ĵŭŕŷ [Court]

[1. The court may order any party to submit proposed jury questions, instructions, and definitions at any reasonable time for the convenience of the court.]

[2. In all jury cases,] Ø[u]nless expressly waived by the parties, [at the conclusion of the evidence,] the trial court shall prepare and ĺń/ǿƿǿń/ǿǿŭŕŧ deliver a written charge to the ĵŭŕŷ [parties, signed by the court, and filed with the clerk, and the charge so filed shall be a part of the record of the case.]

[3. The court shall submit the questions and instructions and definitions raised by the written pleadings and the evidence. The court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The placing of the burden of proof may be accomplished by instruction rather than by inclusion in the question.

4. Inferential rebuttal questions shall not be submitted in the charge.

5. The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

6. The court shall not submit other and various phases or different shades of the same question.

7. In any cause in which the jury is required to apportion the loss among the parties, the court shall submit a question or questions inquiring what percentage, if any, of the negligence or

causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the parties found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the party injured. The court may predicate the damage question or questions upon affirmative findings of liability.

8. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party.

9. The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

10. Nothing herein shall change the burden of proof from what it would have been under a general denial.]

[COMMENT TO 1990 CHANGE: The jury charge rules are entirely rearranged to follow better the order of proceedings in the trial court, to provide means for counsel to assist the court in preparing the charge, to place together the formal requisites of

the charge, and to provide that the charge prepared by the court be signed and filed prior to objections. The court may modify its prepared charge as provided by Rule 272(5).]

TRCP 272 Requisites [Objections to the Charge of the Court]

The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal, and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.

[1. The charge, prepared by the court and filed pursuant to Rule 271, shall be submitted to the respective parties or their attorneys for their inspection and the court shall allow them reasonable time in which to examine and present objections to the charge and to assign error pursuant to Rule 273 outside the presence of the jury.

2. Each party may object to the charge. A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that clearly points out the portion of the charge to which complaint is made and is specific enough to support the conclusion that the trial court was fully aware of the ground of complaint and chose to overrule the objection.

3. When the complaining party's objection to a question, definition, or instruction is obscured or concealed by voluminous unfounded objections, minute differentiations, or numerous unnecessary requests, such objection or request shall be a nullity.

4. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

5. The court may modify the charge of the court at any time before it is read to the jury or as provided in Rule 286.]

[COMMENT TO 1990 CHANGE: To provide procedures and requisites for objecting to the charge of the court.]

TRCP 273 Jury/Submissions [Preservation of Error In the Charge of the Court]

Each party may present to the court and request written questions, definitions, and instructions to be given to the jury, and the court may give them or any part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge.

[1. An objection made in compliance with Rule 272 shall preserve error in the court's charge, and no party is required to submit in writing any question, instruction, or definition in order to preserve error in the court's charge. No failure by the court to submit a question, instruction, or definition, nor any defect therein, shall be a ground for reversal of a judgment unless the party complaining on appeal made an objection in compliance with Rule 272. Failure of any party to submit a question, instruction, or definition in writing shall never be a waiver of any objection made in compliance with Rule 272.

2. The objections shall be presented to the court in writing or be dictated to the court reporter in the presence of the court and opposing counsel before the charge is read to the jury. All objections not so presented shall be considered waived. It shall be presumed, unless otherwise noted in the

record, that any objections made by a party were presented at the proper time.

3. The court shall announce its rulings on the objections before reading the charge to the jury and shall endorse the rulings on the objections or dictate same to the court reporter on the record in the presence of counsel.

4. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a record for appeal of the rulings of the court on the objections.

5. Compliance or noncompliance with Rule 271(1) shall never constitute waiver of any objection to the court's charge made in compliance with Rules 272 and 273.

6. For purposes of appeal, objections shall be deemed overruled if not ruled on by the court or cured by modification in the court's charge, and no waiver of any objection shall result solely from the absence of an express ruling in the record.]

[COMMENT TO 1990 CHANGE: To place in a single rule all requisites and predicates for appellate review of error in the charge of the court and to eliminate any necessity to request questions, instructions, or definitions in writing for purposes of appeal.]

TRCP/274//Objections and Requests

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection;// Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading; is waived unless specifically included in the objections; //When the complaining party's objection//or requested question//definition//or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections;//minute differentiations or numerous unnecessary requests;//such objection or requests shall be untenable;//No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only;

[COMMENT TO 1990 CHANGE: The provisions of Rule 274, to the extent they remain viable, have been relocated to Rules 272 and 273.]

TRCP ~~273~~ [274] Charge [of the Court to be] Read [to the Jury] Before Argument

[After ruling on all objections, and] ~~B~~[b]efore the argument is begun, the trial court shall [complete the charge and] read the [entire] charge to the jury in the precise words in which it ~~was/written~~ [is completed], including all questions, definitions, and instructions/~~which/the/court/may/give~~.

[COMMENT TO 1990 CHANGE: Derived from former Rule 275]

TRCP/275//Charge/Read/Before/Argument

Before/the/argument/is/begun//the/trial/court/shall/read/the charge/to/the/jury/in/the/precise/words/in/which/it/was/written/ including/all/questions//definitions//and/instructions/which/the court/may/give/

[COMMENT TO 1990 CHANGE: The substance of former Rule 275 has been renumbered Rule 274]

TRCP 279. [275. Grounds or Elements] Omissions[tted] From the Charge

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted are waived unless objected to in compliance with Rule 272. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without objection in compliance with Rule 272, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

[COMMENT TO 1990 CHANGE: Former Rule 279 has been renumbered Rule 275.]

TRCP 276 Refusal/or/Modification [Repealed.]

When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall indorse thereon "Refused," and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows:" (starting in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

[COMMENT TO 1990 CHANGE: Rule 276 was repealed to eliminate the necessity for submitting written questions, instructions, or definitions as a predicate for perfecting appeal except as required by paragraph 5 of Rule 273.]

TRCP 277 Submission to the Jury [Repealed.]

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

In any cause in which the jury is required to apportion the loss among the parties, the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers. But the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their

answers when it is properly a part of an instruction or definition.

[COMMENT TO 1990 CHANGE: The provisions of former Rule 277 have to the extent they remain viable been relocated to Rule 271.]

TRCP 278 Submission of Questions, Definitions, and Instructions

[Repealed]

The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence, except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment, provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

[COMMENT TO 1990 CHANGE: The provisions of former Rule 278, to the extent they remain viable, have been relocated to Rule 271.]

TRCP 279. Omissions From the Charge

[Repealed]

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

[COMMENT TO 1990 CHANGE: The substance of former Rule 279 has been renumbered Rule 275]

STATE BAR OF TEXAS

4543.001

hjh
Lm
1-9-90
SB

TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

The Committee on the Administration of Justice has reviewed the Supreme Court Advisory Committee's proposed rule changes. We believe that the vast majority of the proposals are sound and should be approved. We have a few suggestions to make, which fall into these four categories: (1) alternate proposals for rules 21a and 166, (2) criticism of proposed rules 271-275, (3) recommendation that TRAP 90 remain unchanged, and (4) the highlighting of various inadvertent errors in the wording of several of the rules.

2. Criticism of proposed rules 271-275.

The committee voted unanimously (20-0) to oppose proposed rules 271-275, which would replace present rules 271-279. Although we think the reorganization of these rules is a worthwhile change, we offer the following observations about changes in substance.

A. Proposed rules 271-275 are not the product of the SCAC's usual deliberative process. The proposed revisions of rules 271-275 were first seen and discussed at the August 12, 1989 meeting, at which they were modified and approved for

submission to the supreme court. They were drafted by Professor Hadley Edgar, who was unable to attend the August 12 meeting and therefore could not participate in the discussion.

The provisions of the proposed rules that change existing law concerning the duty to request questions and instructions in writing were drafted spontaneously at the August 12 meeting and were approved at that same meeting. Previous SCAC drafts of these rules were proposals to rearrange--but to change only slightly--the existing rules concerning when to object and when to request in writing. Only thirteen voting members attended the August 12 meeting. The revision of Professor Edgar's proposed rules 271-275 took place so quickly that proposed rule 272(3) still contains two references to "requests," even though the on-the-spot re-drafting of the rules had eliminated the duty to request from the rules and required only an objection.

We submit that rules which have existed since 1941 should not be changed so quickly, at least when there is no demonstrated need for such quick action.

B. The proposed rules deny trial courts the opportunity to see requests for questions and instructions in writing. Instead the court must listen to oral objections and assess them without being able to study anything in writing. Thus the proposals ignore the wise observations of this court in Woods v. Crane Carrier Co., 693 S.W.2d 377, 379 (Tex. 1985):

> Anyone who has ever participated in the drafting of a court's charge will comprehend and respect the efficacy of the rule requiring requested issues and instructions to be in

> writing in spite of the rule's preference for form over substance. The sometimes prolificacy of requested issues and instructions and the myriad of interruptions and occasional confusion inherent in the charge conference mandates that all requests be in writing. Phrasing of issues and instructions requires the judge's careful consideration which is possible only upon reading and rereading of the requests. To expect a judge, after hearing oral and lengthy requests just once, to weigh their merits for inclusion in a charge ignores realities.

C. The proposals might contribute to delay at the charge conference by encouraging lawyers to try to preserve error by simply making objections orally. Presently, most lawyers prepare in writing the grounds of recovery and defense that they are really serious about. Under the present rules there are, of course, instances in which lawyers delay trial by writing out their requests at the last minute. But under the proposed rules those lawyers would simply cause the same amount of delay, or more, by making last-ditch objections.

D. Recent rule changes concerning the submission of jury questions have sought to reduce appeals and reversals for charge error. The proposed rules would encourage appeals and possibly reversals by making it easier to throw in last minute objections designed to preserve possible charge error in the event of an unfavorable verdict.

E. The proposed rules [rule 271(1)] authorize trial courts to "order" parties to submit their requests, but the rules attach absolutely no consequences to a party's failure or refusal to do so. See rule 273(1) and (3). Thus the rules

further weaken trial courts by removing the only existing consequence that occurs when a lawyer does not assist the court by submitting requested jury questions and instructions in writing--waiver of omitted grounds of recovery or defense.

F. There has been no credible suggestion that the existing rules are not working or that they are causing any kind of injustice to anyone. It has been suggested that the use of broad-form jury questions makes it harder to know whether to object or tender in writing. But Scott v. Atchison, Topeka, & S.F. Ry., 572 S.W.2d 273, 278 (Tex. 1978), answered that question a decade ago, holding that an objection is sufficient when the complaint about a broad issue could be cured by rewording the question itself or by adding an instruction. Moreover, broad-form questions have long been used in non-personal injury cases, and there has been no problem concerning when to object and when to tender.

In any event, we see no justification for eliminating the present requirement that when the charge completely omits a ground of recovery or defense, the ground is waived unless the party who relies on the ground tendered it to the court in writing. The proposed rules would allow a lawyer to sandbag the trial judge by waiting until the charge had been typed and xeroxed, and then while the jury waited, preserve error on an unsubmitted ground by merely objecting. The trial court would have to evaluate the objection without seeing it in writing, and if the judge decided to submit the matter, all would have to

wait for it to be typed in proper form. Our rules should not enable lawyers to delay trials and sandbag trial judges in that manner.

G. We are in the process of modifying rules 271-275 to retain the SCAC's reorganization but reincorporate existing law regarding preservation of error.

COURT OF APPEALS

FOURTH SUPREME JUDICIAL DISTRICT
500 BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

TELEPHONE
(512) 220-2635

January 18, 1990

1/30 HJH — Agenda

Prof. J. Hadley Edgar
Texas Tech University
School of Law
Lubbock Texas 79409-0004

Re: Proposed changes to rules 271-275

Dear Professor Edgar:

Thank you for your letter of January 15 concerning the SCAC's proposed changes to rules 271-275.

The last thing the COAJ wanted to do was give the supreme court the erroneous impression that the SCAC's final version was yours, which would thereby lend the prestige of your authorship to what we think is an unwise and ill-considered proposal. What we tried to say was this: Professor Edgar reorganized the rules and then the SCAC, acting in great haste and in his absence, changed his version on the spot and did away with the requirement of tender. As I read section "A" of our report (at pages 4-5) it tries to say that, but upon rereading it I can see how one would miss our intended meaning. As the primary author of our report, I apologize for not being clearer and I regret that the impression that you got may have been unintentionally communicated to anyone else.

If you want to clear this matter up with anyone, please feel free to use this letter or else let me know what else I can do.

Sincerely yours,

David Peeples

David Peeples

cc: Justice Nathan L. Hecht
Mr. Luther H. Soules III
Mr. Doak Bishop

4543.001

1-17-90

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

January 15, 1990

Honorable David Peeples
Justice, Fourth Court of Appeals
500 County Courthouse
San Antonio, Texas 78205

Re: Proposed changes to Rules 271-275

Dear Judge Peeples:

Luke Soules has forwarded to me a copy of the December 18, 1989, letter which the Committee on Administration of Justice directed to the Supreme Court.

In that letter the committee erroneously credits me with the proposed changes to Rules 271-275. While I am the subcommittee chairman responsible for these rules, these particular changes did not originate in my subcommittee nor did they go through the normal subcommittee process.

Your letter correctly states that I was unable to attend the August 12 meeting of the Advisory Committee. The record of that meeting will also reflect that I wrote a letter to Mr. Soules favoring the general reorganization of the Rules 271-275 but that I was personally strenuously opposed to the proposal that an objection only would preserve error to the Court's charge as contained in proposed Rule 273[1]. The reasons for my concern were and still are basically the same as reflected in your December 18 letter to the Court.

I join you and your committee in hoping that the Court will not adopt this change.

Sincerely yours,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

cc: Honorable Nathan L. Hecht
Mr. Luther H. Soules III
Mr. Doak Bishop

00407

DON E. WITTIG
JUDGE, 125TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002

(713) 221-5577

December 11, 1989

TRCP 273
276
278
166a

PERSONAL AND CONFIDENTIAL

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Allow me to express my profound and vehement objection to proposed changes to Rules 273, 276, and 278, Texas Rules of Civil Procedure, and a not so strenuous but significant objection to proposed changes to Rule 166a, T.R.C.P.

At this writing, the average civil trial court in Houston has 2167 cases pending. Each court tries between 30 and 100 jury trials per year, including mostly complex litigation. The negative impact of allowing a party in complex civil litigation to orally submit questions, instructions, and definitions (as is the practice in small claims court) cannot be overstated. There can be only two logical reasons for this rule change: First, the attorney is taking up the court and jury's time without knowing in advance what his proposed questions are going to be. The second group, to be more concerned with, is the "sharp" attorney who purposely presents an oral rendition of a needed question, instruction, or definition to a judge in the charge conference solely and purposefully for the intent of obtaining reversal. Neither of these methods should be condoned.

The Harris County civil trial judge, unlike his federal counterpart, has no secretary, no briefing attorney, and is grossly understaffed by district clerk personnel who are overwhelmed with thousands of documents to be filed on a weekly basis.

The proposed change potential for abuse is immense. It ignores decades of custom and practice and is designed to geometrically increase appellate case loads throughout the state. The proposal would lengthen the time and expense of trial. An oral submission is inherently ambiguous, inherently unintelligible, and, as is the well-known practice, will be buried in voluminous, some pertinent and some impertinent, objections by counsel.

We are not here dealing with the relatively simple criminal case or a simple fender bender.

Where in the charge will the oral submissions be placed? What will be the question numbers of the oral submissions? Must the wording be substantially correct? Must the oral question include correctly worded oral instructions and definitions? With the court and court reporter now working until 9:00 p.m. to redraft the charge in accordance with oral modifications, is the court to then give counsel a second opportunity to make further objections, make further oral modifications, ad infinitum?

My objections to proposed changes to 166a, though not as vehement, are serious. Once again, I'm sure your Court is aware of the volume that the metropolitan judges face. I hear approximately 10 summary judgments per week which together with discovery practice already take up close to 35 percent of my time. To allow summary judgment evidence to include by reference matters not on file with the clerk presents an onerous burden on the court and its staff, already taxed beyond reasonable limits. Why should the trial court be faced with rendering judgment on records less accurate than appellate courts? We need to leave most of these rules alone, and this one ain't broke and doesn't need fixing.

In closing, let me observe as a trial specialist with 24 years' experience, that we continue to create instability in the law and traps for the average and even above-average practitioner. The hardship it works on parties is incalculable. Change in the law and its rules should be a thoughtful, gradual, and a judicious process. The myriad of proposed changes has a tendency to bring disrepute to the law and the profession as unwise, whimsical, and unwarranted change for the sake of change.

~~Cordially~~ and fraternally yours,

Don E. Wittig

DEW:mm

cc: Thomas R. Phillips, Chief Justice
Justice Raul Gonzalez
Justice Eugene A. Cook

COUNTIES - FOURTH ADMINISTRATIVE JUDICIAL REGION:

ARANSAS
ATASCOSA
BEE
BEXAR
CALHOUN
DEWITT
DIMMIT
FRIO
GOLIAD
JACKSON
KARNES
LASALLE
LIVE OAK
MAVERICK
MCMULLEN
REFUGIO
SAN PATRICIO
VICTORIA
WEBB
WILSON
ZAPATA
ZAVALA

JOHN CORNYN
Presiding Judge
FOURTH ADMINISTRATIVE JUDICIAL REGION
37TH DISTRICT COURT
Bexar County Courthouse
San Antonio, Texas 78205

LESLIE MURRAY
Administrative Assistant
(512) 220-2908
(512) 220-2515

December 5, 1989

TRCP 271-273

Mr. Nathan L. Hecht
Justice of the Supreme Court of Texas
Chairman of Committees on Rules of Procedure
Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

The undersigned District Judges of Bexar County giving preference to civil cases wish to express strong opposition to proposed Rules 271-273 of the Texas Rules of Civil Procedure, which eliminate the requirement of written submission of requested questions, definitions and instructions in order to preserve error. Existing rules require a more careful and deliberate approach by attorneys which greatly aid the trial judges in the preparation of the charge. The proposed changes would add to the burden of trial courts at a point in the trial when the pressures of trial are already at a peak.

We appreciate the valuable contribution made by the Supreme Court's Advisory Committee on the recommended amendments to the Texas Rules of Civil Procedure, but urge the Court to reject this particular change.

Thank you very much for your attention and consideration.

Respectfully submitted,

John Cornyn
JOHN CORNYN

Carol R. Haberman
CAROL HABERMAN

CHARLES GONZALEZ

ANDY MIRELES, 73RD DISTRICT COURT

ROSE SPECTOR, 131ST DISTRICT COURT

CARLTON SPEARS, 150TH DISTRICT COURT

PETER MICHAEL CURRY, 166TH DISTRICT COURT

CAROLYN SPEARS, 224TH DISTRICT COURT

JOHN J. SPECIA, 225TH DISTRICT COURT

MIKE PEDEN, 285TH DISTRICT COURT

RAUL RIVERA, 288TH DISTRICT COURT

cc: Justices of the Supreme Court
Mr. Luke Soules

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

ERNEST REYNOLDS III

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-2807
ATTORNEY'S DIRECT DIAL
877-2852

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271-279
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TRCP 614

November 21, 1989

Honorable Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

As I noted above, there seems to be a substantial amount of concern about proposed changes to procedural rules 271 through 279. On a personal basis, I would absolutely urge and implore every member of the supreme court to refrain from implementing these proposed changes until further study can be done in a way that would allow broad participation, and full opportunity for comment. I do not believe that the present notice and comment procedure is always adequate to insure reasoned, well considered, and generally satisfactory and acceptable change. Certainly the notice and comment procedure is an important safeguard, but in situations where proposed changes would be perceived as being of great importance and significance, and might be perceived by some as being radical, it seems appropriate to allow for a process of consideration and debate concerning the proposals which generally allows more time, and allows the involvement of more people, than is possible under the notice and comment format.

I have above noted my reservations about the proposed changes to procedural rules 271 through 279. It is clear from a reading of the proposed changes that mainly what we see is the result of an attempt to edit and condense existing rules, but it also appears that there are some substantive changes. Justice Hecht, as you have pointed out in your recent article in The Advocate, putting together the charge may be a "crisis point" in a lawsuit, and it is always a difficult and significant part of the lawsuit. In view of this, and in view of the legitimate concern that many people who practice law appear to be expressing about the proposed changes to these procedural rules I urge the court to refrain from adopting any change in the text of these rules at the present time; but, in view of changes in practice in recent years, and in view of the on-going work in this connection by various PJC committees, and in view of the need to further edit and refine our existing rules to make them more usable, and in an attempt to reach the laudable goals which you have set out in your recent article in The Advocate, my suggestion would be for the court to allow a process of consideration of this group of rules (the ones appearing at 271 through 279) so that when change is made, if it is, it can be made after a vigorous and thorough investigation and debate, and we will see a type of change that will be fair to everyone and that everyone will feel comfortable with

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271-279

POWELL POPP & IKARD

ATTORNEYS AT LAW

707 WEST TENTH STREET

AUSTIN, TEXAS 78701

TELEPHONE 512 473-2661

FACSIMILE 512 479-8013

M. FRANK POWELL
JAMES POPP
WILLIAM IKARD

G. WALTER McCOOL
PATRICIA L. SESSA

WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

7. TRCP 271-279. I certainly hope the court will give strong consideration for the prospects of what it will be like to assemble a charge if you abolish the second half of current Rule 278. That rule now requires that before there can be a complaint of error, when the burden of proof rests with one party, that party must tender a substantially correct issue or instruction. New Rule 273 provides "failure of any party to submit a question, instruction or definition in writing shall never be a waiver of any objection made in compliance with Rule 272." You are going to be asking a lot of trial judges. While you say that the trial judge can require parties to submit proposed charges and instructions, you say that failure to do so is not error. I guess that means it is only punishable by contempt. But, assuming that lawyers cooperate and do furnish written instructions and the like, we may be forcing the party who does not have the burden to object and state a substantially correct instruction to preserve error in the case. Moreover, the whole idea of oral objections because they don't state such-and-such issue or instruction really places an onerous burden on the trail judge. Let me point out language I wrote for the court in Woods v. Crane Carrier Co., Inc., 693 S.W.2d 377 (Tex. 1985):

> Anyone who has ever participated in the drafting of a court's charge will comprehend and respect the efficacy of the rule requiring requested issues and instructions to be in writing in spite of the rule's preference for form over substance. The sometimes prolificacy of requested issues and

> instructions and the myriad of interruptions and occasional confusion inherent in the charge conference mandates that all requests be in writing. Phrasing of issues and instructions requires the judge's careful consideration which is possible only upon reading and rereading of the requests. To expect the judge, after hearing oral and lengthy requests just once, to weigh their merits for inclusion in a charge ignores realities.

Id. at 379. I respectfully submit that by allowing attorneys to dictate objections to the charge in which they say the charge is erroneous because it contains or doesn't contain certain language is not fair to the trial judge. I might add, that in my conversations with Professor Hadley Edgar, that he, too, has expressed his opposition to the proposed amendments having to do with preservation of error in respect to the court's charge.

I trust you will not consider me presumptuous for having written this letter, but I was a part of the rule making process for too long not to be concerned with the course that the rules take. I regret that the court has not chosen to honor my request to you that I be placed on the advisory committee. I really believe I am capable of making a valuable contribution. On the other hand, I respect the fact that a majority of the court members can put whoever they like on that committee.

Sincerely,

William W. Kilgarlin

WWK:ep

cc: The Honorable Franklin S. Spears
The Honorable C. L. Ray
The Honorable Raul Gonzalez
The Honorable Oscar H. Mauzy
The Honorable Eugene Cook
The Honorable Jack Hightower
The Honorable Nathan Hecht
The Honorable Lloyd Doggett
Mr. Luther H. Soules, III

TRCP 296. Conclusions of Fact and Law

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 shall be entitled REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW and shall be filed with the clerk of the court who shall immediately call such request to the attention of the judge who tried the case. Notice of the filing of such request shall be served on the opposite party as provided in Rule 21a.

[TRCP 296. Requests for Findings of Facts and Conclusions of Law

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 shall be entitled REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW and shall be filed with the clerk of the court who shall immediately call such request to the attention of the judge who tried the case.

Time for Filing. Such request shall be filed within twenty (20) days after judgment is signed.

Notice of Filing. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a. The party making the request shall also provide a copy of the request to the judge who tried the case by any method allowed in Rule 21a.]

[COMMENT TO 1990 CHANGE: To better prescribe the practice and times for findings of fact and conclusions of law. See also Rules 297 and 298.]

TRCP 297. Time to File Findings and Conclusion

When demand is made thereafter, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment is signed. Such findings of fact and conclusions of law shall be filed with the clerk and shall be part of the record. If the trial judge shall fail so to file them, the party so demanding, in order to complain of the failure, shall, in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.

[TRCP 297. Time to Make and File Findings of Facts and Conclusions of Law.

(a) The court shall make and file its findings of fact and conclusions of law within twenty (20) days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

(b) If the court fails to make timely findings of fact and conclusions of law, the party making the request shall, within thirty (30) days after filing the original request, file with the clerk a NOTICE OF PAST DUE FINDINGS OF FACT AND CONCLUSIONS OF LAW which shall be immediately called to the attention of the Court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due.

(c) Upon filing the notice in (b) above, the time for the court to make findings of fact and conclusions of law is extended to forty (40) days from the date the original request was filed.

(d) The notice provided by this rule shall be served on each party to the suit in accordance with Rule 21a. A copy of the notice shall also be provided to the judge who tried the case by any method allowed in Rule 21a.]

[COMMENT TO 1990 CHANGE: To better prescribe the practice and times for findings of fact and conclusions of law. See also Rules 296 and 298.]

TRCP 298. Additional or Amended Findings

After the judge so files original findings of fact and conclusions of law, either party may, within five days, request of him specified additional or amended findings, and the judge shall, within five days after such request, prepare and file such further or amended findings and conclusions as may be proper. Where upon the filing of the findings of fact and conclusions as filed in due time, Notice of the filing of the requested findings provided for herein shall be served on the opposite party as provided in Rule 21a or 21b.

[TRCP 298. Additional or Amended Findings of Fact and Conclusions of Law; Notice.

(a) After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions, or both. The request for these findings shall be made within ten (10) days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a. The party making the request shall also provide a copy to the judge who tried the case by any method allowed in Rule 21a.

(b) The court shall make and file any additional or amended findings and conclusions within ten (10) days after such request is filed, and cause a copy to be mailed to

each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional orders or conclusions.]

[COMMENT TO 1990 CHANGE: To better prescribe the practice and times for findings of fact and conclusions of law. See also Rules 296 and 298.]

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman
Supreme Court Rules Advisory Committee

January 15, 1990

RE: Rule 296, Texas Rules of Civil Procedure
Request for Findings of Fact and Conclusions of Law (1 page)

Proposed amended Rule 296, Texas Rules of Civil Procedure, provides in one paragraph:

> Time for filing. Such request shall be filed within twenty (20) days after judgment is signed.

The rule does not address the problem of how to treat a request filed before the judgment is signed. One might read the rule very strictly and mandatorily to say that a request filed before the judgment is signed is simply ineffectual. Also, inasmuch as other related time periods -- when findings and conclusions must be filed (20 days after request is filed), when notice of past due findings and conclusions must be filed (30 days after original request was filed), when extended period for filing ends (40 days after original request was filed), when request for additional or amended findings and conclusions must be filed (10 days after original findings and conclusions are filed, and when additional or amended findings and conclusions must be filed (10 days after any request for them is filed) -- are governed by this filing date, it is possible that all deadlines could occur before the judgment is ever signed. Although the filing of findings and conclusions could precede signing the judgment as easily as follow it, counsel might not anticipate such circumstances and fail to act in a timely manner.

We have had to contend with this same problem of premature filing in other contexts: Rule 41(c), Texas Rules of Appellate Procedure (prematurely filed document to perfect appeal); proposed amended Rule 130(b), Texas Rules of Appellate Procedure (prematurely filed application for writ of error). Perhaps we should deal with it similarly in Rule 296 by adding a sentence immediately following the language quoted above as follows:

> A request filed prior to the signing of the judgment shall be deemed to have been filed on the date the judgment is signed.

The Court has requested the Committee's counsel on this matter.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
→ TRCP 296
TRCP 4
TRAP 51
TRAP 90
TRAP 20

TRAP 4
TRAP 4
TRAP 5
TRAP 13
TRAP 5
TRAP 4
TRAP 9
TRAP 4
TRAP 7

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

B. Effect of filing a request for findings of fact and conclusions of law. The proposed amendments provide that a request for findings of fact and conclusions of law is to be filed within 20 days of judgment after a nonjury case. Tex. R. Civ. P. 296. If one is timely filed, the appellate timetable is extended the same as if a motion for new trial is timely filed. Tex. R. App. P. 41(a)(1) & 54(a).

The impetus seems to be to give appellants' attorneys time to get the findings and conclusions in hand, so that they can assess realistically the desirability of an appeal. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989), *overruling Garcia v. Kastner Farms, Inc.*, 761 S.W.2d 444 (Tex. App.--Corpus Christi 1988).

Nonetheless, the comment to the proposed new rule states only that the amendment is "[t]o make the appellate timetable for non-jury cases conform more to that in jury cases," without further elaboration. This comment is somewhat mystifying, because a motion for new trial could be filed in either a jury or a nonjury case. And there are problems that caselaw will have to resolve. For example, what if a party does not make a timely reminder and fails to obtain any findings or conclusions--is the timetable still extended? A motion for new trial is overruled by operation of law if the trial court doesn't act; a request for findings and conclusions can simply be ignored if there's not a timely reminder.

What if a request is filed in a case in which a request is inappropriate (such as a summary judgment case)--is the timetable still extended? A motion for new trial can be so deficient that it should be overruled as a matter of law, but it still operates to extend the timetable. *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 533-34 (Tex. App.--Corpus Christi 1989, n.w.h.). On the other hand, a motion for new trial in an interlocutory appeal is totally ineffective to do anything. *See Leone v. S. Nordhaus Co., Inc.*, 678 S.W.2d 129, 130 (Tex. App.--San Antonio 1984, no writ) (on mot. for reh'g). A request in a summary judgment case, if analogized to a legally deficient motion, would extend the timetable, but, if analogized to a motion filed in the wrong kind of case, would not. The draft rule does not give much guidance.

The clerks' office will have to be instructed to file in any transcript showing a request for findings and conclusions filed within 20 days of the judgment when the transcript is timely under the 90/120-day timetable. We can't risk the clerks refusing to file a transcript as untimely when it might in fact be timely.

Regards,

Craig T. Enoch
Chief Justice

HAZEL M. PIKE
COURT REPORTER

CHERYL ROSSON
COURT COORDINATOR

LARRY W. STARR, JUDGE
188TH JUDICIAL DISTRICT COURT
GREGG COUNTY
LONGVIEW, TEXAS 75606

P. O. BOX 3651
214-758-6181

21a
271(1)
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296-298

November 27, 1989

Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

RE: Proposed Amendments to the Texas Rules of Civil Procedure

Dear Judge Hecht:

The second aspect of my plea to you has to do with the trial judge's time, access and availability to receive documents and instruments. Increasingly, we see "ten dollar" envelopes brought into our offices and courtrooms which have to be receipted for. I get more and more "certified" and "registered" mail which must be signed for, sometimes with restricted delivery. Proposed Rules 296, 297 and 298 provide:

> "...A copy of the notice shall also be provided to the judge who tried the case by any method allowed in Rule 21a."

Sincerely,

Larry W. Starr

Larry W. Starr

LWS:cr

21b 166 6a(d)
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Riddle & Brown

Phillip W. Gilbert
Board Certified — Civil Trial Law
Texas Board of Legal Specialization

Attorneys and Counselors

A Professional Corporation
2100 Olympia & York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 220-6300
263-6423 (Metro)
(214) 220-3189 (Telecopier)
(214) 220-6414 (Direct Dial)

November 22, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

Finally, I would like to applaud the proposed revisions to the rules related to "findings of fact and conclusions of law" and related to "objections to the court's charge". These changes should promote the review of genuine error by "removing traps for the unwary". Our system should discourage erroneous rulings and promote substance over form. Most of these proposals work to that end.

Sincerely,

Phillip W. Gilbert

PWG/vlb1036

TRCP/305///Draft

/////Counsel/of/the/party/for/whom/a/judgment/is/rendered/shall

prepare/the/form/of/the/judgment/to/be/entered/and/submit/it/to

the/court/

[TRCP 305. Proposed Judgment

Any party may prepare and submit a proposed judgment to the court for signature.

Each party who submits a proposed judgment for signature shall serve the proposed judgment on all other parties and certify thereon that a true copy has been served on each attorney or pro se party to the suit and indicate thereon the date and manner of service.

Failure to comply with this rule shall not affect the time for perfecting an appeal.]

[COMMENT TO 1990 CHANGE: To better prescribe the practice for proposed judgments and notice to other parties.]

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

Local Rules Sub
20 to
TRAP
Rule

November 22, 1989

TRCP 13
305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

7

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

R 305

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell

WHH:wh cc: Ret.

00426

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

ERNEST REYNOLDS III

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-2807
ATTORNEY'S DIRECT DIAL
877-2852

166 b
200
614
271-279
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TRCP 614
TRE 703

November 21, 1989

Honorable Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

The proposed changes for procedural rule 305 appear problematic. Certainly the goal of giving advance notice of a proposed judgment seems on the surface to be meritorious, but does this mean that nobody, for example, could take a default judgment? Does it mean that we do not trust a trial court to carefully review a judgment and make sure that the judgment is proper in form and substance before it is entered? My thought is that before it is adopted, the proposed change to procedural rule 305 needs further and careful consideration so that the interrelation of this proposed change with other procedural rules will be fully understood and so that any potential problems that might arise from the adoption of change to procedure rule 305 can be anticipated and prevented through making any necessary further refinements in the proposed new language.

TRCP 308a. In [a Suit Affecting the Parent-Child Relationship] Child Support Cases

In cases where the court has ordered periodical payments for the support of a child or children, as provided in the statutes relating to divorce, and it is claimed that such order has been disobeyed, the person claiming that such disobedience has occurred shall make same known to the judge of the court ordering such payments. Such judge may thereupon appoint a member of the bar of that court to advise with and represent said claimant. It shall be the duty of said attorney, if the attorney in good faith believes that said order has been contemptuously disobeyed, to file with the clerk of said court a written statement, verified by the affidavit of said claimant, describing such claimed disobedience. Upon the filing of such statement, or upon its own motion, the court may issue a show cause order to the person alleged to have disobeyed such support order, commanding that person to appear and show cause why they should not be held in contempt of court. Notice of such order shall be served on the respondent in such proceedings in the manner provided in Rule 21a, not less than ten days prior to the hearing on such order to show cause. The hearing on such order may be held either in term time or in vacation. No further written pleadings shall be required. The court, the parties and the attorneys may call and question witnesses to ascertain whether such support order has been disobeyed. Upon a finding of such disobedience, the court may enforce its judgment by orders as in other cases of civil contempt.

/////Except /with /the /consent /of /the /court/ /no /fee /shall /be charged/by/or/paid/to/the/attorney/representing/the/claimant/for any /services/ //If /the /court /shall /be /of /the /opinion /that /an attorney/s/fee/shall/be/paid/ /the/same/shall/be/assessed/against the/party/in/default/and/collected/as/costs/

[When the court has ordered child support or possession of or access to a child and it is claimed that the order has been violated, the person claiming that a violation has occurred shall make this known to the court. The court may appoint a member of the bar to investigate the claim to determine whether there is reason to believe that the court order has been violated. If the attorney in good faith believes that the order has been violated, the attorney shall take the necessary action as provided under Chapter 14, Family Code. On a finding of a violation, the court may enforce its order as provided in Chapter 14, Family Code.

Except by order of the court, no fee shall be charged by or paid to the attorney representing the claimant. If the court determines that an attorney's fee should be paid, the fee shall be adjudged against the party who violated the court's order. The fee may be assessed as costs of court, or awarded by judgment, or both.]

[COMMENT TO 1990 CHANGE: This rule has been completely rewritten and designed to broaden its application to cover problems dealing with possession and access to a child as well as support.]

E. Jack Lawrence, III
LEGAL ASSISTANT • EDUCATOR
5570 WINFREE DRIVE
BEAUMONT, TEXAS 77705
~~643-4049~~ (409) 833-0894
November 20, 1989

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2b
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Justice Nathan L. Hecht

Texas Rules of Court Conference

Dear Justice Hecht:

I would like to offer the following comments on the Proposed Amendments to the Texas Court Rules:

6. TRCP 308a. One other possible solution could involve allowing the court to appoint a Special Master in Family Law if this could avoid unnecessary fees, or duplication of effort where there is already a Master available with prior knowledge of the matter.

308a

"RULE 308a. IN A SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

"When the court has ordered child support or possession of or access to a child and it is claimed that the order has been violated, the person claiming that a violation has occurred shall make this known to the court. The court may appoint a member of the bar to investigate the claim to determine whether there is reason to believe that the court order has been violated. If the attorney in good faith believes that the order has been violated, the attorney shall take the necessary action as provided under Chapter 14, Family Code. On a finding of a violation, the court may enforce its order as provided in Chapter 14, Family Code.

"Except by order of the court, no fee shall be charged by or paid to the attorney representing the claimant. If the court determines that an attorney's fee should be paid, the fee shall be adjudged against the party who violated the court's order. The fee may be assessed as costs of court, or awarded by judgment, or both."

12/5

This was a typo in transcription and has been corrected on Original.

Tiny Luke

TRCP 534. [Issuance and Form of] Citation

[a. Issuance.] When a claim or demand is lodged with a justice for suit, he [the clerk when requested] shall [forthwith] issue forthwith [a] citations [and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition if any is filed.] for the defendant or defendants/ //The citation shall require the defendant and answer plaintiff's suit at or before 10:00 o'clock a.m. on the Monday next after the expiration of ten days from the date of service thereof//and shall state the place of holding the court/ It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. The citation shall further direct if it is not served within 90 days after date of its issuance, it shall be returned unserved/ [Upon request, separate or additional citations shall be issued by the Clerk.]

[b. Form. The citation shall (1) be styled "The State of Texas, (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition if any is filed, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11)

contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of ten days after the date of service thereof. The requirement of subsections 10 and 12 of this rule shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of ten days after you were served this citation and petition, a default judgment may be taken against you.

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.]

[COMMENT TO 1990 CHANGE: To conform justice court service of citation to the extent practicable to conform to service of citation for other trial courts.]

RICHARD F. (RIC) WILLIAMSON
State Representative
District 63
Counties:
Cooke • Parker • Wise

☐ P.O. Box 2910
Austin, Texas 78768-2910
512-463-0738

☐ P.O. Box 1179
Weatherford, Texas 76086
817-599-8363

State of Texas
House of Representatives
Austin

Staff:
Gregory D. Watson
Administrative Assistant
House Committees:
Appropriations
(Vice Chairman)
Local & Consent Calendars
Ways & Means
Statewide Boards:
Legislative Budget Board
Automated Information
and Telecommunications
Council

December 20, 1989

TRCP 534 536

The Honorable Nathan L. Hecht
Justice
Supreme Court
STATE OF TEXAS
Supreme Court Building
Austin, Texas

RE: PROPOSED AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

Dear Justice Hecht:

Recently, Justices-of-the-Peace from throughout the 63rd House District have contacted me concerning some of the proposed changes to the Texas Rules of Civil Procedure, indicating that such proposed changes might drive up the justice court cost to both county government and the citizens that you and I serve.

I have carefully considered, for example, the arguments set forth in a letter to you dated November 29, 1989 from Justices-of-the-Peace Glen Densmore, Suzie Markley and Faye Murphree of Parker County. I find their objections to be both persuasive and defensible.

I trust that you and your colleagues will consider that the decisions that you make have a bearing on the rate of property taxation in our state. In addition, I find that Justices-of-the-Peace tend to be in close contact with the everyday citizen in Texas at a level that suggests that Justices-of-the-Peace know the thinking of the everyday citizen concerning such issues as encumbering the legal process with unnecessary steps.

Thank you for considering my thoughts on this matter. With every best wish for Happy Holidays, I do remain very

Respectfully,

RICHARD F. WILLIAMSON
State Representative

RFW/gdw

00434

OFFICE OF

WALTER H. RANKIN, CONSTABLE

PRECINCT NO. 1, HARRIS COUNTY

HOUSTON, TEXAS

6

534

536

November 28, 1989

References to Rule numbers and their page numbers are as reflected in the November 1989 Texas Bar Journal.

TRCP 534. (Issuance and Form of) Citation Page 1163, 1164

... The party requesting citation shall be responsible for obtaining service of the citation...

COMMENT: Previously, this was a mute point. Through an established procedural process the citations are sent to the Constables or Sheriffs office for service. The flow of the process would be expedited if the Justice of the Peace could deliver the service directly to the Constable or Sheriff. This would also eliminate lost processes. Once out of the court's possession, tracking the service would become impossible with this new proposal.

TRCP 534. (Issuance and Form of) Citation Page 1164

... The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved. ...

COMMENT: The above sentence is marked for deletion. We suggest reinstating the 90 days. Deleting the 90 day issuance will clog the Justice of the Peace Court system by creating a backlog of unservicable citations. Many of these citations are not able to be served because the people filing in the Justice Courts lack the knowledge of experience needed to obtain the information necessary to provide the officer so that proper service may be obtained. Since the 90 days has been changed in other trial courts, history has indicated that those courts with outstanding unserved process have a backlog of cases without any information. Until the service is returned with attempts documented by the officer, the court can take no further action in that case. This is why we oppose the 90 expiration for Justice Court papers and would prefer it be reinstated for all processes. This can be a valuable tool in relieving the backlog of civil cases.

PAUL HEATH TILL
JUSTICE OF THE PEACE
PRECINCT 5, POSITION 1
6000 CHIMNEY ROCK, SUITE 102
HOUSTON, HARRIS COUNTY, TEXAS 77081
TELEPHONE: 713/661-2276

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739 et seq
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November 28, 1989

The Honorable Justice Nathan L. Hecht
Texas Supreme Court
Rules Advisory Committee
P. O. Box 12248
Austin, Texas 78711

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

In response to the proposed changes in the Texas Rules of Civil Procedure, as published in the November issue of the State Bar Journal, I respectfully request that the Rules Advisory Committee consider the following comments.

PROPOSED RULE CHANGE 534 - CITATION

This section, which deals with the modification in the citation procedure for the Rules of Practice in Justice Court, presents the court with a dilemma in that there is no seal of the court for the justice court. I have, before these rules were published, requested Representative Eckels to propose legislation to create a seal for justice courts (copy enclosed). Nevertheless, at this time, there is no seal for the justice court. I am not requesting that this be deleted, but that the provision somehow be reserved until the legislation has passed.

Upon reading the proposed changes in Rule 534, I find that section to read in part: "and shall be dated and signed by the justice of the peace." while later the same rule states that citation shall be signed by the clerk under seal of court. It would appear by reading the entire context of the rule that the proposed revision would require that the citation will now have to be signed by the justice of the peace and the clerk of the court. If such be the case, I respectfully request that the language be changed to reflect that the justice of the peace not be required to sign the citation.

County of Cooke

County Judge 668-5436
County Commissioners
Precinct No. 1 665-5674
Precinct No. 2 726-3390
Precinct No. 3 665-9216
Precinct No. 4 759-4423
County Attorney 668-5459
County Clerk 668-5420
Tax Assessor-Collector 668-5426
Auto & Title Division 668-5427
County Treasurer 668-5423
County Auditor 668-6431
County Veteran's Service Office 668-5436

235th District Judge 668-5451
235th District Clerk 668-5450
Child Support Division 668-5448
235th District Attorney 668-5466
Justice of the Peace, pct. 1-pl. 1 668-5460
Justice of the Peace, pct. 1-pl. 2 668-5463
Justice of the Peace, pct. 2 665-1625
Justice of the Peace, pct. 4 726-3539
Emergency Medical Service 665-1012
County Sheriff 665-3471
County Health Unit 668-5454
County Library 668-2401

Gainesville, Texas

534

536

November 29, 1989

Honorable Nathan L. Hecht
Texas Supreme Court
Austin, Texas

Dear Justice Hecht,

I would like to register my opposition to some of the purposed rule changes in the Texas Rules of Civil Procedure.

In regard to the changes in rule 534 I would like to make the following comments. The change would require that citations issued in the justice court be signed by the clerk of the court and under the seal of the court. Many justice courts do not have a clerk and all justice courts are courts without seals. Therefore, it would be impossible for the clerk to sign the citation under the seal of the court. The purposed changes in Rule 534 also requires written answers be filed in all cases and all pleadings would be in writing. I believe this would effectively do away with the image of the justice court in Texas being the people's court. My strongest objection to the changes in Rule 534 is the change concerning service of the citation. The change would allow the requesting party to obtain service. The court would not have any authority over who serves the citation.

In regard to the changes in Rule 536 I would like to make the following comment. The manner in which citations are now being served is working satisfactorily and any change in the rule would be a attempt to repair something that is not broken.

I appreciate your taking time from your busy schedule to consider my comments concerning the changes in the rules. I am dedicated to the improvement of the judicial system in Texas as I know you are. If I can be of any assistance in the future please let me know.

Sincerely yours,

Bill Freeman
Justice of the Peace
Courthouse
Gainesville, Texas 76240

0043

PRECINCT I, PLACE 2
(409) 835-8467

VI McGINNIS
JUSTICE OF THE PEACE

1001 PEARL STREET
BEAUMONT, TEXAS 77701

534
536
536a

November 29, 1989

Hon. Nathan L. Hecht
Texas Supreme Court
Austin, Texas

Dear Justice Hecht:

I would like to take this opportunity to object to the proposed amendments for Rules 534 and 536 (which pertain strictly to justice courts).

The proposed amendments to Rule 534 would basically make the provisions of current Rule 99 apply to justice courts. They remove the authority of the judge to sign citations, requiring instead that the clerk shall sign the citations "under seal of court." Justice courts do not have clerks in the same meaning of the word as county and district courts; in fact, approximately one-third of Justices of the Peace in Texas do not have any clerical help. Additionally, there has never, heretofore, been a requirement that justice courts utilize a seal, and there is no form proscribed for a justice court seal. This part of the amendments is in conflict with Rule 533 which requires that all process issued by justice courts be signed by the justice personally.

The amendments also basically mandate written pleadings to institute a suit and written answers, which conflicts with Rule 525 which states that pleadings in justice court shall be oral (except where otherwise specially provided). I am of the opinion that adopting these amendments would have a negative impact on the way justice courts have always functioned.

Rule 534 as it is currently written serves the justice courts (and litigants using the courts) well and I urge you to reject the proposed amendments.

PARKER COUNTY
Weatherford, Texas 76086

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534
536

November 29, 1989

Honorable Nathan L. Hecht
Texas Supreme Court
Austin, Texas 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

We would like to take this opportunity to comment on three proposed amendments to the Texas Rules of Civil Procedure.

TRCP 534. Issuance and Form of Citation

The comment printed in the Bar Journal for this amendment states that its purpose is to "conform justice court service of citation to the extent practicable to service of citation for other courts"; however, it does quite a bit more than that.

Firstly, subsection a. states that when a suit is filed, " ... the clerk ... shall forthwith issue citation ... ." Approximately one-third of Justices of the Peace in Texas, including two here in Parker County, do not have a clerk.

Subsection a. goes on to say that the clerk will then "... deliver the citation to the requesting party. The party requesting citation shall be responsible for obtaining service of the citation ... ." This is clearly a move to provide for private process servers in J.P. court, which we oppose for reasons that will be stated in our comments on the proposed amendments to Rule 536.

Secondly, subsection b.(2) states, The citation "shall be signed by the clerk under seal of court." This removes the authority of the judge to sign the citation, and is in direct conflict with Rule 533 which states that all process issued by justice courts shall be signed by the justice personally. Justice courts do not have clerks in the same meaning of the word as district and county courts. Nor is there any legal authority for them to do so. HB488, passed in the 1989 regular session, did authorize a J.P. to designate one or more persons to serve as "clerks of the justice court", but a J.P. is under no requirement to do so. Furthermore, there has never been any requirement for justices of the peace to use a seal, nor is there a form for any such seal prescribed by law.

Thirdly, subsection b.(12) directs the defendant to file a "written answer." This is an extremely significant deviation from the historical operation of justice courts. Currently, defendants in justice courts do not have to make a written answer to any type of suit except those enumerated in Rule 93. To require written answers is putting a burden on the defendant that, in many instances, is going to mandate the services of an attorney, which would negatively impact on the historical character of justice courts being a place where the average citizen can have a problem adjudicated without the necessity of seeking legal counsel.

Fourthly, subsection d. basically mandates written pleadings by the plaintiff, in direct conflict with Rule 525. It reads, "The party filing any pleading upon which citation is to be issued and served shall (emphasis added) furnish the clerk with a sufficient number of copies thereof for use in serving the parties ... ." How can a copy be furnished by the plaintiff if the pleadings are not written?

For all these reasons, we are strongly opposed to all the amendments proposed for Rule 534 and urge the Supreme Court to leave the rule as it is.

TRCP 534

10. There is no ending quotation mark.

11. For parallel structure, strike "the" as indicated.

TRCP 534. [Issuance and Form of] Citation

[a. Issuance.] When a claim or demand is lodged with a justice for suit, ~~he~~ [the clerk when requested] shall [forthwith] issue ~~forthwith~~ [a] citations [and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition if any is filed.] ~~for the defendant or defendants. The citation shall require the defendant to appear and answer plaintiff's suit at or before 10:00 o'clock a.m. on the Monday next after the expiration of ten days from the date of service thereof, and shall state the place of holding the court.~~ It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. ~~The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.~~ [Upon request, separate or additional citations shall be issued by the Clerk.]

(10) [b. Form. The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition if any is filed, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of ten days after the date of service thereof. The requirement of subsections 10 and 12 of this rule shall be in the form set forth in section c of this rule.

(11)

c. Notice. The citation shall include the following notice to the defendant: 'You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of ten days after you were served this citation and petition, a default judgment may be taken against you.

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.]

[COMMENT TO 1990 CHANGE: To conform justice court service of citation to the extent practicable to conform to service of citation for other trial courts.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRCP 536. ~~Special Process Server~~ [Who May Serve and Method of Service]

~~The justice, in case of an emergency, may depute any person of good character to serve any process, and the person so deputed shall for such purpose have all the authority of a sheriff or constable, but in every such case the justice shall indorse on the process a statement in writing, signed by him officially, to the effect that he has deputed such person to serve such process. Such person shall also take and subscribe an affidavit, to be indorsed on or attached to the process, to the effect that he will to the best of his ability execute the same according to the law and these rules.~~

[(a) 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.

(b) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by this rule by:

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto if any is filed.

(c) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service:

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.]

[COMMENT TO 1990 CHANGE: To conform justice court service of citation to the extent practicable to conform to service of citation for other trial courts.]

RICHARD F. (RIC) WILLIAMSON
State Representative
District 63

Counties:
Cooke • Parker • Wise

☐ P.O. Box 2910
Austin, Texas 78768-2910
512-463-0738

☐ P.O. Box 1179
Weatherford, Texas 76086
817-599-8363

State of Texas
House of Representatives
Austin

Staff:
Gregory D. Watson
Administrative Assistant

House Committees:
Appropriations
(Vice Chairman)
Local & Consent Calendars
Ways & Means

Statewide Boards:
Legislative Budget Board
Automated Information
and Telecommunications
Council

December 20, 1989

534
TRCP 536

The Honorable Nathan L. Hecht
Justice
Supreme Court
STATE OF TEXAS
Supreme Court Building
Austin, Texas

RE: PROPOSED AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

Dear Justice Hecht:

Recently, Justices-of-the-Peace from throughout the 63rd House District have contacted me concerning some of the proposed changes to the Texas Rules of Civil Procedure, indicating that such proposed changes might drive up the justice court cost to both county government and the citizens that you and I serve.

I have carefully considered, for example, the arguments set forth in a letter to you dated November 29, 1989 from Justices-of-the-Peace Glen Densmore, Suzie Markley and Faye Murphree of Parker County. I find their objections to be both persuasive and defensible.

I trust that you and your colleagues will consider that the decisions that you make have a bearing on the rate of property taxation in our state. In addition, I find that Justices-of-the-Peace tend to be in close contact with the everyday citizen in Texas at a level that suggests that Justices-of-the-Peace know the thinking of the everyday citizen concerning such issues as encumbering the legal process with unnecessary steps.

Thank you for considering my thoughts on this matter. With every best wish for Happy Holidays, I do remain very

Respectfully,

RICHARD F. WILLIAMSON
State Representative

RFW/gdw

00443

OFFICE OF
WALTER H. RANKIN, CONSTABLE
PRECINCT NO. 1, HARRIS COUNTY
HOUSTON, TEXAS

November 28, 1989

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536

TRCP 536. (Who May Serve and Method of Service) Page 1164

...[(a) 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...

COMMENT: We request all service of process be directed to any Sheriff or Constable only, regardless of the method of serivce; personal, mailing, publication, or other substituted service. We are of the opinion that the Sheriff or Constable is the only disinterested party. His primary objective is to serve as an officer of the court and perform his functions without bias.

By allowing all service to be performed by Constables or Sheriffs, those counties with large volumes which have established automated tracking systems can offer even better service. The officers who perform this service professionally have an advantage over part-time civilians.

BILL BAILEY, CONSTABLE
PRECINCT NO. 8, HARRIS COUNTY
7330 SPENCER HIGHWAY PASADENA, TEXAS 77505
713/479-2525

November 29, 1989

The Honorable Eugene A. Cook
Justice Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

RE: Service of Citation by Persons Not Deputies

Dear Justice Cook:

The Supreme Court of Texas, under authorization of Rule-making power granted by the Legislature, has an amendment to Texas Rule of Civil Procedure 536. This change would knock out the "emergency" under the Rule now in effect and cancel considerably the reasons expressed favoring law enforcement officers in the case of Lawyers Civil Process, Inc. v. State, 690 S.W.2d 939 (Tex. App., Dallas, no writ). Constables and Sheriffs take pride in being elected to office and given the opportunity to serve the people of the community who elected them. Throwing a part of the work officers are elected to do, and bound to do under their Constitutional oath of office, is not in the best interests of the litigating citizens nor of the Courts. A law enforcement officer is trained to do service of citations. Such training is not necessarily used for a private process server. Neither is a private person bound by a Constitutional oath.

Moreover, every fee earned by a Deputy goes immediately into the County Treasury for payment of, among other things, Judge's salaries, other County employee salaries, and operational expenses of the County. That does NOT happen with a fee paid to a private process server. The County Treasury NEVER sees it. That fee goes into the bank account of the private process server and is of NO BENEFIT to the County for payment of its operational expenses.

Harris County is on a JIMS (Justice Information Management System) network. The Constable of Precinct One gets all citations and enters information into the computer.

Then, when the citation is forwarded to the Constable in whose precinct a defendant is found, THAT CONSTABLE enters the particular Deputy handling the process. At any time a Court Clerk, a Judge, or a law enforcement officer can run the process up on a computer and find out what is holding up service of the process. Private Process servers are not hooked up to JIMS--and NOBODY knows what they are doing until they make return to the Court, served or not served.

Additionally, some people being served with process are bad actors. They tend to take out their frustrations on the person serving them. They seldom over-react when a Deputy serves them--THAT DEPUTY MAY BE ARMED! An unarmed private individual is not authorized to bear an arm and cannot lawfully do so. The public peace is maintained when a law enforcement officer serves process-even to bad guys.

The professional, state licensed officer, acting as an officer of the Court, has as his goal "good service". One can only guess the motive for non-professional service. The word "profit" comes immediately to mind.

Finally there is the issue of fairness. Have the Justices of the Peace of Texas had problems with Rule 536? Where is the documentation of the widespread problem? Shouldn't our association have some input into the formation of rule changes? We think so.

As President of the Justices of the Peace and Constables Association of Texas, I respectfully ask that Rule 536 be left unchanged.

Sincerely,

Bill Bailey
President,
Justices of the Peace and
Constables Association of
Texas

BB:jc

County of Cooke

County Judge 668-5436
County Commissioners
Precinct No. 1 665-5674
Precinct No. 2 726-3390
Precinct No. 3 665-9216
Precinct No. 4 759-4423
County Attorney 668-5459
unty Clerk 668-5420
x Assessor-Collector 668-5426
Auto & Title Division 668-5427
County Treasurer 668-5423
County Auditor 668-6431
County Veteran's Service Office 668-5436

Gainesville, Texas

532
536

235th District Judge 668-5451
235th District Clerk 668-5450
Child Support Division 668-5448
235th District Attorney 668-5466
Justice of the Peace, pct. 1-pl. 1 668-5460
Justice of the Peace, pct. 1-pl. 2 668-5463
Justice of the Peace, pct. 2 665-1625
Justice of the Peace, pct. 4 726-3539
Emergency Medical Service 665-1012
County Sheriff 665-3471
County Health Unit 668-5454
County Library 668-2401

November 29, 1989

Honorable Nathan L. Hecht
Texas Supreme Court
Austin, Texas

Dear Justice Hecht,

I would like to register my opposition to some of the purposed rule changes in the Texas Rules of Civil Procedure.

In regard to the changes in rule 534 I would like to make the following comments. The change would require that citations issued in the justice court be signed by the clerk of the court and under the seal of the court. Many justice courts do not have a clerk and all justice courts are courts without seals. Therefore, it would be impossible for the clerk to sign the citation under the seal of the court. The purposed changes in Rule 534 also requires written answers be filed in all cases and all pleadings would be in writing. I believe this would effectively do away with the image of the justice court in Texas being the people's court. My strongest objection to the changes in Rule 534 is the change concerning service of the citation. The change would allow the requesting party to obtain service. The court would not have any authority over who serves the citation.

In regard to the changes in Rule 536 I would like to make the following comment. The manner in which citations are now being served is working satisfactorily and any change in the rule would be a attempt to repair something that is not broken.

I appreciate your taking time from your busy schedule to consider my comments concerning the changes in the rules. I am dedicated to the improvement of the judicial system in Texas as I know you are. If I can be of any assistance in the future please let me know.

Sincerely yours,

Bill Freeman
Justice of the Peace
Courthouse
Gainesville, Texas 76240

00447

PARKER COUNTY
Weatherford, Texas 76086

4
534
536
103

November 29, 1989

Honorable Nathan L. Hecht
Texas Supreme Court
Austin, Texas 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

We would like to take this opportunity to comment on three proposed amendments to the Texas Rules of Civil Procedure.

TRCP 536. Who May Serve and Method of Service; also TRCP 536a. Duty of Officer or Person Receiving and Return of Citation

The proposed amendment to Rule 536, subsection (a) is the same language as Rule 103, verbatim. Proposed 536, subsections (b) and (c) contain the same lanugage as current Rule 106 (except that Rule 106 references Rule 103, instead of using the language "this rule"). The proposed "new" rule numbered 536a is not new at all, but a restatement of Rules 105 and 107 (except that the requirement for district and county courts that the return must be made 10 days before a default judgment can be rendered has been changed to three days for justice courts).

The commentary on page 1147 in the Texas Bar Journal preceding the proposed amendments states that the rules have often been criticized for being too long (among other things), and that the Court and its Committee are working to meet all the criticisms. It does not appear to us that the amendments proposed by the Committee on Rule 536 are toward that end. If clarity and brevity were a desired end goal of the Committee, it would appear much simpler to repeal Rule 536; which the proposed amendment effectively does anyway. Rules 103, 105, 106, and 107 would then apply equally to justice courts, since Rule 523 makes all county and district court rules apply to justice courts except where otherwise specifically provided. In fact, Rules 105, 106, and 107 apply now to justice courts and it is redundant to repeat them in the 500 series. (If it is desired to add a requirement for justice courts that the return of a citation be on file three days before default judgment is rendered, it would be far more practical to add it as an amendment to Rule 107.)

Considering all this, we question why the Rules Committee proposed such extensive, unnecessary amendments to Rule 536. The answer that comes to mind is that perhaps it was an attempt to "muddy the waters" and obscure the fact that the Committee is proposing to effectively repeal Rule 536 and replace it with Rule 103. The opposition of Justices of the Peace and Constables (as well as many counties) to the amendment that was made to Rule 103 two years ago is well known. That amendment authorized service of citation by private individuals without there first being demonstrated that a valid need existed for such private service when all attempts to do this legislatively have been effectively blocked.

534
536
536a

PRECINCT I, PLACE 2
(409) 835-8467

VI McGINNIS
JUSTICE OF THE PEACE

1001 PEARL STREET
BEAUMONT, TEXAS 77701

November 29, 1989

Hon. Nathan L. Hecht
Texas Supreme Court
Austin, Texas

Dear Justice Hecht:

I would like to take this opportunity to object to the proposed amendments for Rules 534 and 536 (which pertain strictly to justice courts).

There are lenghy proposed amendments to Rule 536 which include the addition of a "new" Rule 536a. Rule 536a is, in fact, not new at all but simply a restatement of current Rules 105 and 107 (which already apply to justice courts), with the exception of changing from 10 days to 3 days the time period that a return of a citation must be on file before a default judgment can be rendered.

105 & 107?

Proposed Rule 536, subsection (a), however, is a radical departure from the current rule. The proposed amendment reads exactly like Rule 103 and basically makes provision for the service of citation by private individuals without there first being demonstrated that there is a valid need for private service (as is currently required by Rule 536). The Justices of the Peace and Constables in Jefferson County are opposed to the amendments and urge you to leave Rule 536 as it is currently written.

Your careful consideration of this matter will be appreciated.

Sincerely,

Vi McGinnis
Justice of the Peace

VMc/pg

TRCP 536

TRCP 536. ~~Special Process Server~~ [Who May Serve and Method of Service]

~~The justice, in case of an emergency, may depute any person of good character to serve any process, and the person so deputed shall for such purpose have all the authority of a sheriff or constable, but in every such case the justice shall indorse on the process a statement in writing, signed by him officially, to the effect that he has deputed such person to serve such process. Such person shall also take and subscribe an affidavit, to be indorsed on or attached to the process, to the effect that he will to the best of his ability execute the same according to the law and these rules.~~

[(a) 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.

(b) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by this rule by:

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto if any is filed.

(c) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service:

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.]

[COMMENT TO 1990 CHANGE: To conform justice court service of citation to the extent practicable to conform to service of citation for other trial courts.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

[TRCP 536a. Duty of Officer or Person Receiving and Return of Citation

The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 536, the return by the officer or authorized person must also contain the receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 536, proof of service shall be made in the manner ordered by the court.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 536, shall have been on file with the clerk of the court three (3) days, exclusive of the day of filing and the day of judgment.]

[COMMENT TO 1990 CHANGE: To conform justice court service of citation to the extent practicable to conform to service of citation for other trial courts.]

PRECINCT I, PLACE 2
(409) 835-8467

VI McGINNIS
JUSTICE OF THE PEACE

1001 PEARL STREET
BEAUMONT, TEXAS 77701

534
536
536a

November 29, 1989

Hon. Nathan L. Hecht
Texas Supreme Court
Austin, Texas

Dear Justice Hecht:

I would like to take this opportunity to object to the proposed amendments for Rules 534 and 536 (which pertain strictly to justice courts).

There are lenghy proposed amendments to Rule 536 which include the addition of a "new" Rule 536a. Rule 536a is, in fact, not new at all but simply a restatement of current Rules 105 and 107 (which already apply to justice courts), with the exception of changing from 10 days to 3 days the tir period that a return of a citation must be on file before a default judgment can be rendered.

105 & 107?

Proposed Rule 536, subsection (a), however, is a radical departure from the current rule. The proposed amendment reads exactly like Rule 103 and basically makes provision for the service of citation by private individuals without there first being demonstrated that there is a valid need for private service (as is currently required by Rule 536). The Justices of the Peace and Constables in Jefferson County are opposed to the amendments and urge you to leave Rule 536 as it is currently written.

Your careful consideration of this matter will be appreciated.

Sincerely,

Vi McGinnis
Justice of the Peace

VMc/pg

TRCP 749c. Appeal Perfected

The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed.

When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court~~, however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed and when one rental period's rent has been paid into the justice court registry~~. In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled~~, and if the case involves nonpayment of rent, one rental period's rent has been paid into the justice court registry~~.

[COMMENT TO 1990 CHANGE: To dispense with the appellate requirement of payment of any rent into the court registry.]

SUBCOMMITTEE REPORT/TRCP 737-813

The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

2. Rule TRCP 749c

Input from the practicing bench and bar expressed several concerns including that a party appealing informa pauperis from a justice court ruling in a forcible rule and detainer case, be required to continue to pay rent accruing in the duration of the appeal. Conceptually, this is similar to the notion that any litigant be required to post a supersedeas or other security to cover costs accruing by virtue of the appeal being taken. Therefore, Rule 749c and its counterparts are proposed to be amended as follows. The right to appeal in a forcible entry and detainer case by a pauper, is not however, conditioned on the posting of additional rent in proposed amendments to Rule 749c as it has in the past, but only current accruing rent as suggested in Rule 749b.

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 7439, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the notice of the filing of such affidavit thereof to the opposite party or his attorney of record, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as a part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the mailing of notice, the presumption shall be deemed conclusive; but if a contest if filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellant, the justice shall hold a hearing and rule on the matter within five days.

If the justice of peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.

RULE 749c. APPEAL PERFECTED

When an appeal bond has been timely filed or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1) with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

SUBCOMMITTEE REPORT/TRCP 737-813

The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

1. Rules 748, 749, 749a, 749b, 749c

Comments support that suggested amendments to Rule 4 TRCP [to exclude Saturday, Sunday, and legal holidays from time computation of five days or less]; would serve to enlarge the times relative to forcible entry and detainer actions and appeals therefrom. Suggestions from justices of the peace and practicing attorneys support that these types of actions should be excluded from the application of the enlargement of time as proposed in Rule 4. We endorse the recommendation set forth by the subcommittee charged with reviewing and recommending revisions of TRCP 1-14, that is that Rule 4 be further amended as proposed to include this sentence following the word transfer, Saturdays, Sundays and legal holidays shall be counted for purposes of the five day periods provided under Rule 748, 749, 749a, 749b, and 749c.

NIEMANN & NIEMANN
ATTORNEYS AT LAW
1210 MBANK TOWER
AUSTIN, TEXAS 78701

TELEPHONE (512) 474-6901
FAX (512) 474-0717

FRED NIEMANN
LARRY NIEMANN
FRED NIEMANN, JR.

4543, 601

12-21-89

December 20, 1989

Professor Elaine Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Re: Texas Apartment Association's objections to changes in TRCP 749c

Dear Professor Carlson:

This is a follow-up on several points raised in the hearing in Austin regarding TRCP 749c on Thursday, November 30, 1989. The proposed rule change for TRCP 749c would delete the requirement that the tenant (who has had judgment rendered against him in a non-payment-of-rent eviction) must pay one rental period's worth of rent into the court as a condition of appeal. Very briefly, my additional thoughts are as follows:

1. Constitutionality. I would like to make it clear that the intended meaning of my language in paragraph 2 of page 4 of my letter to Judge Hecht was that the Texas Apartment Association and the Texas Tenants Association believed TRCP 749c to be constitutional at the time of its original adoption by the Court.

2. Relationship of Rule 749c to Rule 749b(1). When the appeal rules for paupers were adopted for non-payment of rent evictions, it was intended that the rental payment required in Rule 749c was the same rental payment as required in Rule 749b(1). The attorney for the Texas Tenants Association and I jointly prepared the original draft of the rule. It was intended that the eviction appeal would not be perfected until both the affidavit was filed and the rent which was called for in Rule 749b(1) was tendered into JP court.

If the proposed change were adopted and if an appeal could be perfected by the tenant in a non-payment-of-rent eviction without payment of rent for one rental period, the landlord would be doomed to unjustified delay and expense, i.e., the landlord would have to hire an attorney, file a motion to dismiss the appeal in county court, arrange for a hearing, wait for the hearing, have the hearing, get the judgment, and then get a writ of possession from the county court if the tenant has not moved out. As a practical matter, any hearing on such a motion would occur no sooner than the hearing on the merits of the appeal. I think you can see, therefore, the practical importance of the requirement of tender into the JP court of one rental period's rent in order to protect the landlord during appeal and minimize frivolous appeals with no factual justification.

3. Appellate supersedeas bond analogy. When an appeal of a JP Court eviction is perfected, there is a trial de novo in county court. It has been assumed by both landlord and tenant lawyers that the perfection of the appeal prevents execution of the judgment and allows the tenant to continue in possession of the premises. TRCP 749c serves as a type of supersedeas bond to protect the landlord during the appeal since he is losing rent by the tenant remaining in possession.

Under the Texas rules of appellate procedure applicable to other civil cases, a losing party may not avoid the necessity of filing a supersedeas bond by merely filing a pauper's oath. (See TRAP 47 in which there is no "pauper" exception for avoidance of a supersedeas bond to suspend the trial court's judgment during appeal and protect the party who won in trial court.

The requirement in TRCP 749c that the tenant pay one rental period's rent in a nonpayment of rent eviction serves a purpose similar to a supersedeas bond. The provisions of Rules 749 et al were intended to avoid the overwhelming complexities of Appellate Rule 47 regarding supersedeas bonds and to make it simple and easy for the tenant to appeal a nonpayment-of-rent eviction while still protecting the landlord. In such cases, a single rental period of rent is still woefully insufficient to cover past due rent; but it is better than nothing. When Rule 749 et al were adopted, there was considerable doubt as to whether Appellate Rule 47 actually governed JP court eviction appeals to county court; and it was believed by the lawyers supporting the change that there may indeed have been a void in the Texas Rules on that subject. This author believes that TRAP 47 did not and still does not apply to eviction appeals from JP court to county court and that therefore a traditional supersedeas bond is not available for the landlord's protection.

4. Federal Appeal Rules and Supersedeas Bonds. Federal Rule of Appellate Procedure 24 allows paupers affidavits in civil cases for appeal bonds to cover fees and costs of appeal. However, under federal rules, there is no provision for waiver of the requirement of a supersedeas bond under FRAP 8 merely because the appellant is a pauper.

5. Limited to non-payment of rent cases. I would emphasize that the requirement of the payment of one rental period's rent as a condition of appeal under Rule 749c applies only when judgment has been rendered against the pauper tenant in a non-payment-of-rent eviction case. It does not apply to other eviction appeals.

6. JP Association. We would urge you to make inquiry to the Justices of the Peace and Constables Association of Texas as to whether that association shares our fear that the proposed change to TRCP 749c will result in widespread abuses. You may find that the JPs will agree with TAA. If the proposed rule change is adopted, we believe that it will be used and abused by many, many tenants who claim they are "broke". *Tenants who haven't paid their rent will be able to appeal the eviction by merely filing a "pauper's affidavit", do nothing further, and still get two to four more weeks of free rent from a landlord while the landlord tries to get extricated from the appeal. And, in addition, the tenant will have unjustifiably run up another attorneys fee bill for the landlord. The potential drain on the court's time is also a factor.*

Thank you for your patience and indulgence with regard to this Rule. The proposed change has a very serious potential economic effect on the apartment industry, and for that reason I would appreciate the opportunity to attend the next meeting of the Supreme Court Advisory Committee on the rules to answer any questions.

Sincerely,

NIEMANN & NIEMANN

By Larry Niemann
Larry Niemann
Attorneys for Texas Apartment Association

pec.9ms

xc: Judge Nathan Hecht, Texas Supreme Court
Judge David Peeples
Mr. Luther H. Soules III, Chairman, Supreme Court Advisory Committee on Rules
Mr. Paul Heath Till
Mr. Joe Bax, Attorney for the Houston Apartment Association
Mr. Jerry Adams, TAA Executive Vice President
Judge Fay Murphree, President, Justices of the Peace and Constables Association of Texas

OBJECTION TO PROPOSED CHANGE IN TRCP 749c

The proposed changes in Rule 749c of the Texas Rules of Civil Procedure as published in the Bar Journal are as follows (hyphenated language is being deleted and underlined language is new):

> TRCP 749c. Appeal Perfected. The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed.
>
> When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court; ~~however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed and when one rental period's rent has been paid into the justice court registry~~. In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled ~~and, if the case involves nonpayment of rent, one rental period's rent has been paid into the justice court registry~~.

ARGUMENTS AGAINST CHANGE

1. DELAY OF POSSESSION. The most significant result of perfecting an appeal is to stop the writ of possession from being issued by the JP. If appeal can be perfected in a nonpayment-of-rent eviction of a pauper *without* an appeal bond or *without* at least one rental period's rent being tendered to the court to protect the landlord, then a pauper can merely file a pauper's affidavit in lieu of an appeal bond and ride the "free rent" gravy train for two to four weeks more while the landlord tries to get a hearing and a decision out of the county court. This is patently unfair. Who is going to compensate the landlord for this extra time period without any rent coming in? the pauper?

2. CONSTITUTIONALITY AND PAST APPROVAL BY TENANTS. The Texas Tenant's Association helped draft existing Rules 749a, b, and c. They supported the rules in public hearing, and they wrote a letter to the Court urging the initial adoption of the rules several years ago. They and TAA both were of the opinion that the rules were unconstitutional. No one has ever challenged the constitutionality of the rules.

3. NO COMPLAINT BY JP ASSOCIATION. We would encourage the Court to inquire about the wisdom of this rule with the Justices of the Peace and Constables Association of Texas. The JPs live with these rules on a daily basis and collectively have experience and insight regarding the need for any change and the potential abuse from the change. We believe the Court will find no opposition to the existing rule from that body.

4. POTENTIAL ABUSE. If the rent-tender requirement were deleted from pauper appeals in nonpayment-of-rent evictions, it would very likely be a real source of abuse by knowledgeable tenants who would claim pauper status, force the landlord to a possible hearing to contest the pauper status, and probably squeeze another month's worth of free rent out of the landlord via the county court trial de novo process. In this regard, it would be difficult for a landlord to contest the pauper affidavit since the landlord is seldom privy to sufficient facts to contest the alleged pauper status. Furthermore, to contest the alleged pauper status would probably cost the landlord more in attorneys fees than an extra month's rent; so he cannot come out ahead, even if he is right.

5. RULES WHICH ARE AFFECTED. Set forth below are the various rules which relate to the proposed change in TRCP 749c. The bold language is for purposes of emphasis only.

[Existing] Rule 749c. APPEAL PERFECTED. The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed. **When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court;** however, when the case involves nonpayment of rent, such appeal is perfected when both the pauper's affidavit has been filed **and when one rental period's rent has been paid into the justice court registry.** In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled and, if the case involves nonpayment of rent, **one rental period's rent has been paid into the justice court registry.**

[Existing] Rule 751. TRANSCRIPT. **When an appeal has been perfected, the justice shall stay all further proceedings** on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

rulchg.5t

NIEMANN & NIEMANN
ATTORNEYS AT LAW
1210 MBANK TOWER
AUSTIN, TEXAS 78701

FRED NIEMANN
LARRY NIEMANN
FRED NIEMANN, JR.

TELEPHONE (512) 474-6901
FAX (512) 474-0717

November 27, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

via hand delivery

Re: TAA objections to changes in TRCP 4 and TRCP 749c

Dear Justice Hecht:

I am writing this letter on behalf of the Texas Apartment Association. TAA wishes to object to the proposed rule changes in TRCP 4 regarding computation of time and TRCP 749c regarding appeal by paupers in eviction cases. Our specific reasons for objecting to the language of the proposed changes in those rules are set forth in the attached summaries.

It may come as a surprise to the Court that forcible detainer cases comprise approximately 11.76% of all civil cases filed in all original jurisdiction courts in Texas. For the reporting year which ended in 1988, the total number of new civil cases filed in JP, county level, and district courts in this state was 899,820. Of that total, 29.88% (or 268, 923 cases) were filed in JP courts. Forty percent of the JP court cases were eviction cases. We suspect, therefore, that the number of people affected by the eviction rules far exceeds any other one kind of civil litigation. The impact of eviction cases on the people of our state and their pocketbooks cannot be overemphasized.

Accordingly, the Texas Apartment Association respectively requests that TRCP 4 be modified to exclude the 5-day time period under TRCPs 748 through 749c regarding writs of possession and eviction appeals.

Respectfully submitted,

NIEMANN & NIEMANN

By Larry Niemann
Larry Niemann
Attorneys for Texas Apartment Association

nlh.8ms
enclosures

xc: Mr. Luke Soules, Jr.,Chairman, Supreme Court Advisory Committee, via FAX 224-9144
Mr. Frank Finch, TAA President
Mr. Jerry Adams, TAA Executive Vice President

JOE G. BAX, P.C.
PARTNER
BOARD CERTIFIED-COMMERCIAL REAL ESTATE LAW
BOARD CERTIFIED-RESIDENTIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

HOOVER, BAX & SHEARER
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SAN FELIPE PLAZA
5847 SAN FELIPE, SUITE 2200
HOUSTON, TEXAS 77057
(713) 977-8686
FAX (713) 977-5395

REPLY TO
P.O. BOX 4547
HOUSTON, TEXAS 77210

F
748
749c

November 28, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

VIA FEDERAL EXPRESS
AIRBILL #5000353945

RE: Objections of the Houston Apartment Association to changes in TRCP 4.

Dear Justice Hecht,

Our firm is counsel to the Houston Apartment Association, a trade association representing over 350,000 apartment units in the Houston area. We have discussed the proposed changes to TRCP Rule with Larry Niemann, counsel for both the Texas Building Owners and Managers Association, and the Texas Apartment Association. We must concur with Larry's comments and we share the same objections expressed to you by Mr. Niemann.

Simply stated, Texas landlords are in the business of collecting rent for the shelters that they provide; they are not in the business of evicting tenants. As you know the vast majority of evictions are filed for nonpayment of rent. By the time that eviction has been filed the average tenant, who knew the date the rent was due in the first place, has received a late notice, various forms of informal request for payment, a notice to vacate, and a copy of the Plaintiff's eviction petition. If the lease required some opportunity to cure there would have been an additional written notice furnished that resident. It goes without saying that at any point along that process, the resident has the opportunity of curing the default and tendering payment to the landlord, who in most cases would gladly accept the payment.

The proposed change in the rules would simply elongate the delay in returning the apartment to production.

The joinder of a claim for the delinquent rent with the eviction petition has not been effective. Most tenants are judgment proof and therefore the landlords do not have a practical remedy to gain back the lost rent. For this reason it is extremely important that the eviction process continue to be an

expedited one designed to return an unproductive asset back to an income producing apartment unit.

Candidly, we have heard no objection from any of the Constables or Justices of the Peace regarding the current rules. In fact, we have heard no real request for a modification of those rules. Accordingly, we would urge the court to make an exception to the proposed Rule TRCP 4 for the five day time periods involved in TRCP 748 through 749c regarding the waiting period for writs of possession and eviction appeals.

Respectfully submitted,

HOOVER, BAX & SHEARER

Joe G. Bax
Attorney for the
Houston Apartment Association

JGB:df

cc: Mr. Paul Heiberger

TRAP 4. Signing, Filing and Service

(a) Signing. Each application, brief, motion or other paper filed shall be signed by at least one of the attorneys for the party/ [and] shall give the State Bar of Texas identification number, the mailing address[,] and telephone number[, and telecopier number, if any,] of each attorney whose name is signed thereto/ /and /shall /state /that /a /copy /of /the /paper /has /been delivered /to /all /to /each /group /of /opposing /parties /or /their counsel. A party who is not represented by an attorney shall sign his brief and give his address and telephone number. The statement /of /service /on /opposing /party /who /is /not /a licensed/attorney/shall/be/verified/by/affidavit/

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on /day /or /more /before [on or before] the last day for filing same, the same, if received by the clerk not more than ten

days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) Manner of Service. Service may be personal[,] ~~or~~ by mail[, or by telephonic document transfer to the party's current telecopier number]. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(g) ~~Proof~~ Service. Papers presented for filing shall [be served and shall] contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names [and addresses] of the persons served, certified by the person who made the service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement or proof of service but shall require such to be filed promptly thereafter.

[COMMENT TO 1990 CHANGE: Time period clarification, deletion of requirement of verification by a pro se litigant, provision for service by telephonic document transfer, and textual corrective changes.]

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP

Rule 4(b). This rule provides for mailing only, not other services such as Federal Express, etc. However, we do not see this as a problem.

Rule 4(f). This rule does not define service by telephonic document transfer. Is service complete when the document is sent?

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5 → TRAP 4
TRCP 296 → TRAP 41
TRCP 4 → TRAP 5
TRAP 51 → TRAP 13
TRAP 90 → TRAP 5
TRAP 20 → TRAP 4c
TRAP 9
TRAP 40
TRAP 7

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

A. Certificate of service requirements.

(1) Tex. R. App. P. 4 would now require certificates of service to give the names and addresses of all parties served. A general certificate showing service "upon all counsel of record" is not sufficient.

This change is significant primarily for prerecord motions, *e.g.*, a motion to extend the time to file the cost bond. Once we get the transcript, we have a fighting chance at knowing who the parties and the attorneys are, but before we get the transcript, the only information we have about the appeal comes from the prerecord motion itself. In the past, when we got a prerecord motion with a general certificate, we did not know who the adversary was, and the only letter asking for a response was sent just to the movant, asking him to respond to his own motion.

This situation was hardly desirable. With the adoption of the amended rule, we can reserve ruling on such motions until the movants supply us with a specific certificate of service and we can cite the rule as our authority. Then we can effectuate real notice on all interested parties.

(2) Rule 4 is also being amended to permit pro se parties from dispensing with the old requirement that they certify service by affidavit. (We usually didn't require a pro se party to provide us an affidavit; we relied upon our clerks' notice to the parties for a 10-day response and simply waited the full 10 days.)

D. Faxing. The new rules accommodate filing by fax. *See, e.g.*, Tex. R. App. P. 4.

A man in a cafe once asked the waiter for a cup of coffee, "black, without cream." The waiter returned and said, "Sir, I'm sorry, but we're out of cream; would you like your coffee black, without milk?" I can tell you how these amendments would have changed our procedures (if we had had any) concerning the faxing machines that we don't have, if we had had any, but black is black.

But I note these changes because the day is coming.

A. Changes in the mailbox rule.

(1) Both Tex. R. Civ. P. 5 and Tex. R. App. P. 4 will now expressly provide that a document is timely filed if deposited in the first-class mail on the day that it is due, even if that day otherwise results from the application of the weekend rule. This amendment effectively overrules our opinion in *Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel*, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ).

(2) The mailbox rule (rule 4) still applies only to items deposited in the first-class mail. Any other transmittal method does not trigger the rule. *See Mr. Penguin Tuxedo Rental & Sales, Inc., v. NCR Corp.*, 777 S.W.2d 800, 801-02 (Tex. App.--Eastland 1989, n.w.h.) (per curiam) (something sent by Federal Express is not sent by first-class mail). The proposed rule amendments do not address *Mr. Penguin*; the failure to do so is probably because the opinion is so recent, not because of any implied endorsement by the Rules Advisory Committee.

Regards,

Craig T. Enoch
Chief Justice

LAW OFFICES OF
TOBOLOWSKY, PRAGER & SCHLINGER
A PROFESSIONAL CORPORATION

300 CRESCENT COURT, SUITE 950

DALLAS, TEXAS 75201

214-871-3900

TELEX 4630189 TELECOPY 214-871-3914

EDWIN TOBOLOWSKY
JEROME L. PRAGER
GERALD W. BENSON
RONALD L. McKINNEY
N. HENRY SIMPSON, III
PETER M. GROSS
ROBERT A. MILLER
EMILY G. TOBOLOWSKY
STUART A. LAUTIN
MORGAN A. JONES
FRANK J. SIGNORIELLO, JR.
JOHN H. TULL, JR.
TERRY T. PICCO
J. HUNTER JOHNSON

HENRY D. SCHLINGER
(1921-1988)

November 28, 1989

21A
& TRAP 4(f)

The Honorable Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

Re: Telephonic Document Transfer; TRCP Rule 21A and TRAP Rule 4(f)

Dear Judge Hecht:

On behalf of myself and my entire firm, I suggest an amendment to the Rules on telephonic service under the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure. First, the hours of transmission should be limited to regular business hours, such as 9:00 a.m. to 5:00 p.m. Monday through Friday. There are instances where notices have been telecopied very late in the evening notifying counsel of a hearing the next morning and this is an abuse that the Rules should prohibit from the outset. Additionally, the number of pages that can be telecopied should be limited. I suggest a limit of five pages, since anything longer inordinately ties up the telecopy machine. Finally, on each telecopy, the time of transmission and the sender should be clearly identified. I have been involved in a case where over fifty pages of deposition notices were telecopied beginning at 11:00 p.m. This type of conduct should not be condoned.

In the alternative, the Rules could be written so each counsel could agree to accept telephonic notice during extended hours. However, I believe a uniform statewide rule is necessary and preferable.

Yours very truly,

Robert A. Miller

RAM:ag

TRAP 5. Computation of Time

(a) In General. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run ~~is/not/to~~ [shall not] be included. The last day of the period so computed ~~is /to~~ [shall] be included, unless it is a Saturday, [a] Sunday or [a] legal holiday, as defined by Article 4591, Revised Civil Statutes, in which event the period ~~runs/until~~ [extends to] the end of the next day which is ~~neither~~ [not] a Saturday, Sunday ~~nor~~ [or a] legal holiday. ~~When /the /last /day /of /the /period /is /the next/day/which/is/neither/a/Saturday//Sunday/nor/legal/holiday/ any/paper/filed/by/mail/as/provided/in/Rule/4/is/mailed/on/time when/it/is/mailed/on/the/last/day/of/the/period/~~

(b) (No change.)

(c) Nunc Pro Tunc Order. In civil cases, when a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 ~~or/317~~ of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.

(d) (No change.)

(e) (No change.)

(f) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP

Rule 5. Please note typographical error . . . a Saturday, Sunday nor [or a] legal holiday. "Nor" should be stricken.

Note: already corrected.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
TRAP 51
TRAP 90
TRAP 20

→

TRAP 4
TRAP 4
TRAP 5
TRAP 13
TRAP 5
TRAP 4
TRAP 9
TRAP 4
TRAP 7

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

D. Definition of legal holiday. I note that one timeliness problem that has not been entirely cleared up is the question of what constitutes a holiday for filing purposes. Tex. R. Civ. P. 4 provides that something due to be filed on a legal holiday may be filed on the next day that is not a Saturday, Sunday, or legal holiday. The rule has been construed to include banking holidays. *See Johnson v. Texas Employers Insurance Association*, 674 S.W.2d 761 (Tex. 1984) (per curiam). When the Texas Rules of Appellate Procedure were first promulgated, Tex. R. App. P. 5 was derived from Tex. R. Civ. P. 4.

Subsequently, however, Tex. R. App. P. 5 was amended to state that something due to be filed on a legal holiday, "*as defined by Article 4591, Revised Civil Statutes*" (emphasis added), could be filed on the next working day. That language pretty clearly overrules *Johnson*. For example, if July 4 falls on a Sunday, July 5 is a banking holiday, but not a holiday listed in article 4591.

One commentator has noted the potential for confusion. M. O'Connor, Perfecting the Appeal 3 (1988). Filing a motion for new trial is governed by Tex. R. Civ. P. 329b. Therefore, to keep on with the example, filing it on July 5 would be timely. Filing a cost bond is governed by Tex. R. App. P. 41, so filing it on July 5 would not be timely. The variance between the two rules adds unnecessary complexity to civil procedure as a whole, but the current amendments do not address the problem.

Regards,

Craig T. Enoch
Chief Justice

004

324
TRAP 5
90(h)

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

November 22, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas, 78711

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

The proposed change to TRAP 5 is one that has been needed for some time and probably every one will agree is a good change. I am confident it will be adopted.

Sincerely,

Max N. Osborn

TRAP 5

12. Same problems in #1; strike the "nor".

TRAP 5. Computation of Time

(a) In General. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run ~~is not to~~ [shall not] be included. The last day of the period so computed ~~is to~~ [shall] be included, unless it is a Saturday, [a] Sunday or [a] legal holiday, as defined by Article 4591, Revised Civil Statutes, in which event the period ~~runs until~~ [extends to] the end of the next day which is ~~neither~~ [not] a Saturday, Sunday ~~nor~~ [or a] legal holiday. ~~When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.~~

(12)

(b) (No change.)

(c) Nunc Pro Tunc Order. In civil cases, when a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 ~~or 317~~ of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.

(d) (No change.)

(e) (No change.)

(f) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRAP 9 Substitution of Parties

(a) Death of a Party in Civil Cases. (No change.)

(b) Death of Appellant in a Criminal Case. (No change.)

(c) Public Officers; Separation from Office. (No change.)

[(d) Substitution for Other Causes. If substitution of a successor to a party in the appellate court is necessary for any reason other than death or separation from public office, the appellate court may order such substitution upon motion of any party at any time or as the court may otherwise determine.]

[COMMENT TO 1990 CHANGE: To provide mechanism for substitution of appellate parties as may be necessary.]

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
TRAP 51
TRAP 90
TRAP 20

TRAP 4
TRAP 41
TRAP 54
TRAP 130
TRAP 5
TRAP 40
→ TRAP 9
TRAP 40
TRAP 74

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

B. Substitution of parties. The only provisions for substituting parties on appeal in the old rules were: (1) on the death of a party; or (2) in the case of a public official succeeding a previous official litigating in his official capacity. Proposed new Tex. R. App. P. 9 now expressly provides for substitution generally as the Court may determine necessary.

That's what we've been doing all along anyway, because, as a practical matter, it seemed to make things so much simpler. (We have a number of cases in which FDIC has been substituted as successor-in-interest to an insolvent bank.) But we did so on very slender authority, and arguably with no authority at all. *See Leggitt v. Nesbitt*, 415 S.W.2d 696, 700 (Tex. Civ. App.--Tyler 1967, no writ). Now we have clear authority.

Regards,

Craig T. Enoch
Chief Justice

00477

TRAP 12. Work of Court Reporters

(a) (No change.)

(b) (No change.)

(c) To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each ~~Supreme Judicial~~ [d]istrict in which the court sits.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP

Rule 12(c). A copy shall be filed with the Court of Appeals where the case will be heard on appeal not necessarily where the court sits. For example, transfer cases.

TRAP 12

TRAP 90 156 216(1) 289 307 542 324(a)

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES II
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5609

TELECOPY NUMBER
(512) 478-1971

Ref Rules Sec

TRAP 21a 237a 41, 202, 210 57(a)(1) 12 74 41(a)(1) 54(a) (2(d)

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

5. Texas Rule of Appellate Procedure 57(a)(1) refers to "supreme judicial district." Perhaps this should be changed to "court of appeals district" or simply "district" in keeping with the proposed amendments to rules 12, 74, and the appendix for criminal cases.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 20. Amicus [Curiae] Briefs

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties,a nd shall show in the brief that copies have been furnished to all attorneys of record in the case. [In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

[COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs in civil cases to conform with Rules 74(h) and 136(e).]

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP Rule 20. Please note typographical error "a nd" should be "and." Also, the added portion is unnecessary since the rule already requires that the amicus curiae brief comply with the briefing rules for the parties.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
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TRAP 7

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

C. Motions for amicus curiae briefs in excess of 50 pages. Amicus curiae briefs were always marked received, but never filed. Tex. R. App. P. 20. (The reason is that the Court always has discretion to address any point raised in an amicus brief, but, unlike a point raised by a party, need not do so.) As a result, we never filed motions for leave to file amicus briefs, because the motions could not be granted in any case.

Tex. R. App. P. 20 is being amended to require a motion for leave to tender an amicus brief in excess of 50 pages. At first glance, the rule appears to be confused: how can we refuse to accept a motion for leave to file an amicus brief less than 50 pages, while we must accept a motion for leave to file an amicus brief more than 50 pages? The distinction between a filestamp and a "rec'd" mark is critical here.

Because we never had the authority to file amicus briefs, we could only receive them. Because we could only receive them, we could not refuse to accept any; it made no difference whether an amicus brief was ten or a thousand pages long. If a *party* tendered a thousand-page brief, we could mark it "rec'd" and compel him to file a motion for leave to file it; we could then deny the motion, strike the brief, and return it. But as long as an *amicus* could never get leave to file a brief of any size, we had no mechanism by which we could get rid of unwanted amicus briefs.

But at a point when we're putting file boxes throughout the hallways of the Court because we've run out of storage space, it is a little ridiculous to say that we can compel a party to cut his brief down to 50 pages, but that we can't do anything about the bulk that a nonparty gives us. This rule change is obviously to remedy that problem. The amendment is carefully worded and never talks about the filing of an amicus brief, of any size. But it puts amicus briefs on a par with party briefs: it gives us the

mechanism to get rid of excessively long ones. The motion required for a lengthy amicus brief will not, strictly speaking, be a motion for leave to *file* an amicus brief in excess of 50 pages; it will be a motion for leave to *tender* an amicus brief in excess of 50 pages.

The clerks' office will have to be told that they are to continue refusing to file any motion for leave to file an amicus brief, if:

(a) the brief is less than 50 pages long; or

(b) if the brief has not yet been tendered (so that we can't tell how long it is going to be).

They are, however, to require a motion whenever an amicus brief is tendered that is longer than 50 pages.

Orders drafted for the motions panel on motions in connection with excessively long amicus briefs must be carefully drafted: they must never inadvertently order the briefs "filed," but merely direct the clerk to "receive" them.

Regards,

Craig T. Enoch
Chief Justice

TRAP 40. Ordinary Appeal -- How Perfected

(a) Appeals in Civil Cases.

(1) When Security is Required. (No change.)

(2) When Security is Not Required. (No change.)

(3) When Party is Unable to Give Security. (No change.)

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective ~~as to a party adverse to~~ unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on ~~the adverse party~~ [all other parties to the trial court's final judgment] within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

(5) Judgment Not Suspended by Appeal. (No change.)

(b) Appeals in Criminal Cases.

(1) (No change.)

(2) Effect of Appeal in Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Court of Appeals
Fifth District of Texas at Dallas
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

CRAIG T. ENOCH
CHIEF JUSTICE

(214) 653-6920

December 7, 1989

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TRAP 71

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

E. Failure to serve a court reporter with an affidavit of inability to pay. Tex. R. App. P. 40(a)(3)(B) currently provides that an indigent appellant shall serve his affidavit upon the opposing party and upon the court reporter; "otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." This rule has caused us some difficulty in interpretation. *See Dodson v. Stevens Transport*, 776 S.W.2d 800 (Tex. App.--Dallas 1989, no writ) (en banc). In *Dodson*, we carved out an exception to the rule in summary judgment cases, where no statement of facts is necessary. If the Rules Advisory Committee wants to give clarification concerning what it intended the rule to mean, it is not taking the opportunity of the current proposed amendments to do so.

Regards,

Craig T. Enoch
Chief Justice

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

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Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

C. Parties to be served

The proposed rules contain provisions throughout statihg, in substance, that anything part of the record on an appeal (except for the transcript and the statement of facts) is to be served on all "parties to the trial court's judgment." *See* comment to Tex. R. App. P. 40. This change applies to our own notices, orders, opinions, and judgments. *See* Tex. R. App. P. 91.

The clerks' office will have to be informed. The clerks will also have to make sure that every party to the judgment is on the Court's mailing list for every case.

The change is probably to prevent the disaster that occurred in *Hexcel Corp. v. Conap, Inc.*, 738 S.W.2d 359 (Tex. App.--Fort Worth 1987, writ denied). *Hexcel* involved multiple parties, with claims for contribution. The appellant served a copy of its bond upon the party against whom it directly asserted a claim, but not upon all parties to the judgment. As a result, the appellant's direct adversary was unable to timely perfect an appeal against the third party from whom the adversary sought contribution, if the appellant should ultimately prevail. Because the appellant's failure to serve all parties prejudiced its adversary's rights against the third party, the appeal was dismissed.

Yet this change, seemingly innocuous enough, is probably going to impact upon our day-to-day operations the most. Even when a party attempts to limit an appeal so that not all parties are affected, all "parties to the trial court's judgment" must still be served. *See* Tex. R. App. P. 40(a)(4). An immediate problem for us will be to identify just who is and who is not a party to the judgment. Not all parties to the suit are parties to the judgment: for example, a named defendant whom a plaintiff voluntarily nonsuits before trial. Conversely, the rules make clear that a party to the judgment must be served even if he appears to be not a party directly interested in the appeal.

Presently, the transcript department of the trial court clerks' office types the names and addresses of the parties on appeal on the cover of the transcript. The transcript department gets this information from the bond: the appellant is the principal on the bond, and the appellee is the obligee. Thus, the transcript cover identifies only the parties to the appeal. When the transcript is filed, our clerks note who the parties are by looking at the cover. Notice of the filing of the transcript is then sent immediately to the parties.

About all that we can do, on adoption of these amendments, is our best to identify the proper parties that require notice. Now there will be other parties (aside from the parties to the appeal) who will also require notice.

The clerks should look at the final judgment in the transcript to determine who is named in that judgment, instead of referring to the parties given on the cover of the transcript.

Despite *Hexcel*, the proposed changes requiring us to give notice to all parties to the judgment do not completely absolve prospective appellants from making sure that all interested parties are served. Tex. R. App. P. 74(a) has a proposed amendment, to provide that parties must include the names and addresses of all parties to the judgment in their briefs, for the express purpose of assisting our clerks in determining to whom notice should be sent. We will also be assisted by the new requirement that certificates of service give the names and addresses of all parties served. We can check our own notice list against a specific certificate to eliminate variances or omissions. (This the clerks already do, when a motion is filed; the problem is when the transcript is filed, before there are any motions.)

The *Hexcel* problem is likely to remain. The most critical (and jurisdictional) deadlines occur at the beginning of an appeal. By the time we get the transcript, the time to file a motion to extend the time to file a bond has usually completely expired. Thus, although the clerks do not have the ultimate responsibility to keep all interested parties informed, the proposed rule changes

will achieve their full purpose only if the clerks do attempt to establish who the parties to the judgment are as soon as possible. Because the clerks can't do so without examining the inside of the transcript, the task of sending out our initial notice letters will be considerably more difficult.

Also, the clerks will have to brace themselves for phone calls from anxious attorneys. Attorneys whose clients have no direct interest in an appeal are prone to panic when they hear from the Court; they conclude that we must know something about the appeal that they don't. The clerks' office has even been asked in the past to review an appellant's brief and assure an attorney that he need not respond to it on behalf of his client. We inform the attorney, of course, that that kind of determination is beyond the clerks' capacity, but the proposed change means that we will be giving that answer out far more frequently.

Regards,

Craig T. Enoch
Chief Justice

TRAP 41 Ordinary Appeal - When Perfected

(a) Appeals in Civil Cases.

(1) Time to Perfect Appeal. When security for costs on appeal is required, the bond or affidavit in lieu thereof shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a nonjury case]. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.

(2) Extension of Time. (No change.)

(b) Appeals in Criminal Cases.

(1) Time to Perfect Appeal. (No change.)

(2) Extension of Time. (No change.)

(c) Prematurely Filed Documents. No appeal or bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the ~~date~~ [time] of signing of the judgment or the ~~date~~ [time] of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of appealable order by the trial judge, provided that no notice of appeal shall be

effective if given before a finding of guilt is made or a verdict is received.

[COMMENT TO 1990 CHANGE: To make the appellate timetable for non-jury cases conform more to that in jury cases.]

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP

Rule 41(a)(1). We suggest you cite the rule governing the timely filing of a request for findings of fact and conclusions of law. Also, rule could be changed to delete the last line of rule 41(a)(1) and in the first sentence simply add the word "deposit." For example, "When security for costs on appeal is required the bond, the deposit or the affidavit in lieu thereof . . ."

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

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Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

B. Effect of filing a request for findings of fact and conclusions of law. The proposed amendments provide that a request for findings of fact and conclusions of law is to be filed within 20 days of judgment after a nonjury case. Tex. R. Civ. P. 296. If one is timely filed, the appellate timetable is extended the same as if a motion for new trial is timely filed. Tex. R. App. P. 41(a)(1) & 54(a).

The impetus seems to be to give appellants' attorneys time to get the findings and conclusions in hand, so that they can assess realistically the desirability of an appeal. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989), *overruling Garcia v. Kastner Farms, Inc.*, 761 S.W.2d 444 (Tex. App.--Corpus Christi 1988).

Nonetheless, the comment to the proposed new rule states only that the amendment is "[t]o make the appellate timetable for non-jury cases conform more to that in jury cases," without further elaboration. This comment is somewhat mystifying, because a motion for new trial could be filed in either a jury or a nonjury case. And there are problems that caselaw will have to resolve. For example, what if a party does not make a timely reminder and fails to obtain any findings or conclusions--is the timetable still extended? A motion for new trial is overruled by operation of law if the trial court doesn't act; a request for findings and conclusions can simply be ignored if there's not a timely reminder.

What if a request is filed in a case in which a request is inappropriate (such as a summary judgment case)--is the timetable still extended? A motion for new trial can be so deficient that it should be overruled as a matter of law, but it still operates to extend the timetable. *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 533-34 (Tex. App.--Corpus Christi 1989, n.w.h.). On the other hand, a motion for new trial in an interlocutory appeal is totally ineffective to do anything. *See Leone v. S. Nordhaus Co., Inc.*, 678 S.W.2d 129, 130 (Tex. App.--San Antonio 1984, no writ) (on mot. for reh'g). A request in a summary judgment case, if analogized to a legally deficient motion, would extend the timetable, but, if analogized to a motion filed in the wrong kind of case, would not. The draft rule does not give much guidance.

The clerks' office will have to be instructed to file in any transcript showing a request for findings and conclusions filed within 20 days of the judgment when the transcript is timely under the 90/120-day timetable. We can't risk the clerks refusing to file a transcript as untimely when it might in fact be timely.

Regards,

Craig T. Enoch
Chief Justice

324
TRAP 5
90(h)

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

November 22, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas, 78711

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

My real purpose in writing is with regard to the Article on page 1147 of the Journal and the comment that many complain because the rules "do not do enough to reduce the cost and delay of litigation." In particular I note that under TRAP 41 we are now increasing the time table in many non-jury cases so as to conform to the rules in jury cases. I don't object to conformity. It may be needed. But I see nothing in any of the rules which will reduce delay. Thus, the following suggestion is made to help speed up appellate review.

When I began my practice in 1953 and up until the change of Rule 324 in 1976 a motion for new trial was a necessity and served as the basis for practically all points of error. Nothing could be incorporated by reference and thus under the holding in Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960) Motions for New Trial were ususally the longest instrument in any transcript. I just reviewed a copy of the motion for new trial which I filed in Shell Oil Company v. Reinhart, 375 S.W.2d 717 (Tex. 1964) and find it was more than 20 pages in length. It included all the objections to evidentiary rulings, all the objections to the court's charge and matters set forth in motions for an instructed verdict. That was not an unusual motion in those days of practice. At that time a motion for new trial had to be filed within 10 days after the judgment and could be amended in another 20 days. That much time was needed in those days.

Sincerely,

Max N. Osborn

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1969)
BEN F. VAUGHAN, III, OF COUNSEL

TELECOPY NUMBER
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5689

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 46. Bond for Costs on Appeal in Civil Cases

(a) Cost Bond. (No change.)

(b) Deposit. (No change.)

(c) Increase or Decrease in Amount. (No change.)

(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given ¢øµ#$ø1 før [each] appellant by #ø1l1#g [serving] a copy thereof tø ¢øµ#$ø1/øf /rø¢ør¢ [on all parties in the trial court together with notice of] ør/ø¢¢#/pørty/øt#ør/t#ø#/t#ø/øppø11ø#t/ør//if/ø pørty/is/nøt/røpr¢$ø#tød/by/¢øµ#$ø1/ /tø/t#ø/pørty/øt/#is/1ø$t k#ø¥#/ød¢rø$$///¢øµ#$ø1/$#øll/nøtø/ø#/ø¢¢#/¢øpy/$ørv¢d the date on which the appeal bond or certificate was filed. Failure to [so] serve ø/¢øpy [all other parties] shall be ground for dismissal of the [appellant's] appeal or other appropriate action if [an] appellee is prejudiced by such failure.

(e) Payment of Court Reporters. (No change.)

(f) Amendment: New Appeal Bond or Deposit. (No change.)

[COMMENT TO 1990 CHANGE: To provide immediate notice to all parties in the trial court of any appeal by any other parties.]

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP
Rule 46(d). It is not clear who must give notification of the filing of the bond.

TRAP 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds [:

(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim] that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

[(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that setting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and setting the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.]

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a ~~child~~ [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of

the ~~child~~ [minor], unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: To conform the rule to statute.]

4543.001 hjh LHS

9-22-89 SB

CARL A. PARKER
President Pro Tempore
DISTRICT 4

Committees:

EDUCATION, Chairman
Administration
Finance
Jurisprudence

The Senate of The State of Texas

CAPITOL OFFICE:
Post Office Box 12068
Austin, Texas 78711
512/463-0104

DISTRICT OFFICE:
One Plaza Square
Port Arthur, Texas 77[illegible]2
409/985-2591

TRAP 49
TRAP 47

September 18, 1989

Mr. Luther H. Soules III
Soules and Wallace
10th Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I appreciated you giving me the opportunity to comment on your proposed rules to implement the provisions of SB 134. While I believe that your draft accurately captures the intent of the law with regard to the subject of the change made in the burden required of a defendant to obtain a reduced bond requirement, I offer the following additional comments.

The draft you sent me fails to incorporate the change made in Sec. 52.004 of the bill, which reinstates statutorily the old, pre-amendment Rule 49(b), "Excessiveness". As you may be aware, this provision was dropped by the Supreme Court Advisory Committee. when the rules were rewritten in the spring and summer of 1987, and took effect January 1, 1988. The new rules allowed for a review for "Sufficiency" (Rule 49(a)), but dropped excessiveness.

49(a)

The Joint Committee heard testimony from Professor Elaine Carlson, who chaired the subcommittee of the Advisory Committee which proposed the rules, that discretion still existed for excessiveness review. The Joint Committee in this instance, however, believed that because a positive action had been taken (the deletion of an existing rule), that the rule would need to be readopted or statutorily imposed to be effective. Thus the passage of Sec. 52.004 of SB 134.

I would suggest that appropriate language for a rule to implement this change read as follows:

49(d) Rule 49(d). In a manner similar to appellate review under this rule of the sufficiency of the amount set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under Tex. Civ. Prac. & Rem. Code Section 52.002, or under these rules if security is not set under Section 52.002. If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

I hope you will consider an additional area where there seemed to be some confusion as to the ability of a trial court to accept some type (form) of security other than a bond or cash deposit to suspend enforcement of a civil money judgment pending appeal. The Joing Special Committee was informed by Professor Carlson that the language of Rule 47(b), as written by the Advisory Committee and adopted by the Court, allowed such discretion. The Joint Committee, relying on and referencing Professor Carlson's analysis, recommended clarifying the trial court's additional flexibility in setting the type of security but hoped this could be clarified by the Court in any changes to the rules. I do suggest, therefore, that the Advisory Committee make 47(b) more clear (as it is for other types of judgments) to more clearly reflect that amount and type of bond or deposit are discretionary with the court, within the guidelines set otherwise by rule or statute.

47(b)

I am appreciative of the work being done by you and the committee on these rules and your responsiveness to the concerns of and actions by the legislature. Should you undertake to write a rule dealing with the lien portions of the bill, I'll be glad to share with you my comments on that section also.

Thanks for your interest.

Sincerely,

Carl A. Parker

CAP/pl

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Senator Carl Parker
Representative Patricia Hill
Representative Senfronia Thompson

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
SUSAN SHANK PATTERSON
JUDITH L. RAMSEY
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

TRAP 47
49

October 16, 1989

Senator Carl A. Parker
Law Offices of Carl A. Parker
One Plaza Square
Port Arthur, Texas 77642

Dear Senator Parker:

Thank you very much for your letter of September 18 regarding TRAP 47 and 49. My apologies for not responding sooner. I enclose an interlined mark-up of the rules with some ideas on how to address your very appropriate suggestions. I will call you in a few days to determine whether you feel these interlineations are adequate to resolve your concerns.

I would like to discuss with you the "excessiveness" matter that you raise. I had perceived, although perhaps erroneously so, that the insertion beginning in the fifth line of TRAP 49(b) of the words "appellate court for insufficiency or excessiveness" reached that concern. If it does not, then I simply have not understood your suggestion, and I certainly want to fully understand it and respond to it. I certainly agree with you that discretion should be expressed in the rule for review of excessiveness for security set under either Rule 47 or Section 52.002.

I have tried to capture your excellent suggestion on varying the "type" of security by making insertions in proposed Rule 47(b) to cover instances where security is set either under Rule 47 or Section 52.002.

I would like also to discuss with you your suggestion to include in TRAP 49(d) a specific rule reference to Section 52.002. The proposed amendment deletes the current reference in TRAP 49 to "Rule 47" so as to broaden the scope of TRAP 49. If you desire a specific statutory reference, I will recommend that. However, perhaps the use of language such as "by law or these rules" to generalize to both legislation and other civil rules

may be adequate, and even perhaps safer in event subsequent legislation or rule-making generates additional sources and TRAP 49 not be contemporaneously adjusted due to oversight.

I am indeed interested in your thoughts on the lien matters and will work with you in any way you ask to fully harmonize the rules with the statutes.

We are most appreciative of the time that you spend to improve the administration of justice in Texas, and particularly the attention that you have given to assisting with TRAP Rules 47 and 49 and Section 52.002.

Very truly yours,

Luther H. Soules III

LHSIII:gc
Enclosure
C:/DW4/LHS/LETTERS/405.DOC

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Representative Patricia Hill
Representative Senfronia Thompson

TRAP 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

The trial court may make an order to provide for security in an amount or ~~to~~ deviating from this general rule if after notice to all parties and a hearing the trial court finds [:

(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim] that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

[(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that ~~setting~~ posting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and ~~setting~~ ordering the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.]

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a ~~child~~ [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of

the ~~CHILD~~ [minor], unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: To conform the rule to statute.]

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending Enforcement of Judgment Pending Appeal. The trial court's order ~~pursuant to Rule 47~~ [setting security or staying enforcement of a judgment] is subject to review ~~by~~ [on] a motion to the ~~court of appeals~~ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~court of appeals~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~court of appeals~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

4543.001 hjr LHS

9-22-89 SB

CARL A. PARKER
President Pro Tempore
DISTRICT 4

Committees:

EDUCATION, Chairman
Administration
Finance
Jurisprudence

The Senate of The State of Texas

CAPITOL OFFICE:
Post Office Box 12068
Austin, Texas 78711
512/463-0104

DISTRICT OFFICE:
One Plaza Square
Port Arthur, Texas 776
409/985-2591

TRAP 49

September 18, 1989

Mr. Luther H. Soules III
Soules and Wallace
10th Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I appreciated you giving me the opportunity to comment on your proposed rules to implement the provisions of SB 134. While I believe that your draft accurately captures the intent of the law with regard to the subject of the change made in the burden required of a defendant to obtain a reduced bond requirement, I offer the following additional comments.

The draft you sent me fails to incorporate the change made in Sec. 52.004 of the bill, which reinstates statutorily the old, pre-amendment Rule 49(b), "Excessiveness". As you may be aware, this provision was dropped by the Supreme Court Advisory Committee when the rules were rewritten in the spring and summer of 1987, and took effect January 1, 1988. The new rules allowed for a review for "Sufficiency" (Rule 49(a)), but dropped excessiveness.

49(a)

The Joint Committee heard testimony from Professor Elaine Carlson, who chaired the subcommittee of the Advisory Committee which proposed the rules, that discretion still existed for excessiveness review. The Joint Committee in this instance, however, believed that because a positive action had been taken (the deletion of an existing rule), that the rule would need to be readopted or statutorily imposed to be effective. Thus the passage of Sec. 52.004 of SB 134.

00510

I would suggest that appropriate language for a rule to implement this change read as follows:

49(d) Rule 49(d). In a manner similar to appellate review under this rule of the sufficiency of the amount set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under Tex. Civ. Prac. & Rem. Code Section 52.002, or under these rules if security is not set under Section 52.002. If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

I hope you will consider an additional area where there seemed to be some confusion as to the ability of a trial court to accept some type (form) of security other than a bond or cash deposit to suspend enforcement of a civil money judgment pending appeal. The Joing Special Committee was informed by Professor Carlson that the language of Rule 47(b), as written by the Advisory Committee and adopted by the Court, allowed such discretion. The Joint Committee, relying on and referencing Professor Carlson's analysis, recommended clarifying the trial court's additional flexibility in setting the type of security but hoped this could be clarified by the Court in any changes to the rules. I do suggest, therefore, that the Advisory Committee make 47(b) more clear (as it is for other types of judgments) to more clearly reflect that amount and type of bond or deposit are discretionary with the court, within the guidelines set otherwise by rule or statute.

47(b)

I am appreciative of the work being done by you and the committee on these rules and your responsiveness to the concerns of and actions by the legislature. Should you undertake to write a rule dealing with the lien portions of the bill, I'll be glad to share with you my comments on that section also.

liens

Thanks for your interest.

Sincerely,

Carl A. Parker

Carl A. Parker

CAP/pl

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Senator Carl Parker
Representative Patricia Hill
Representative Senfronia Thompson

copies

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

KEITH M. BAKER
RICHARD M. BUTLER
W. CHARLES CAMPBELL
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
SARAH B. DUNCAN
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
RONALD J. JOHNSON
REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
SUSAN SHANK PATTERSON
JUDITH L. RAMSEY
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

TRAP 47
TRAP 49

October 16, 1989

Senator Carl A. Parker
Law Offices of Carl A. Parker
One Plaza Square
Port Arthur, Texas 77642

Dear Senator Parker:

Thank you very much for your letter of September 18 regarding TRAP 47 and 49. My apologies for not responding sooner. I enclose an interlined mark-up of the rules with some ideas on how to address your very appropriate suggestions. I will call you in a few days to determine whether you feel these interlineations are adequate to resolve your concerns.

I would like to discuss with you the "excessiveness" matter that you raise. I had perceived, although perhaps erroneously so, that the insertion beginning in the fifth line of TRAP 49(b) of the words "appellate court for insufficiency or excessiveness" reached that concern. If it does not, then I simply have not understood your suggestion, and I certainly want to fully understand it and respond to it. I certainly agree with you that discretion should be expressed in the rule for review of excessiveness for security set under either Rule 47 or Section 52.002.

I have tried to capture your excellent suggestion on varying the "type" of security by making insertions in proposed Rule 47(b) to cover instances where security is set either under Rule 47 or Section 52.002.

I would like also to discuss with you your suggestion to include in TRAP 49(d) a specific rule reference to Section 52.002. The proposed amendment deletes the current reference in TRAP 49 to "Rule 47" so as to broaden the scope of TRAP 49. If you desire a specific statutory reference, I will recommend that. However, perhaps the use of language such as "by law or these rules" to generalize to both legislation and other civil rules

may be adequate, and even perhaps safer in event subsequent legislation or rule-making generates additional sources and TRAP 49 not be contemporaneously adjusted due to oversight.

I am indeed interested in your thoughts on the lien matters and will work with you in any way you ask to fully harmonize the rules with the statutes.

We are most appreciative of the time that you spend to improve the administration of justice in Texas, and particularly the attention that you have given to assisting with TRAP Rules 47 and 49 and Section 52.002.

Very truly yours,

Luther H. Soules III

LHSIII:gc
Enclosure
C:/DW4/LHS/LETTERS/405.DOC

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Representative Patricia Hill
Representative Senfronia Thompson

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending to Enforcement of Judgment Pending Appeal. The trial court's order ~~þ~~ [setting security or staying enforcement of a judgment by law or these rules] is subject to review ~~þ~~ [on] a motion to the ~~¢~~ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~¢~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~¢~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

TRAP 49

13. Strike "to" in the title.

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending ~~to~~ Enforcement of Judgment Pending Appeal. The trial court's order ~~pursuant to Rule 47~~ [setting security or staying enforcement of a judgment] is subject to review ~~by~~ [on] a motion to the ~~court of appeals~~ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~court of appeals~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~court of appeals~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRAP 51. The Transcript on Appeal

(a) Contents. (No change.)

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." The failure to timely make the designation shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 54(a); however, if the designation specifying such matter is not timely filed, t] The failure of the clerk to include designated matter will not be grounds for complaint on appeal.

(c) Duty of Clerk. (No change.)

(d) Original Exhibits. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely designation is a jurisdictional requisite for appeal.]

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
→ TRAP 51
TRAP 90
TRAP 20

TRAP 4
TRAP 4
TRAP 5
TRAP 13
TRAP 5
TRAP 40
TRAP 9
TRAP 4
TRAP 7

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

A. Late designation of the transcript and late request to the court reporter. The rules have always provided that the trial court clerk is to prepare a transcript according to rule when a bond is filed; if an appellant does not designate the contents, the rule itself does. *See* Tex. R. App. P. 51(a). A late designation can be accommodated, if it has to be, by a supplemental transcript. Hence the timeliness of an appellant's designation does not affect our jurisdiction.

While a late designation does not affect our jurisdiction, we repeatedly get appellees filing motions to dismiss, arguing that it does. Tex. R. App. P. 51(b) is being amended to reduce (we hope) the number of such motions, which routinely get denied anyway.

The request to the court reporter is a somewhat different matter. The reason is that filing a bond with the trial court clerk suffices in itself to inform the clerk that an appeal has been initiated. The reporter, however, knows to begin preparing the statement of facts only if an appellant makes the request. Thus, a late request to the reporter is a consideration that we must take into account in determining whether to grant an extension for the statement of facts. *See* Tex. R. App. P. 54(c). Nonetheless, Tex. R. App. P. 53(a) is being amended to clarify that a late request is something to consider in our discretion, but nothing of jurisdictional dimension. If a reporter timely files the statement of facts despite a late request, the lateness of the request is immaterial.

Regards,

Craig T. Enoch
Chief Justice

TRAP 52. Preservation of Appellate Complaints

(a) General Rule. (No change.)

(b) Informal Bills of Exception and Offers of Proof. (No change.)

(c) Formal Bills of Exception. (No change.)

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in paragraph (b) of Rule 324 of the Texas Rules of Civil Procedure. [A party desiring to complain on appeal in a non-jury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with subdivision (a) of this rule.]

[COMMENT TO 1990 CHANGE: To clarify appellate requisites from non-jury trials.]

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES 1888-19
BEN F. VAUGHAN, III, P
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN JR.
(512) 480-5629

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 53. The Statement of Facts on Appeal

(a) Appellant's Request. The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. [Failure to timely request the statement of facts under this paragraph shall not prevent the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 54(a).]

(b) Other Requests. (No change.)

(c) Abbreviation of Statement. (No change.)

(d) Partial Statement. (No change.)

(e) Unnecessary Portions. (No change.)

(f) Certification by Court Reporter. (No change.)

(g) Reporter's Fees. (No change.)

(h) Form. (No change.)

(i) Narrative Statement. (No change.)

(j) Free Statement of Facts. (No change.)

(k) Duty of Appellant to File. (No change.)

(l) Duplicate Statement in Criminal Cases. (No change.)

(m) When No Statement of Facts Filed in Appeals of Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely request is a jurisdictional requisite for appeal.]

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

Local Rules Sub
20 to
TRAP

November 22, 1989

TRCP 13
305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

TRAP 53

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell

WHH:wh cc: Ret.

00521

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

TRAP 80(c)
— 53(k)
— 54(c)

September 27, 1989

Hon. Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

I want to thank you for an excellent presentation to appellate judges assembled last week at the Judicial Conference. We appreciate the opportunity to discuss our rules of civil and appellate procedure with those who have a direct influence in making them.

I would like to respectfully recommend two changes in our appellate rules.

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

(k) **Duty of ~~Appellant~~ Court Reporter to File** It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

00522

TRAP 54. Time to File Record

(a) In Civil Cases -- Ordinary Timetable. The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a nonjury case], within one hundred twenty days after the judgment is signed. If a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.

(b) In Criminal Cases - Ordinary Timetable. The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred [twenty] days after the day sentence is

imposed or suspended in open court or the order appealed from has been signed.

(c) No change.

[COMMENT TO 1990 CHANGE: To make the appellate timetable for non-jury cases conform more to that in jury cases. To conform paragraph (b) to the rule amendment adopted by the Court of Criminal Appeals.]

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
TRAP 51
TRAP 90
TRAP 20

→

TRAP 4
TRAP 41
TRAP 54
TRAP 130
TRAP 5
TRAP 40
TRAP 9
TRAP 40
TRAP 74

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

B. Effect of filing a request for findings of fact and conclusions of law. The proposed amendments provide that a request for findings of fact and conclusions of law is to be filed within 20 days of judgment after a nonjury case. Tex. R. Civ. P. 296. If one is timely filed, the appellate timetable is extended the same as if a motion for new trial is timely filed. Tex. R. App. P. 41(a)(1) & 54(a).

The impetus seems to be to give appellants' attorneys time to get the findings and conclusions in hand, so that they can assess realistically the desirability of an appeal. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989), *overruling Garcia v. Kastner Farms, Inc.*, 761 S.W.2d 444 (Tex. App.--Corpus Christi 1988).

Nonetheless, the comment to the proposed new rule states only that the amendment is "[t]o make the appellate timetable for non-jury cases conform more to that in jury cases," without further elaboration. This comment is somewhat mystifying, because a motion for new trial could be filed in either a jury or a nonjury case. And there are problems that caselaw will have to resolve. For example, what if a party does not make a timely reminder and fails to obtain any findings or conclusions--is the timetable still extended? A motion for new trial is overruled by operation of law if the trial court doesn't act; a request for findings and conclusions can simply be ignored if there's not a timely reminder.

What if a request is filed in a case in which a request is inappropriate (such as a summary judgment case)--is the timetable still extended? A motion for new trial can be so deficient that it should be overruled as a matter of law, but it still operates to extend the timetable. *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 533-34 (Tex. App.--Corpus Christi 1989, n.w.h.). On the other hand, a motion for new trial in an interlocutory appeal is totally ineffective to do anything. *See Leone v. S. Nordhaus Co., Inc.*, 678 S.W.2d 129, 130 (Tex. App.--San Antonio 1984, no writ) (on mot. for reh'g). A request in a summary judgment case, if analogized to a legally deficient motion, would extend the timetable, but, if analogized to a motion filed in the wrong kind of case, would not. The draft rule does not give much guidance.

The clerks' office will have to be instructed to file in any transcript showing a request for findings and conclusions filed within 20 days of the judgment when the transcript is timely under the 90/120-day timetable. We can't risk the clerks refusing to file a transcript as untimely when it might in fact be timely.

Regards,

Craig T. Enoch
Chief Justice

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

TRAP 80(c
53(k)
54(c)

September 27, 1989

Hon. Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

My second recommendation is that rules of appellate procedure 53(k) and 54(c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

Similarly, rule 54(c) should be changed to read as follows:

> (c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1969)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5689

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 57. Docketing the Appeal

(a) (No change.)

(b) Attorneys' Names. Before an attorney has filed his [or her] brief he [or she] may notify the clerk in writing of the fact that he [or she] represents a named party to the appeal, which fact shall be þý/ŧħ¢/¢Ɩ¢ŗĸ noted [by the clerk] upon the docket, opposite the name of the party for whom ħ¢ [the attorney] appears, and shall be regarded by the court as having whatever effect is given to the appearance of a party to a case without [a] brief [having been] filed. After briefs have been filed, the name of [each] ŧħ¢ attorney ø/đŧŧøŗħ¢ý$ sign¢đ/ŧø[ing] the brief shall be entered by the clerk on the docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel [up]on request.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1
BEN F. VAUGHAN, III, ...
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5609

TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

5. Texas Rule of Appellate Procedure 57(a)(1) refers to "supreme judicial district." Perhaps this should be changed to "court of appeals district" or simply "district" in keeping with the proposed amendments to rules 12, 74, and the appendix for criminal cases.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 72. Motions to Dismiss for Want of Jurisdiction

Motions to dismiss for want of jurisdiction to decide the appeal and for such [other] defects as defeat the jurisdiction in the particular case and [which] cannot be waived shall also be made, filed and docketed within thirty days after the filing of the transcript in the court of appeals; provided, however, if made afterwards they may be entertained by the court upon such terms as the court may deem just and proper.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP

Rule 72. Why is this rule necessary? If the defect is truly jurisdictional, it can't be waived and, therefore, can be raised at any time.

TRAP 74. Requisites of Briefs

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct ~~Supreme/Judicial/D~~ [d]istrict. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State".

(a) Names of All Parties [to the Trial Court's Final Judgment]. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case [and so the clerk of the court of appeals may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the court of appeals].

(b) Table of Contents and Index of Authorities. (No change.)

(c) Preliminary Statement. (No change.)

(d) Points of Error. (No change.)

(e) Brief of Appellee. (No change.)

(f) Argument. (No change.)

(g) Prayer for Relief. (No change.)

(h) Length of Briefs. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the [list of names and addresses of parties,] table of contents, index of

authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

(i) Number of Copies. (No change.)

(j) Briefs Typewritten or Printed. (No change.)

(k) Appellant's Filing Date. (No change.)

(l) Failure of Appellant to File Brief. (No change.)

(m) Appellee's Filing Dates. (No change.)

(n) Modifications of Filing Time. (No change.)

(o) Amendment or Supplementation. (No change.)

(p) Briefing Rules to be Construed Liberally. (No change.)

[(q) Service of Briefs. All briefs filed in the appellate court shall at the same time be served on all parties to the trial court's final judgment.]

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP Rule 74. This rule as well as other previous rules and comments suggests that the clerk of the court of appeals notify the parties to the trial court's final judgment and their counsel, if any, of the orders of the court. There are 2 problems with this requirement. First, the appellate courts should notify counsel only, not the party and their counsel. Second, all parties to the trial court's judgment may not be involved in the appellate process. In other words, if ten parties are named in the judgment but only three are involved in the appeal, then there is no need to send routine notices to the other seven parties no longer involved. In addition, this rule requires that the brief contain a list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court. Again, shouldn't counsel on appeal be the important factor. For example, one party may have had attorney A for trial counsel and now has retained attorney B. The notice provisions throughout the appellate rules will cause a great increase in expense if the appellate courts are required to notify all parties to the judgment and their trial counsel and their appellate counsel. For example, a will contest involving several heirs.

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman
Supreme Court Rules Advisory Committee

January 15, 1990

RE: Rules 74(h), 131(i), Texas Rules of Appellate Procedure
Length of Briefs (1 page)

To meet the 50-page limit on briefs without sparing the appellate court the full benefit of their views, counsel occasionally reduce the page margins and type size rather dramatically. Some members of the Court have raised the issue of whether the rules should specify printing standards for briefs to eliminate this practice. I would prefer to await that ironic crisis when counsel's determination to add a few very important words will yield a brief with type too small to be read.

My own view is that the problem, when it occurs, can be dealt with under Rules 131(j), and the corresponding provision of Rule 74(h), irrespective of the actual number of pages in the brief. The issue raised is but a smaller part of a larger problem which takes myriad forms: placement of materials in appendices, reference to other parties' briefs, etc. The point is, good counsel will not burden a court with more than it can or will consider in a given case. Page limits and other such standards are only rules of thumb. I do not see much to be gained by being more specific. However, the Court has asked for the Committee's counsel.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
TRAP 51
TRAP 90
TRAP 20

TRAP 4
TRAP 4
TRAP 5
TRAP 13
TRAP 5
TRAP 4
TRAP 9
TRAP 4
→ TRAP 7

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

C. Parties to be served

The proposed rules contain provisions throughout stating, in substance, that anything part of the record on an appeal (except for the transcript and the statement of facts) is to be served on all "parties to the trial court's judgment." *See* comment to Tex. R. App. P. 40. This change applies to our own notices, orders, opinions, and judgments. *See* Tex. R. App. P. 91.

The clerks' office will have to be informed. The clerks will also have to make sure that every party to the judgment is on the Court's mailing list for every case.

The change is probably to prevent the disaster that occurred in *Hexcel Corp. v. Conap, Inc.*, 738 S.W.2d 359 (Tex. App.--Fort Worth 1987, writ denied). *Hexcel* involved multiple parties, with claims for contribution. The appellant served a copy of its bond upon the party against whom it directly asserted a claim, but not upon all parties to the judgment. As a result, the appellant's direct adversary was unable to timely perfect an appeal against the third party from whom the adversary sought contribution, if the appellant should ultimately prevail. Because the appellant's failure to serve all parties prejudiced its adversary's rights against the third party, the appeal was dismissed.

Yet this change, seemingly innocuous enough, is probably going to impact upon our day-to-day operations the most. Even when a party attempts to limit an appeal so that not all parties are affected, all "parties to the trial court's judgment" must still be served. *See* Tex. R. App. P. 40(a)(4). An immediate problem for us will be to identify just who is and who is not a party to the judgment. Not all parties to the suit are parties to the judgment: for example, a named defendant whom a plaintiff voluntarily nonsuits before trial. Conversely, the rules make clear that a party to the judgment must be served even if he appears to be not a party directly interested in the appeal.

Presently, the transcript department of the trial court clerks' office types the names and addresses of the parties on appeal on the cover of the transcript. The transcript department gets this information from the bond: the appellant is the principal on the bond, and the appellee is the obligee. Thus, the transcript cover identifies only the parties to the appeal. When the transcript is filed, our clerks note who the parties are by looking at the cover. Notice of the filing of the transcript is then sent immediately to the parties.

About all that we can do, on adoption of these amendments, is our best to identify the proper parties that require notice. Now there will be other parties (aside from the parties to the appeal) who will also require notice.

> **The clerks should look at the final judgment in the transcript to determine who is named in that judgment, instead of referring to the parties given on the cover of the transcript.**

Despite *Hexcel*, the proposed changes requiring us to give notice to all parties to the judgment do not completely absolve prospective appellants from making sure that all interested parties are served. Tex. R. App. P. 74(a) has a proposed amendment, to provide that parties must include the names and addresses of all parties to the judgment in their briefs, for the express purpose of assisting our clerks in determining to whom notice should be sent. We will also be assisted by the new requirement that certificates of service give the names and addresses of all parties served. We can check our own notice list against a specific certificate to eliminate variances or omissions. (This the clerks already do, when a motion is filed; the problem is when the transcript is filed, before there are any motions.)

The *Hexcel* problem is likely to remain. The most critical (and jurisdictional) deadlines occur at the beginning of an appeal. By the time we get the transcript, the time to file a motion to extend the time to file a bond has usually completely expired. Thus, although the clerks do not have the ultimate responsibility to keep all interested parties informed, the proposed rule changes

will achieve their full purpose only if the clerks do attempt to establish who the parties to the judgment are as soon as possible. Because the clerks can't do so without examining the inside of the transcript, the task of sending out our initial notice letters will be considerably more difficult.

Also, the clerks will have to brace themselves for phone calls from anxious attorneys. Attorneys whose clients have no direct interest in an appeal are prone to panic when they hear from the Court; they conclude that we must know something about the appeal that they don't. The clerks' office has even been asked in the past to review an appellant's brief and assure an attorney that he need not respond to it on behalf of his client. We inform the attorney, of course, that that kind of determination is beyond the clerks' capacity, but the proposed change means that we will be giving that answer out far more frequently.

Regards,

Craig T. Enoch
Chief Justice

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1)

BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5689

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

7. In amending Texas Rules of Appellate Procedure 74(a) and 131(a), the court may wish to consider United States Supreme Court Rule 28.1, which requires a corporation to name all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

SMEAD, ANDERSON, WILCOX & DUNN
ATTORNEYS AT LAW
425 NORTH FREDONIA, SUITE 100
P. O. BOX 3343
TELEPHONE (214) 757-2868
FACSIMILE (214) 757-4612
LONGVIEW, TEXAS 75606-3343

H. P. SMEAD, JR.
BOB ANDERSON
MELVIN R. WILCOX, III
MICHAEL L. DUNN
KYLE KUTCH
PETER L. BREWER

November 30, 1989

74

TRAP

Justice Nathan L. Hecht
Supreme Court of Texas
Rules Advisory Committee
P.O. Box 12248
Austin, Texas 78711

Re: Tex. R. App. P. 74(k)

To The Committee:

In response to the Court's invitation in the November, 1989 issue of the Texas Bar Journal, the following suggestion regarding the Rules of Appellate Procedure is made. Rule 74(k) of the Texas Rules of Appellate Procedure concerns the deadline for filing Appellant's Brief in the Court of Appeals. It states: "Appellant shall file his brief within 30 days after the filing of the transcript and statement of facts, if any . . . ."

This rule is slightly ambiguous where the transcript and facts are not filed on the same day. The rule could be clarified as rephrasing that portion of the Rule as follows: Appellant shall file his brief within 30 days after both the transcript and statement of facts, if any, have been filed . . . ."

Sincerely,

SMEAD, ANDERSON, WILCOX AND DUNN

BY: _____
Peter L. Brewer
Former Briefing Attorney,
Texas Supreme Court
1987-88 term

dl

TRAP 74(a) 90

TRAP 18(b)

November 29, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

This letter is in response to the invitation to comment on the proposed amendments to the Texas Rules of Civil and Appellate Procedure. This letter will be confined to expressing concerns as to two major changes in the Rules of Appellate Procedure as viewed by the office of Clerk of the Second Court of Appeals.

Appellate Rule 74(a) as amended will require briefs to list all parties to the trial court's final judgment and their counsel so that the Clerk of the court of appeals may send those parties copies of all orders, opinions and judgments of the court of appeals. Rule 91 similarly requires the appellate clerk to send copies of the opinion and judgment to all parties to the trial court's judgment. This proposed rule does not aid the legal system to "reduce the cost and delay of litigation," nor does it "increase both the efficiency and the fairness of the justice system," professed goals of the rules committee as stated on p.1147 of the November Texas Bar Journal.

Court clerks already face a heavy load of paperwork. Now over-burdened copy machines and expensive supplies of paper and envelopes as well as precious hours of labor must be wasted sending copies of every order an appellate court issues to people who are not parties to the appeal. Additionally, those persons who chose not to appeal might have to pay legal fees to their trial attorneys who will receive those orders, opinions and judgments, and pass them along to their clients at a suitable billing rate. The office of Clerk of this court strongly opposes such a wasteful, time-consuming change in the Rules of Appellate Procedure.

Thank you for giving us the opportunity to comment on the proposed Rules changes.

Sincerely,

Yvonne Palmer

Yvonne Palmer
Chief Clerk
2nd Court of Appeals

TRAP 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion. ~~which should not be published~~

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

~~(c)~~ [c)] · Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish." [Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other

relief. The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time.]

~~(c)~~ [(d)] Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

~~(d)~~ [(e)] Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(f) (No change.)

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they should be published. [However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or

Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.]

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, ~~when by order the~~ an opinion previously unpublished shall forthwith be released [by the clerk of the court of appeals] for publication. ~~If the Supreme Court orders~~

[Upon the denial or dismissal of an application for writ of error, an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication, if the Supreme Court so orders].

(i) (No change.)

[COMMENT TO 1990 CHANGE: To preclude publication of an unpublished opinion by a court of appeals after court action in the appeal by the Supreme Court or the Court of Criminal Appeals; to provide that anyone, whether or not a party, can seek an order from the Supreme Court or Court of Criminal Appeals to publish any such opinion at any time; to require the clerks of the courts of appeals to release for publication all court of appeals opinions following grant or refusal of writ of error by the Supreme Court of Texas and to make other textual changes.]

STATE BAR OF TEXAS

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4543.001

1-9-90
SB

TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

The Committee on the Administration of Justice has reviewed the Supreme Court Advisory Committee's proposed rule changes. We believe that the vast majority of the proposals are sound and should be approved. We have a few suggestions to make, which fall into these four categories: (1) alternate proposals for rules 21a and 166, (2) criticism of proposed rules 271-275, (3) recommendation that TRAP 90 remain unchanged, and (4) the highlighting of various inadvertent errors in the wording of several of the rules.

3. Recommendation that TRAP 90 remain unchanged.

The advisory committee's proposed TRAP 90 would significantly alter present law concerning the publishing of court of appeals opinions. We believe the present rule is working well and should not be changed.

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP
Rule 90[c]. This should be corrected to include a full set of ( ). Does section (c) allow for a request by a court of appeals to the Supreme Court or Court of Criminal Appeals to publish a previously unpublished court of appeals opinion? If not, the rule should do so.

TRAP
Rule 90(h). This rule states that, if an application for writ of error is granted or refused, automatically, the previously unpublished opinion of the Court of Appeals shall be published. There may be times when the Court initially grants, and then withdraws the decision. Publishing should simply be ordered by the Court when necessary, and not be an automatic occurrence.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
TRAP 51
→ TRAP 90
TRAP 20

TRAP 4
TRAP 41
TRAP 5
TRAP 1
TRAP 5
TRAP 4
TRAP 6
TRAP 40
TRAP

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

B. Publication of opinions. The amended rules clarify publication policy. We can publish an opinion upon motion, provided that a higher court has not yet granted any relief to a party appealing our decision. *See* Tex. R. App. P. 90(g). Once a higher court has granted some relief, it has the exclusive prerogative to determine whether our opinion should be published.

Regards,

Craig T. Enoch
Chief Justice

DALLAS COUNTY
DISTRICT ATTORNEY
JOHN VANCE

90(c) & (g)

November 21, 1989

TRAP

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas 78711

RE: Comments on Proposed Amendments to Texas Court Rules-
Texas Rules of Appellate Procedure - TRAP 90

Dear Justice Hecht:

Pursuant to the invitation for public comment on the proposed rule changes found in the November issue of Texas Bar Journal, please consider the following:

TRAP[1] 90(c) and (g)

In my opinion both the present and proposed rules suffer from the same species of flaw. Under both rules it is possible that a Court of Appeals opinion may be changed from unpublished to published after the parties have decided not to file a petition for discretionary review. While the proposed rules have the "advantage" of at least making it clear that this can occur, they also appear to broaden the categories of persons who may request a post-decision change in the publication status of the opinion.

This problem is not theoretical in nature, it has already happened to me. In my case, the unpublished opinion of the Court of Appeals was changed to a published opinion by way of an order signed 2 days before the expiration of the time to file a petition for discretionary review. Due to delays in delivery of this order to me, I became aware of the fact that this change was made approximately 4 hours before the State's petition for discretionary

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[1] In this acronym conscious age, I wonder if any one but me has noticed the unfortunate "trap" produced by the abbreviation used in the Bar Journal article.

review was due to be filed.

As the head of the appellate division of a major metropolitan District Attorney's office my concerns about the severity of this problem may be somewhat atypical. However, I think that there may be other appellate litigators (and some on the civil side as well) who may share my concerns.

These concerns arise from the fact that our office is in many instances concerned with the rationale and holding of a particular opinion for reasons outside of the resolution of the case(s) which the opinion may decide. Because of the large number of cases which have identical or near identical issues in them, this office must be concerned with the effect that the published opinions may have on the jurisprudence of this State.

The State of Texas may "lose" a particular case based upon certain holdings of the Court of Appeals which are questionable, unclear, or simply wrong. Yet, the attorney for the State may feel that further appeal of a particular unpublished opinion would be fruitless in light of other known reasons supporting reversal of the conviction which are not stated in the unpublished opinion. In such a situation the State's attorneys may decide to simply stop beating the dead horse in question, and proceed to a speedy retrial of the case. However, such a conclusion might not have been reached if the opinion had been published and therefore of precedental value pursuant to TRAP 90(i). To allow the published/unpublished status of the opinion to be changed after the time for filing a petition for discretionary review has substantially elapsed or expired, allows for an alteration of this portion of the decision-making equasion to be changed after the time for doing anything about correcting the erroneous opinion has effectively passed.

In addition, it may be that in a rare situation, a particular unpublished opinion of the Court of Appeals may "affirm" the conviction but still contain a holding deemed unsatisfactory to the State. Again, this actually happened to me in a particular case. Where the unsatisfactory opinion is unpublished, the State's attorney may be content to take the win (never take points off the board is the theory, originating in the NFL, behind such a decision) and, as they say in East Texas, "go to the house." However, the State may wish to seek discretionary review of an improperly decided point if it is contained in a <u>published</u> opinion, particularly where the defendant has sought petition for discretionary review on another issue in the case.[2]

Another related concern is based on my perception that

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[2] But this is not the only instance where this may occur. I once had the State's Attorney (in Austin) seek a petition in a case I had won in the Court of Appeals without consulting me, even though the defendant had not filed a petition.

court of appeals justices may take more care in crafting an opinion (by including appropriate limiting language, etc.) where the justice believes that he is not writing for publication.

I propose that if the Court desires that there be a mechanism in the appellate rules to allow for the change of the publication status of a court of appeals opinion (and I concede some such rule is desirable), that the Rules be structured to allow either party to the case in question a full 30 days from the day the appellate court orders such a change in status (from unpublished to published) to file a petition for discretionary review, writ of error, or other relief.

In addition, I believe it would be useful to specifically require any party or non-party requesting a change in the publication status of an opinion to serve copies of the request on the opposing party (or both parties in the case of a non-party request) and to specifically require at least 15 days for the parties to respond to such requests before the appellate court to which such a request is made may rule on the request. This will allow the appellate court to rule on the request with a maximum amount of input from the attorneys who have handled the case.

I have also enclosed a recently published article written by Justice O'Connor of the Houston Court of Appeals which suggests that a more thorough evaluation of the policies informing the initial publication decision by the Court of Appeals is in order. I realize that the rule changes in question were not designed to deal specifically with such issues, but this topic should be put forward for consideration by the Court.

Respectfully yours,

Jeffrey B. Keck
Assistant District Attorney
Frank Crowley Criminal Courts Bldg.
Dallas County, Texas
(214) 653-3628

JBK/sn

Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

TRAP 90

September 29, 1989

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

On September 21, 1989, at the Annual meeting of the Council of Justices of the Courts of Appeals the enclosed resolution was adopted unanimously.

We earnestly request that you favorably consider this Resolution at the time of the proposed changes to the Rules of Civil Procedure.

Kindest personal regards,

Norman L. Utter

NLU:mjd
Enclosure
cc: Hon. Bob Dickenson
Hon. Jimmy Carroll
Hon. John T. Boyd

BE IT RESOLVED THAT THE COUNCIL OF JUSTICES OF THE COURTS OF APPEALS REQUESTS THE SUPREME COURT OF TEXAS TO REJECT THE RECOMMENDATION OF THE RULES ADVISORY COMMITTEE TO REQUIRE THE AUTOMATIC PUBLICATION OF ALL OPINIONS WHEN AN APPLICATION FOR WRIT OF ERROR IS GRANTED.

LIDDELL, SAPP, ZIVLEY, HILL & LABOON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS
TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002
(713) 226-1200
TELEX 76-2616
TELECOPIER (713) 223-3717

237 PARK AVENUE
NEW YORK, NEW YORK 10017
(212) 455-9300
TELECOPIER (212) 986-7281

1200 TEXAS COMMERCE TOWER
2200 ROSS AVENUE
DALLAS, TEXAS 75201
(214) 220-4800
TELECOPIER (214) 220-4899

301 CONGRESS AVENUE
SUITE 1400
AUSTIN, TEXAS 78701
(512) 320-4111
TELECOPIER (512) 320-4161

November 29, 1989

VIA FEDERAL EXPRESS

Justice Nathan Hecht
Supreme Court of Texas
15th at Colorado
Austin, Texas 78711

RE: Proposed 1990 Change to Tex. R. App. P. 90 (publication of court of appeals decisions)

Dear Judge Hecht:

I would suggest a couple of minor textual changes in proposed Tex. R. App. P. 90. These changes would, I believe, better reflect the Court's intent in amending the rule.

(c) Determination to Publish. . . . Any party may move the ~~appellate court~~ Court of Appeals to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the ~~appellate court~~ Court of Appeals shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.

(g) Action of Court En Banc. . . . However, the ~~appellate court~~ court of appeals shall not order any unpublished opinion to be published after the Supreme Court or Court of Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.

The purpose for these suggested minor changes is to make it perfectly clear that the phrase "the appellate court" really refers to the Court of Appeals, and not both the Court of Appeals and the Supreme Court.

In addition, I have a number of substantive concerns regarding the proposed rule change. I understand the Court's concern with possible abuse of power by courts of appeals. I also assume that the Supreme Court Advisory Committee considered the proposed changes in detail. I am curious, however, whether the following matters have been considered:

1. The new rule would apparently permit the Texas Supreme Court to order a court of appeals opinion published even when no party has ever sought an application for writ of error or otherwise invoked the Texas Supreme Court's jurisdiction. Is a decision by the Texas Supreme Court to order an opinion published under these circumstances consistent with the general prohibition on advisory opinions? Is it practical or desirable for the Texas Supreme Court to make a determination regarding whether a court of appeals opinion should be ordered published without the benefit of briefing or argument by either party to the case? Is it courteous or wise to reverse the decision of a court of appeals to order an opinion not published without formally consulting that court or giving that court an opportunity to rule on a motion to order publication?

2. As currently worded, the proposed rule change permits a non-party to ask the Texas Supreme Court to order publication of an originally unpublished decision. Is there any reason for not permitting the same option to a non-party on application to the court of appeals, while that court has authority to amend its publication decision?

3. As currently worded, the rule is silent regarding the authority of a court of appeals to order post-hac publication of a "no writ" decision, months or years after that decision is final. Should some provision be made for this situation?

4. In addition to giving the Texas Supreme Court the authority to determine whether to publish an opinion in a case where jurisdiction is final in the court of appeals (e.g., a temporary injunction proceeding), the revised rule also appears to give the Court the power to determine whether to order publication of a criminal decision. Is this intended?

5. For the limited classes of cases in which jurisdiction is made final in the court of appeals, certiorari review by the United States Supreme Court may be available. The United States Supreme Court certiorari process is to some extent influenced by the jurisprudential importance of a case which, in turn, is somewhat influenced by whether or not a decision is published. Would it not make sense to curtail the power of a court of appeals to retroactively order publication in situations in which the United States Supreme Court has acted on a petition for writ of certiorari?

6. In light of the new provision in Tex. R. App. P. 90(h) permitting the Texas Supreme Court to order opinions published after denial or dismissal of writ applications, attorneys will inevitably speculate about what such an order "really" means. I assume that the Court anticipates using this authority only in unusual circumstances. Accordingly, the Court might decrease speculation by adding a sentence at the end of Tex. R. App. P. 90(h), like the following: "Such decision to order or not order publication is not intended and should not be construed as expressing any opinion on the legal merits of the lower court's decision."

Again, I expect that all of these matters have been fully taken into consideration. If any clarification or explanation for my comments is desired, however, I would be more than happy to discuss them with any member of the Committee.

Sincerely,

Jim Paulsen

James W. Paulsen

JWP/eaj

324

TRAP 5
90(h)

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

November 22, 1989

Justice Nathan L. Hecht
P. O. Box 12248
Austin, Texas, 78711

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

I also favor the proposed change in TRAP 90(h). I believe all opinions by the Courts of Appeals should be published where an application for writ of error is granted. If a case is reversed the Supreme Court disagrees with either the facts or law as set forth by the intermediate court and that opinion should be of record to disclose the difference to those who are interested. I urge the adoption of this change.

Sincerely,

Max N. Osborn

TRAP 90

Dear Justice Hecht:

This letter is in response to the invitation to comment on the proposed amendments to the Texas Rules of Civil and Appellate Procedure. This letter will be confined to expressing concerns as to two major changes in the Rules of Appellate Procedure as viewed by the office of Clerk of the Second Court of Appeals.

The second rule change we are concerned about is found in Rule 90. Part of our concern arises from the conflict between subsections (c) and (h). Subsection (c) in and of itself makes perfect sense in forbidding the appellate court to publish an opinion after the Supreme Court has acted on the case. Subsection (h), however, then requires the court of appeals to automatically publish all court of appeals' opinions in which writ is granted or refused. Perhaps (c) should be amended to read:

> However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief, **except as provided in (h).**

If granting or refusing a writ makes all opinions printworthy, perhaps the Standards for Publication set out in (d) should also be amended to add: **; or (5) if writ of error is granted or refused.** A problem then arises in that (h) does not tell the appellate court whether it must publish opinions in which discretionary review is granted or refused, as the Court of Criminal Appeals is not mentioned in (h), although it is in (c).

A further problem arises for the appellate clerks in the instances under (h) where writ is granted and the Supreme Court later holds writ was improvidently granted. Should the court of appeals then attempt to withdraw from publication its unpublished opinion that was published only because writ had been granted? It would be helpful to appellate court clerks if the rules addressed this question.

These comments on Rule 90 are based on the assumption that (h) is only addressing cases in which the court of appeals' opinion is marked "do not publish" under Rule 90(c). If, however, we have misread (h) and it is intended that the court of appeals withhold publication on all opinions until the Supreme Court has acted, we do oppose such a construction of (h). This construction of (h) would seriously delay publication of opinions by courts of appeals. As a practical result, attorneys could not use a court of appeals opinion for legal research or authority unless they were fortunate enough to have Westlaw or Lexis. Legal research is extremely difficult with only slip opinions.

If these constructions of (h) are not what the Rules Committee intended, please clarify rule 90(h) so that your intent is clear and there is no internal conflict with 90(c).

Sincerely,

Yvonne Palmer

Yvonne Palmer
Chief Clerk
2nd Court of Appeals

00559

TRAP 91. Copy of Opinion and Judgment to ***[illegible]*** [Interested Parties, and Other Courts]

On the date an opinion of an appellate court is handed down, ***[illegible]*** the clerk of the appellate court ***[illegible]*** [shall] mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to ***[illegible]*** [the State and each of the defendants in a criminal case and to each of the parties to the trial court's final judgment in a civil case] a copy of the opinion ***[illegible]*** [handed down] by the appellate court and a copy of the judgment rendered by ***[illegible]*** [the] appellate court as entered in the minutes. [Delivery to a party having counsel indicated of record shall be made to counsel.] The ***[illegible]*** clerk of the trial court shall ***[illegible]*** filed [the copy of the opinion] among the papers of the cause in such court. When there is more than one attorney ***[illegible]*** [for a party], the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals ***[illegible]***.

[COMMENT ON 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts

STATE BAR OF TEXAS

4543.001

TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

4. Suggested corrections of errors in spelling and errors of omission.

We also point out various errors in spelling and wording which have appeared in the rules as forwarded to the supreme court and as published in the bar journal. These mistakes are identified by line number and rule on the typewritten copy of the proposed rules submitted to the court.

L. TRAP 91, lines 12-14: "Delivery on a party . . . shall be made on counsel" should read "Delivery to a party . . . shall be made to counsel."

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP

Rule 91. Again this rule requires the clerk of the court to notify parties that might not be parties to the appeal. This rule, unlike the prior rules, specifically allows for service to be on counsel indicated of record instead of the party. What counsel? Previous rules require a listing of trial counsel, but, again, appellate counsel is what is important. There should be a provision here, as well as a general provision applying to all of the appellate rules, that, if more than one attorney represents a party and if the attorneys fail to designate in advance the one to whom copies of all correspondence is to be sent, then the appellate court may so designate.

TRAP 100. Motion and ~~Second~~ [Further] Motion for Rehearing

(a) Motion for Rehearing. (No change.)

(b) Reply. (No change.)

(c) Decision on Motion. (No change.)

(d) ~~Second~~ [Further] Motion for Rehearing. (No change.)

(e) Amendments. (No change.)

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within ~~fifteen days after submission~~ [the period of the court's plenary jurisdiction[with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) by written order issues within said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(g) Extensions of Time. (No change.)

[COMMENT TO 1990 CHANGE: To provide that en banc review may be conducted at any time within the period of plenary jurisdiction of a court of appeals.]

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP
Rule 100. Since the rule discusses the plenary power of the appellate court, then "plenary power" should be defined. In other words, if a motion for rehearing is overruled by a court of appeals and then later, on the 29th day afterwards but prior to the filing of an application for writ of error, a majority of the justices order an en banc reconsideration on their own motion, is that okay? What about reconsideration by the panel itself? There is no provision to allow for the reconsideration by a panel itself during the court's "plenary power."

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

I apologize for not being able to submit my comments prior to November 30, but hope that these arrive in time for consideration.

(15) TRAP100: There is a textual error in subparagraph f. I believe the word "within" has been inadvertently omitted.

(note: this has already been corrected.

120a
166
166(a)
271(4)
TRAP 100(f)

LAW OFFICES
OF
STANLEY G. SCHNEIDER
A PROFESSIONAL CORPORATION
Eleven Greenway Plaza, Suite 3112
Houston, Texas 77046
(713) 961-5901

Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

November 16, 1989

Justice Nathan L. Hecht
P.O. Box 12248
Austin, Texas 78711

RE: Proposed 1990 Rule Changes.

Dear Justice Hecht:

After reviewing the proposed rule changes, I offer the following comments and suggestions:

4. Texas Rules of Appellate Procedure 100(f):

The proposed change in the first full textual sentence would produce a rule that said:

A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel [-] the period of the court's plenary jurisdiction . . . "

Either the striken word "within" or some other similar word should remain between "panel" and "the".

Respectfully,

W. TROY McKINNEY

WTM/agl

TRAP 100

14. Do not strike "within".

15. For parallel structure and verb tense, (f)(2) should say "issuing a written order within said period, . . ."

TRAP 100. Motion and ~~Second~~ [Further] Motion for Rehearing

(a) Motion for Rehearing. (No change.)

(b) Reply. (No change.)

(c) Decision on Motion. (No change.)

(d) ~~Second~~ [Further] Motion for Rehearing. (No change.)

(e) Amendments. (No change.)

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel ~~within fifteen days after such decision is issued~~ [the period of the court's plenary jurisdiction] with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) ~~by~~ written order ~~issues within~~ said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(g) Extensions of Time. (No change.)

issuing a

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

TRAP 90(h)

2. Appellate Rule 90(h) conflicts with (c) and makes no sense. If (h) means that a court of appeals must automatically publish all opinions in which writ was filed, I oppose such a change. The number of pulished opinions would increase greatly. The quality of law published would not be increased, but the time lawyers must spend wading through useless appellate opinions will certainly increase -- further slowing legal research and raising legal fees. Law libraries will be hard pressed to find room for all the new reporters.

If, on the other hand, (h) means courts of appeals should withhold from publication all their opinions until time for Supreme Court action has passed, I oppose the change. This would seriously delay publication of court of appeals opinions. Not everyone has slip opinions and access to Westlaw and Lexis. If I am incorrect in these interpretations of (h), please re-write the section and clarify the committee's intent.

These may not be the type of comments the committee sought, but I felt they needed to be made. Thank you for your time and attention.

Sincerely,

Carol Baker

Carol Baker
1224 Randy Drive
Irving, TX 75060
SB #01565580

SECTION NINE. APPLICATION FOR WRIT OF ERROR AND BRIEF IN RESPONSE [IN THE SUPREME COURT]

TRAP 130. Filing of Application in Court of Appeals

(a) Method of Review. (No change.)

(b) [Number of Copies;] Time and Place of Filing. [Twelve copies of] T[t]he application shall be filed with the Clerk of the Court of Appeals within thirty days after the ~~ø~~ ~~ø~~ ruling ~~ø~~ ~~ø~~ [on all] timely [filed] motion[s] for rehearing/~~f~~ ~~ø~~ ~~ø~~ ~~ø~~ ~~ø~~. [An application filed prior to the filing of a motion for rehearing by a party shall not preclude a party, including the party filing the application, from filing a motion for rehearing, or the court of appeals from ruling on such motion. An application filed prior to the last ruling on all timely filed motions for rehearing shall be deemed to have been filed on the date of but subsequent to the last ruling on any such motion].

(c) Successive Applications. (No change.)

(d) Extension of Time. (No change.)

[COMMENT TO 1990 CHANGE: To provide that the court of appeals shall rule on all timely filed motions for rehearing regardless of any prematurly filed application for writ of error and to deem that all premature applications for writ of error are filed on the date of but subsequent to the last ruling by the court of appeals on the last timely filed motion for rehearing.]

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman — January 15, 1990
Supreme Court Rules Advisory Committee

RE: Rule 130(c), Texas Rules of Appellate Procedure
Time for Filing Successive Applications for Writ of Error (1 page)

A question has arisen whether the deadline for filing successive applications for writ of error should be determined by reference to the actual filing of the first application or by reference to the event from which the deadline for the first application is measured, the overruling of the last timely motion for rehearing filed by any party. It has been suggested that the present rule is confusing. The following amendment is proposed:

> **(c) Successive Applications.** If any party files an application within the time specified or as extended by the Supreme Court any other party who was entitled to file ~~such~~ an application ~~but failed to do so shall have ten additional days from the date of filing any preceding application in which to file it~~ may do so within forty days after the overruling of the last timely motion for rehearing filed by any party.

The Court requests the Committee's counsel regarding this matter.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

(214) 653-6920

December 7, 1989

TRCP 5
TRCP 296
TRCP 4
TRAP 51
TRAP 90
TRAP 20

TRAP
TRAP
TRAP
→ TRAP
TRAP
TRAP
TRAP
TRAP
TRAP

Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

C. Prematurely filed applications for writ of error. The Supreme Court has listened to us and has attempted to resolve the problem stated in our *Wadsworth* opinions, beginning with *Wadsworth Business Center-Willowbrook Limited Partnership*, 775 S.W.2d 663 (Tex. App.--Dallas 1989, writ pending). Whether it has been resolved, only time can tell. Tex. R. App. P. 130(b) now expressly provides that a writ application "filed prior to the filing of a motion for rehearing by a party shall not preclude . . . the court of appeals from ruling on such motion." In such cases, the application is treated as a premature application, deemed filed on the date of, but subsequent to, the filing of the motion.

I note that the wording of the amended rule only contemplates that the application be filed before the motion; it does not literally address the situation in which a motion is filed, but just not ruled upon, before the application is filed. (Because of the different deadlines--15 days for a motion, 30 days for an application--the latter situation is far more likely.) Nonetheless, if we have jurisdiction to issue an order on a motion that is filed after a writ application, we must have jurisdiction to issue an order, after a writ application, on a motion that was filed before the application. Additionally, the comment to the rule states that the amendment is "[t]o provide that the court of appeals shall rule on *all* timely filed motions for rehearing regardless of any prematurely filed application for writ of error . . . " (emphasis added). Thus, the rule seems sufficiently clear, but it may need caselaw expounding.

The clerks' office will have to be told that, from now on, they file all timely motions for rehearing whether or not an application for writ of error has already been filed.

Regards,

Craig T. Enoch
Chief Justice

005

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885 - 81)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5689

TELECOPY NUMBER
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

TRAP 130

Dear Judge Hecht:

9. In light of the language of footnote 5 to Judge Ray's concurring opinion in *Donwerth*, the court may wish to add the following language to the end of Texas Rule of Appellate Procedure 130(c): "in which to file it **[with the Clerk of the Court of Appeals]**. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 643 n.5 (Tex. 1989) (Ray, J., concurring). Conversely, the court may wish to allow successive applications to be filed directly with the clerk of the supreme court. In any event, it would be unfortunate if under the current rule a successive application was mistakenly filed in the supreme court and opposing counsel argued that no jurisdiction existed to consider that application. This is the sort of appellate trap the court has sought to do away with.

The court may also wish to address the other appellate trap highlighted in *Donwerth*: the requirement that a motion for rehearing in the court of appeals be filed before a successive application for writ of error may be filed. *Donwerth*, 775 S.W.2d at 643 n.6. Texas Rule of Appellate Procedure 130(c) appears to be a savings clause that allows a party who originally did not intend to file an application for writ of error to file an application if the opposing party files an application. This savings clause is largely nullified by the jurisdictional requirement of filing a motion for rehearing in the court of appeals. The court may wish to consider either waiving the requirement of a motion for rehearing in the court of appeals for a successive application or specifically stating in rule 130(c) that a motion for rehearing is still required.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1884
BEN F. VAUGHAN, II
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5609

TELECOPY NUMBE
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

8. The proposed amendments to Texas Rules of Appellate Procedure 130(b) and 132(a) refer to the court of appeals ruling on all timely filed motions for rehearing. I assume this language is intended to prevent the situation that occurred in *Rose*. *Rose v. Court of Appeals*, 32 Tex. Sup. Ct. J. 279 (Mar. 9, 1989). I am concerned, however, that unless these rules specifically apply only when the court of appeals finally **overrules** all timely filed motions for rehearing, then the proposed amendments will not solve the problem.

Under the proposed amendments, what happens if the court of appeals rules on all timely filed motions for rehearing, granting one and overruling the other? Proposed rule 133(a), if read literally, appears to require the clerk of the court of appeals to forward the record and any applications for writ of error to the clerk of the supreme court. In addition, proposed rule 130(b) appears to require a party to file an application for writ of error thirty days after a rehearing is granted. Does this mean that a party no longer has a right to another motion for rehearing in the court of appeals if the judgment is changed on rehearing, and that this second motion for rehearing is no longer a jurisdictional prerequisite for an application for writ of error?

Finally, is there a typographical error in the *Bar Journal* where "prematurely" is spelled "prematurly" in the comment?

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 131. Requisites of Applications

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) Names of All Parties. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case [and so the clerk of the court may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the Supreme Court].

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) (No change.)

(h) (No change.)

(i) (No change.)

(j) (No change.)

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP
Rules 131 and 132. Again, this rule requires notification by the clerk on all trial parties instead of appellate parties (counsel). See previous comments.

TRAP 131

TRAP 90 156 216(1) 289 307 542 324(a)

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1881
BEN F. VAUGHAN, III
OF COUNSEL

TELECOPY NUMBE
(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5689

Fed Rules Sect

TRAP 21a 237a TRAP 41, 202, 210 57(a)(1) 12 14 41(a)(1) 54(a) (2)(d)

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

7. In amending Texas Rules of Appellate Procedure 74(a) and 131(a), the court may wish to consider United States Supreme Court Rule 28.1, which requires a corporation to name all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 132. Filing and Docketing Application in Supreme Court

(a) Duty of Clerk of Court of Appeals. When an application for writ of error to the Supreme Court is filed with the Clerk of the Court of Appeals, he shall record the filing of the application, and shall [, after the court of appeals has ruled on all timely filed motions for rehearing,] promptly forward it to the Clerk of the Supreme Court with the original record in the case and the opinion of the court of appeals, the motions filed in the case, and certified copies of the judgment and orders of the court of appeals. The clerk need not forward any exhibits that are not documentary in nature unless ordered to do so by the Supreme Court.

(b) Expenses. (No change.)

(c) Duty of the Clerk of the Supreme Court. The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify ~~the attorney of record~~ [each party to the trial court's final judgment, as listed on the first page of the application,] by letter of the filing of the application in the Supreme Court. [Notification to parties having counsel indicated of record shall be made to counsel.]

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the

parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

January 2, 1990

Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

We have reviewed the proposed amendments to the Texas Court Rules and respectfully submit the following comments for the Court's consideration:

TRAP
Rules 131 and 132. Again, this rule requires notification by the clerk on all trial parties instead of appellate parties (counsel). See previous comments.

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-
BEN F. VAUGHAN, III,
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5689

TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

8. The proposed amendments to Texas Rules of Appellate Procedure 130(b) and 132(a) refer to the court of appeals ruling on all timely filed motions for rehearing. I assume this language is intended to prevent the situation that occurred in *Rose*. *Rose v. Court of Appeals*, 32 Tex. Sup. Ct. J. 279 (Mar. 9, 1989). I am concerned, however, that unless these rules specifically apply only when the court of appeals finally **overrules** all timely filed motions for rehearing, then the proposed amendments will not solve the problem.

Under the proposed amendments, what happens if the court of appeals rules on all timely filed motions for rehearing, granting one and overruling the other? Proposed rule 133(a), if read literally, appears to require the clerk of the court of appeals to forward the record and any applications for writ of error to the clerk of the supreme court. In addition, proposed rule 130(b) appears to require a party to file an application for writ of error thirty days after a rehearing is granted. Does this mean that a party no longer has a right to another motion for rehearing in the court of appeals if the judgment is changed on rehearing, and that this second motion for rehearing is no longer a jurisdictional prerequisite for an application for writ of error?

Finally, is there a typographical error in the *Bar Journal* where "prematurely" is spelled "prematurly" in the comment?

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 133. Orders on Applications for Writ of Error

(a) (No change.)

(b) Conflict in Decisions. In cases of conflict ~~named in~~ [under] subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

(c) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

TO: Luther H. Soules, Chairman
Supreme Court Rules Advisory Committee

January 15, 1990

RE: Rule 133(b), Texas Rules of Appellate Procedure
Supreme Court Per Curiam Opinions (3 pages)

When the Supreme Court grants an application, it is not required by the Constitution or statutes to hear oral argument. In certain cases, the Court does not hear oral argument and issues its decisions in per curiam opinions. The Court also sometimes issues a per curiam opinion with the denial of an application.

Although Rule 133(b), Texas Rules of Appellate Procedure, does not refer expressly to per curiam opinions, it purports to state the applicable procedure in the Supreme Court, as follows:

> **Conflict in decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court or appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

In effect, the rule is advisory and informational only, and not binding upon the Court. The Court has the power to issue per curiam opinions in cases in which the predicate conflict required by the rule does not exist. Arguably, some might argue that it does so already, although the Court has at least attempted to adhere to the policy stated in the rule. It is less certain that the Court has the power to issue a per curiam opinion when an application is denied.

The Court is considering whether to expand the category of cases in which per curiam opinions should issue to include, particularly, cases in which the issue is so clear, simple and well-defined, and the briefs so thorough, that it is very unlikely that oral argument could in any way influence the outcome of the case. The kind of language the Court may consider is set out below.

The Court requests the counsel of the Committee regarding these matters.

PROPOSED AMENDMENTS

Rule 133. Orders on Applications for Writ of Error

(a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

~~**(b) Conflict in Decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.~~

~~(c)~~ (b) **Moot Cases.** If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such

cause or the appealable portion thereof without reference to the merits of the appeal.

Rule 170. ~~Order of~~ Submission

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument.

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1888-1981)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

CHARLES A. SPAIN, JR.
(512) 480-5789

TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

10. Since Texas Rule of Appellate Procedure 133(b) is going to be amended anyway, the court may wish to codify its decision in *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1980). I propose the following language:

> If the decision of the court of appeals is in conflict with an opinion of the Supreme Court **[or the United States Supreme Court]**, **[or]** is contrary to the **[United States or Texas]** Constitution, ~~the statutes~~ **[state or federal law,]** or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the ~~case~~ **[cause]**, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

Deletion of "the statutes" and insertion of "state or federal law" would clarify that the court may issue a per curiam opinion whenever the opinion of the court of appeals conflicts with any state or federal law, regardless of whether it is a statute, treaty, or agency rule.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRAP 181. Judgments in Open Court

In all cases decided by the Supreme Court, its judgments or decrees will be ~~pronounced/in/open~~ [announced through the clerk of the] court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. Where the court, after the submission of a case, is of the opinion that the court of appeals has entered a correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or ~~refuse~~ [deny] the application as though the writ had never been granted, without writing any opinion.

[COMMENT TO 1990 CHANGE: To conform Rule 181 to the Supreme Court's current method of announcing its orders.]

GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885 - 19)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

CHARLES A. SPAIN JR.
(512) 480-5609

November 26, 1989

The Honorable Nathan L. Hecht, Justice
The Supreme Court of Texas
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Judge Hecht:

11. To be consistent with other references to the clerk, the court may wish to alter the proposed amendment to Texas Rule of Appellate Procedure 181 to "**[announced through the Clerk of the Supreme Court]** ~~court~~;".

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

Charles A. Spain, Jr.

TRCE 614. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. [This rule is not applicable to discovery proceedings.]

[COMMENT TO 1990 CHANGE: See Rules 200 and 208, Texas Rules of Civil Procedure, relating to depositions.]

LAW OFFICES
OF
PAT MALONEY
PROFESSIONAL CORPORATION

December 4, 1989

** PAT MALONEY
* PAT MALONEY, JR.
* GEORGE LeGRAND
JANICE MALONEY
* VIRGIL W. YANTA
PATRICIA MALONEY
TOM JONES
CHARLES NICHOLSON
AL M. HECK (1896-1977)
STEPHANI WALSH
ROGER G. BRESNAHAN
* GARY HOWARD
OF COUNSEL
T.J. SAUNDERS
OF COUNSEL

Justice Lloyd Doggett
The Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

RE: Proposed Revisions to Texas Rules

Dear Mr. Justice Doggett:

After having reviewed the proposed changes to the Texas Rules of Civil Procedure and the Texas Rules of Civil Evidence, I wanted to point out the following less-than-salutary provisions in the rules, as well as the one exemplary provision, all of which are stated below:

Texas Rules of Civil Evidence:

614:

The rule should be more explicit in stating that "the Rule" can be invoked in depositions, for while it appears that such will be the case under the proposed amendments to the Rules of Civil Procedure regarding notices of depositions, this rule is less-than-clear in stating that to be its purport. Thus, if it is the intention of the Supreme Court to allow for the exclusion of non-parties and non-spouses, it should be clearly stated so. If it was not the Supreme Court's intention to do the same, it should be.

Very truly yours,

LAW OFFICES OF PAT MALONEY, P.C.

By: Virgil W. Yanta
VIRGIL W. YANTA

VWY:naj

cc: Chief Justice Thomas R. Phillips
Justice Franklin S. Spears
Justice C.L. Ray
Justice Raul A. Gonzalez
Justice Oscar H. Mauzy
Justice Eugene A. Cook
Justice Jack Hightower
Justice Nathan L. Hecht

WHITE, HUSEMAN, PLETCHER & POWERS
ATTORNEYS AT LAW

'ANCEY WHITE
AN HUSEMAN
ANTHONY E. PLETCHER
BRYAN POWERS
JOHN O. MILLER III
MARGERY HUSTON
MARK DEKOCH
PAUL DODSON

2100 THE 600 BUILDING
CORPUS CHRISTI, TEXAS 78473
(512) 883-3563

MAILING ADDRESS:
P.O. BOX 2707
CORPUS CHRISTI, TEXAS 78403-2707
FAX (512) 883-0210

TRCP 200

TRC-614

November 14, 1989

Hon. Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Changes to the Rules of Civil Procedure

Dear Justice Hecht:

Please note my opposition to the proposed change to TEX. R. CIV. P. 200. The proposed change would simply create problems in taking depositions; the change would not cure any problems which may now exist.

The amendment appears to deal obliquely with the question of which persons may properly appear at a deposition. The amendment, however, provides no guidance on the question, and the proposed amendement to TEX. R. CIV. EVID. 614 would expressly make "the rule" inapplicable to depositions. Instead the proposed change to Rule 200 simply creates another needless battleground for issues such as who constitutes "employees of counsel," what constitutes reasonable notice of identity of other persons, and the nature of the notice that is required. The question of sanctions for violations of this rule also should be interesting.

This aspect of the rules is not broken. Please don't fix it.

Sincerely,

Paul Dodson

PD:jd

CANTEY & HANGER
ATTORNEYS AT LAW
2100 FIRST REPUBLICBANK TOWER
801 CHERRY STREET
FORT WORTH, TEXAS 76102
817/877-2800

ERNEST REYNOLDS III

METRO LINE 429-3815
TELEX 75-8631
TELECOPY 817/877-280
ATTORNEY'S DIRECT DIAL
877-2852

166 b
200
~~614~~
271-279
208
305
TRCE 614
TRCE 703

November 21, 1989

Honorable Justice Nathan Hecht
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Regarding the proposed change for evidence rule 614, and as I have noted above, my thought is that this proposal to clarify the applicability of the rule probably is a good proposal, but the language probably should appear as a comment below the rule, not as a part of the rule. I would not presume to speak for the other members of the evidence committee, but I would say this: my best speculation is that the other members of the committee would probably have some interest in this approach, also.