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SUPREME COURT OF TEXAS ADVISORY COMMITTEE
AGENDA

May 15, 16, 17, 1986

1. Report on Proposed Administrative Rules for Texas Trial Courts by Judge Solomon Casseb, Chairman of the Special Subcommittee on matters contemplated by House Bill 1658

2. Report and final action on Rule changes addressed by the Standing Subcommittee on Pre-Trial and Discovery Rules 15-215A: Sam Sparks

3. Report of Ad Hoc Committee composed of Spivey, Morris, McConnico and Reasoner regarding their work with the Supreme Court and their space requirements during the upcoming remodeling of the Court building

4. Report on Canon 3-C: Luther H. Soules III

5. Report of Subcommittee on Proposed Rule 365a: Professor J. Hadley Edgar

6. Report and final action on Rule changes addressed by the Standing Subcommittee on Rules of Evidence including their relationship to Rules of Civil Procedure: Professor Newell Blakely

7. Report of the Standing Subcommittee on Post Trial Rules 315-331: Harry Tindall

8. Report of the Standing Subcommittee on Justice Court Rules 523-591: Broadus Spivey

9. Report of the Standing Subcommittee on Ancillary Proceedings Rules 592-734: Pat Beard

10. Report of the Standing Subcommittee on Special Procedures Rules 737-813: James Kronzer

11. Report of the Standing Subcommittee on General Rules 1-14: Judge Linda Thomas

12. Report on Rule changes addressed by the Standing Subcommittee on Trial Rules 216-314: Franklin Jones, Jr.

13. Report and final action on Rule changes addressed by the Standing Subcommittee on Court of Civil Appeals Rules 342-472 and Supreme Court Rules 474-515: Professor William Dorsaneo and Russell McMains

MINUTES SUPREME COURT ADVISORY COMMITTEE

March 7-8, 1986

The Advisory Committee of the Supreme Court of Texas met on March 7, 1986, at 10:30 a.m. pursuant to call of the Chairman.

Members of the committee in attendance were Honorable Luther H. Soules III, Chairman, Gilbert T. Adams, Jr., Pat Beard, David J. Beck, Professor Newell Blakely, Frank L. Branson, Professor William V. Dorsaneo III, Professor J. Hadley Edgar, Chief Justice John Hill, Vester T. Hughes, Jr., Franklin Jones, Jr., W. James Kronzer, Gilbert I. Low, Steve McConnico, Russell McMains, Charles Morris, Harold Nix, Honorable Jack Pope, Tom L. Ragland, Harry M. Reasoner, Sam D. Sparks, Sam Sparks, Broadus A. Spivey, Harry Tindall, Honorable Bert H. Tunks, Professor Orville C. Walker, Justice James P. Wallace, and Honorable Allen Wood.

Welcoming remarks were received from Chief Justice John L. Hill.

Upon motion by Franklin Jones, Jr., seconded by Charles, the minutes from May 31, 1985, were approved.

The Chairman requested discussion concerning Canon 3C of the Code of Judicial Conduct. The language "shall" was changed to "should" by a show of hands 14 to 2. The Chairman's suggestion that the proposed Canon 3C be recommended to the Supreme Court was unanimously approved.

Professor Dorsaneo gave his subcommittee report. Rules 354 and 380 has been incorporated in proposed Rule 30(a)(3)(B). Rule 377 submitted by Raymond Judice has been taken care of by the Supreme Court itself. Rule 4 regarding certification form on the transcript or statement of acts, pursuant to a memo to Chief Justice Pope from Ray Judice, dated August 22nd, was done. Current Rule 423 was done by the Supreme Court in the last amendment of Rule 423. Rule 439, submitted by Justice Robertson, was reported on at the last meeting. It was decided by both the subcommittee and the full committee that Rules 439, 440, and 441 relating to remittiturs not be abolished. Rule 452 was extensively discussed last meeting and there will be no change in the present practice recommended. Rule 458, submitted by Judge Casseb, was voted down in the last meeting.

It was unanimously decided that Judge Frank J. Douthitt's recommendation regarding changing the time periods in the appellate timetable not be considered.

After discussion, Professor Jeremy Wicker's recommendation that the reference to a notice of appeal be deleted from current Rule 360 and from proposed Rule 35 at paragraphs 5 and 8 was unanimously rejected.

It was moved by Professor Dorsaneo and seconded by Mr. Sparks that Professor Wicker's recommended change of Rule 363, incorporated in Proposed Rule 30(a)(1) be rejected. The committee voted unanimously to reject same.

Professor Dorsaneo's recommendation that the sentence that currently appears in Rule 363 that is the subject matter of Professor Wicker's second recommendation be moved from proposed Rule 30(a)(1) to proposed appellate Rule 35 was unanimously approved, after being moved by Professor Dorsaneo and seconded by Mr. McMains.

Professor Wicker's recommendation that Rule 447 be corrected by replacing the reference to the repealed rule with the reference to the rule that covers that matter was approved and the change will be recommended.

After a motion by Professor Dorsaneo, and a second by Mr. Tindall, it was approved by a show of hands that, in the proposed rule that would supersede current Rule 447, there would be no cross reference to other rules. Proposed appellate Rule 88 will be used as a guide in drafting same.

Professor Wicker's suggestion concerning Rule 496, suggesting that it refer to the rule that contains the requirements or requisites for an application for writ of error rather than the rule for preparation of a brief in the court of appeals has already been addressed by Professor Dorsaneo's committee. Professor Wicker's suggestion that "J" and "N" be eliminated was approved and Professor Dorsaneo's suggestion that Proposed Rule 136(b) be corrected to reflect the foregoing was carried unanimously after motion by Professor Edgar and a second by Mr. Beck and Judge Tunks.

After discussion, it was agreed that Professor Dorsaneo would contact Professor Wicker for clarification of his suggestion regarding Rule 376(a).

Professor Wicker's suggestion concerning current Rule 388a (incorporated in the proposed appellate rules as Rule 13) was next considered by the committee. It was moved by Professor Dorsaneo and seconded by David Beck that, if the proposed rules are adopted, the order ought to be changed to refer to Rule 13 of

the Texas Rules of Appellate Procedure. The motion carried unanimously.

As per Professor Wicker's suggestion, Professor Dorsaneo moved that current Rule 385a, and if it's adopted, Proposed Rule 16, be corrected by changing the reference from the repeal statute to the appropriate section of the Texas Government Code. Mr. Sparks seconded and the motion carried unanimously.

Professor Dorsaneo made the same recommendation concerning Rule 469 (Proposed Rules 131 and 483, located in the proposed rules as Proposed Rule 133) and current Rule 499a (Proposed Rule 140) and the recommendation carried unanimously. Professor Dorsaneo and Mr. Tindall suggested deletion of the word "Texas" and it was the consensus of the committee that the deletion be made.

Professor Dorsaneo then read his redrafted Proposed Rule 84 to the committee and requested whether he had followed the committee's wishes as expressed in its November, 1985, meeting. Discussion ensued regarding current Rules 435 and 438, and there was extensive discussion regarding the wording of Proposed Rule 84. 11 members felt the Rule should contain the word "frivolous" and 11 members felt the phrase "without sufficient cause" to be appropriate. Chairman Soules read Rule 84, as changed in the committee's discussion, out loud as follows: "In civil cases where the court shall find that an appeal or writ of error has been taken for delay and without sufficient cause then the court of appeals may award the appellee as much as 10 percent of the amount of damages awarded in the judgment." Mr. Spivey motions to table the discussion and take it up at a later point in the session.

Professor Dorsaneo then reported to the committee that, since its last meeting, the Court of Criminal Appeals promulgated a version of the Texas Rules of Appellate Procedure that goes into effect September 1, 1986. He also discussed with the committee the work that needs to be done to harmonize the rules promulgated by the Court of Criminal Appeals and the ones that will be promulgated by the Supreme Court. David Beck volunteered to have his office read the two drafts, highlight the differences and send them to Professor Dorsaneo. Chairman Soules then appointed David Beck and Russell McMains to work with Professor Dorsaneo in working with the Court of Criminal Appeals for a June publication of a joint set of appellate rules. Justice Wallace will work with Mr. Beck, Mr. McMains and Professor Dorsaneo.

Chairman Soules stated that, in the event that 364a or 365a is adopted or recommended, then 368, 627 and 634 would also need to be amended as a housekeeping measure. Mr. Branson suggested that the matter be tabled, since several members of the committee represent both sides in the Pennzoil vs. Texaco litigation. Chairman Soules stepped down and appointed Professor Dorsaneo as

chairman in this particular matter and discussion ensued. Mr. Branson ruled that consideration of Proposed Rule 365a be tabled and Mr. Low seconded. By show of hands, by two-thirds vote, the committee tabled consideration of Proposed Rule 365a. David Beck, Russell McMains, Luther Soules, Harry Reasoner and James Kronzer abstained from voting. Mr. Low requested that the record reflect that his vote in no way reflected on any member of the committee. Justice Wallace requested that the issue be taken up again as soon as possible. Professor Dorsaneo, as acting chairman, appointed a subcommittee to be chaired by Professor J. Hadley Edgar with Broadus Spivey and Sam Sparks of El Paso to make a report at the next meeting.

Professor Edgar gave a brief summary of proposed Rule 277, regarding standardization of broad form questions, and the subcommittee's reasoning processes behind its recommendations for changes. Said changes were discussed extensively by the committee. The first sentence of the first full paragraph on Page 15 under the Proposed Rule 277 was changed by deleting from "in any case" in the first line, and deleting all of the second, third, fourth, fifth, sixth and seventh lines through the word "culpable." The word "also" was struck from the second sentence of the first full paragraph on page 15. Chairman Soules asked, by show of hand, how many felt good cause should be retained for the submission of a general charge. Ten felt it should be retained and ten felt it should not. On a show of hands, fourteen members approved the adoption of Rule 277, as proposed on page 13, with one change, deleting the words "in a proper case" and inserting "for good cause" in their place. Eight members opposed the motion. Regarding inferential rebuttal issues, the rule as written was defeated by a majority by show of hands with four opposed. It was voted, house against one, that the proposed rule have language saying "inferential rebuttal questions shall not be submitted." The language "Placement of the burden of proof may be accomplished in instructions rather than by inclusion in the question" was recommended by a unanimous show of hands. Chief Justice Pope commented at length regarding the court advising the jury of the effect of its answers. Upon unanimous vote, it was decided to delete the first sentence in the first full paragraph on Page 16, "upon request of either party the court may instruct the jury as to the effect of its answers to questions will have upon the judgment to be rendered in the case." It was moved by Mr. Branson and seconded by Professor Edgar that the second sentence, "counsel may argue to the jury what they contend to be the effect of the jury's answers and the judgment to be rendered." Upon show of hands, sixteen members voted for deletion and four members voted for retention. Retention of the last sentence of the rule was approved, sixteen to five. Eight members voted to make the last sentence mandatory, with the last sentence being permissive carrying. "The court may predicate the damage question upon affirmative findings of liability" was moved to the first paragraph on Page

15 to read "The court shall 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 questions upon affirmative findings of liability." The committee voted to adopt the last paragraph on Page 16, as written. Six members felt that the judge should be able to explain from the bench to the jury without given them a written instruction, be outside of a written instruction in the event of a conflict. Nine members felt that the judge, whenever he does instruct, if he can instruct on an inconsistency, should be confined to a written instruction which he may read to the jury from the bench after an opportunity for objections. Chairman Soules' suggestion to move the paragraph regarding written instructions being read from the bench from Rule 277 to Rule 295 was unanimously approved by show of hands. Chairman Soules then moved that Rule 277 be recommended to the Supreme Court and upon a show of hands, it was carried, with Harry Reasoner and James Kronzer voting against same.

The committee discussed meeting times and dates and agreed that it should attempt to meet quarterly instead of twice a year, meet earlier in the day and schedule working lunches instead of lunch breaks.

The committee agreed to meet on May 16th and 17th, 1986, beginning at 8:30 a.m. on the morning of May 16, 1986.

After discussion, Mr. Branson moved that the committee adopt the provisions underlined on Page 21 regarding broad form questions. Mr. Low seconded the motion and by show of hands, eleven to six, it was adopted.

The committee re-convened on March 8, 1986.

It was proposed that the word "judge" in Rule 271 be changed to "trial court". The motion carried unanimously.

On Rule 272, "judge" was changed to "court" "his" to "its" and an addition was made "outside the presence of the jury". The changes will be recommended to the Supreme Court as a unanimous recommendation of the committee.

Rule 273 as proposed will be recommended for adoption by the Supreme Court as the unanimous recommendation of the committee.

Rule 274 as proposed will be recommended for adoption by the Supreme Court as the unanimous recommendation of the committee.

It was unanimously agreed that the word "charge" be eliminated from Rules 273, 274, and 275.

It was unanimously agreed that the first word in the third sentence from the bottom of Page 8 "requested" be deleted from

Rule 275. With that deletion, it was unanimously agreed that Proposed Rule 275 be recommended to the Supreme Court for adoption.

Rule 277 and 295 came up for further discussion. It was moved by Mr. Beck and seconded by Mr. Sparks that they be referred back to Mr. Jones' subcommittee for further review.

Chairman Soules requested that Mr. Beck and Mr. Jones work on the issue submission aspects of Rules 295 and 286.

Proposed Rule 278, "Submission of Questions" is the first full paragraph of what used to be Rule 279. Mr. Low moved that the first line of Proposed Rule 278 be deleted, with Professor Edgar seconding. The motion was unanimously carried. The committee moved to eliminate the words "the controlling" and the first clause in the sentence. After further discussion, It was agreed that further work was necessary before Rule 278 could be submitted.

Proposed Rule 279 was then discussed. Suggestions concerning deletions and changes to language were made and it was referred back to subcommittee.

The deletion of the phrase "as well as distance actually traveled in serving such process" in Rule 16 was unanimously recommended.

Chairman Soules included Rule 21c in the repealer list to the appellate rules project under no objection from the committee.

It was moved by Mr. Sparks to approve the recommendation made by Mary Jo Carroll regarding Rule 117a, seconded by Professor Dorsaneo. Rule 117a was adopted unanimously by show of hands.

The idea of "good cause" in Rule 165a(2) was rejected unanimously by show of hands, after motion by Mr. Kronzer and second by Mr. McConnico. The proposal to extend the time to seek reinstatement to six months will be taken up at the next meeting by Mr. Sparks. Professor Wicker's suggestion to change "is" to "are" in the phrase "The same reinstatement procedures and timetables" was unanimously recommended by show of hands.

It was moved by Professor Dorsaneo and seconded by Mr. Sparks that Rule 184 and 184a be repealed, since the subject matter is covered by the Texas Rules of Evidence. Chairman Soules, Mr. Kronzer, Mr. Reasoner, Mr. McMains, Mr. Beck and Judge Casseb abstained from voting.

Chief Justice Hill requested a subcommittee be appointed to assist the Supreme Court in the remodeling of the Supreme

Courtroom and its chambers. Mr. Reasoner was appointed chairman, with Mr. Spivey, Mr. McConnico and Mr. Morris volunteering as members.

Chairman Soules requested that Mr. Professor Blakely study the Rules of Practice in District and County Courts in Section 9, Evidence in Depositions and Subsection A, Evidence, numbered Rules 176 through and including Rule 185 to determine whether they should be repealed in light of the subject matter being covered by the Rules of Evidence.

A meeting was scheduled for September 12th and 13, 1986, beginning at 8:30 a.m. and ending at 5:30 on Friday and from 8:30 a.m. to 1:30 p.m. on Saturday.

Mr. Sparks addressed Don Baker's suggestion regarding Rule 201. The committee decided that it had already accepted his suggestion and incorporated it into the Proposed Rules.

It was unanimously decided that the committee would recommend Judge Barrow's suggestion regarding Rule 206, reinsertion of the provision that the original deposition be taxed as costs, which is the current practice.

The suggestion regarding Rule 209, allowing clerks to dispose of depositions 180 days after judgment was tabled for further investigation by subcommittee.

Professor Jeremy Wicker's suggestions concerning the rules beginning with Rule 18a through 182a were unanimously approved by show of hands.

Professor Wicker's suggestions concerning Rules 167 through Rule 209 are being studied and will be studied further by Mr. Sparks' committee and he urged members of the committee to send in their comments and/or suggestions regarding same.

Rule 84 was again discussed at length. It was unanimously decided that each delayed appellee can recover up to ten percent of the taxable costs from the parties causing the delay and that the sentence "a request for damages for delay shall not have the effect of permitting the appellate court to consider error that has not been preserved for appellate review" be retained.

It was unanimously decided that Rule 438 should contain the language "where the court upon its own motion or upon request of any party shall find".

Judge Casseb gave a summary of actions taken by the task force in response to House Bill 1658. Judge Casseb strongly urged that the committee review the output of his subcommittee for consistency and harmony with the Rules of Civil Procedure before its adoption by the Supreme Court. Chairman Soules

suggested that the committee meet on May 15, 1986, to discuss Judge Casseb's recommendations to House Bill 1658.

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 602 • P.O. Box 12066 • Austin, Texas 78711-2066 • 512/463-1625

TO: Members, Task Force on the Court Administration Act

FROM: C. Raymond Judice

DATE: April 10, 1986

RE: Proposed Administrative Rules

Enclosed is a copy of the Proposed Administrative Rules incorporating the changes made by the Task Force on April 5, 1986.

These proposed rules will be published in the June issue of the Texas Bar Journal. There will be an open forum during the State Bar Convention in Houston in June to afford an opportunity for additional input on the rules.

Enclosure

OCA:MEMTF1.21

PROPOSED ADMINISTRATIVE RULES
FOR
TEXAS TRIAL COURTS

Proposed by the
TASK FORCE ON THE
COURT ADMINISTRATION ACT
on
April 5, 1986

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

PROPOSED ADMINISTRATIVE RULES
FOR
TEXAS TRIAL COURTS
April 5, 1986

The Texas Rules of Civil Procedure shall govern in event of conflict.

Rule 1. The purpose of these Rules is to provide for the just and expeditious disposition of the cases in the courts of Texas. It is intended that these Rules be consistent with the Texas Rules of Civil Procedure, ~~which shall govern in all matters not specifically addressed by these Rules.~~ In the execution of these Rules, telephone hearings or conferences in lieu of court appearances are encouraged.

Move to T.R.C.P. 21.

RULE 2. It shall be the policy of the courts and bar of Texas to manage their work to achieve the disposition of non-probate civil cases within the periods of time listed:

	50%	90%	98%
Family Law ~~Domestic~~ Actions and Actions for Liquidated Monetary Claims	90 days	180 days	360 days
All Other Civil Actions	180 days	360 days	540 days

[COMMENT: As this is a new policy, cases pending on the effective date of these rules should be approached with the same attitude as new cases.]

RULE 3. The local administrative judges of each county shall require the following information to be reported on a monthly basis:

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PROPOSED ADMINISTRATIVE RULES

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RULE 2. It shall be the policy of the courts and bar of Texas to manage their work to achieve the disposition of non-probate civil cases within the periods of time listed:

Family Law Actions and Actions for Liquidated Monetary Claims	50%
All Other Civil Actions	

[COMMENT: As this is a new

date of these rules should be

cases.]

RULE 3. The local administra

the following information to be reported on a monthly basis:

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a. The age of cases at the time of disposition for each category of case.

b. A chart aging the active cases in the same time spans as the disposition aging.

c. The number of cases, by category, disposed of:

(1) within 72 hours before the trial setting;

(2) at the first trial setting;

(3) at or after the second trial setting; or

(4) after the commencement of trial; or

(5) after verdict or rendition.

d. The length of "trials" in hours, separately for jury and non-jury.

e. The number and median age of cases at disposition for all

(1) dismissals,

(2) defaults,

(3) agreed judgments,

(4) trials before a judge, and

(5) trials to a jury verdict.

RULE 3. The control of the flow of non-probate civil cases shall be subject to the following:

a. It is the purpose of this rule to provide a process for the routine management of non-probate civil cases. This rule shall be interpreted liberally to provide for the just and expeditious disposition of the cases brought to the courts of Texas. Nothing in this rule shall be interpreted to prevent a court in an individual case from issuing an exception order

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Move to 6

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based on a specific finding that the interest of justice requires a modification of the routine processes as prescribed by this rule.

b. This rule shall apply to all non-probate civil cases filed in the courts of Texas unless a more specific rule covering a specific category or group of cases is otherwise provided.

c. Within 30 days after ~~filing of~~ the ~~initial pleading by~~ general appearance of the last Defendant to appear:

(1) any or all parties may, without waiver of any rights, file with the Court a proposed plan for completion of discovery, preparation for trial and trial setting, or a formal request pursuant to section d.;

(2) within 21 days after the filing of a proposed plan, any other party may respond to a proposed plan;

(3) in the event additional persons become parties ~~are joined~~ after the order for the schedule for the completion of discovery and preparation for trial has been rendered ~~entered~~, then ~~such additional~~ any party may, within 21 days from the date such additional persons make a general appearance, ~~party is required to answer,~~ propose changes in such schedule; and

(4) as soon as reasonably practicable after the time period for responding to a proposed plan has elapsed, the Court shall render and sign ~~enter~~ its written order, or if additional parties are added, its amended order, for completion of discovery, for preparation for trial, and for trial setting.

Rule 166(g)

If at any time a case appears to be sufficiently complicated to require close supervision, a party may request that a scheduling hearing ~~conference~~ be held, which the Court shall hold

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within ten days of the request. If at any time the Court determines that believes a case requires close supervision, the Court may set and hold a scheduling hearing ~~conference~~.

(1) The request for a scheduling hearing ~~conference~~ shall be accompanied by an outline of the characteristics of the case which the requesting party believes will justify its treatment as complicated.

(2) At a scheduling hearing ~~conference~~, the judge shall prescribe:

(a) time limits for the completion of discovery;

(b) time limits for any motions which might be necessary;

(c) other time limits necessary to coordinate the preparation of the case for hearings and for trial;

(d) the time on which a pretrial hearing ~~conference~~, if any, shall be held;

(e) the date on which trial shall commence; or

enter a determination that the case does not require close supervision with such further order as may be proper under the circumstances.

e. In all cases where the proceedings are not subject to a ~~plan~~ scheduling order under section c. or ~~a scheduling order under~~ section d., the following time limits shall take effect:

(1) A date no more than 270 days after the last original answer or other pleading is filed shall be set for trial.

Change plan to scheduling order throughout

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(2) The parties shall have no less than 90 days under this section to complete discovery, which shall be completed 30 days before the date set for trial under subsection e.(1).

(3) Each party shall file with the Court 45 days before the date set for trial under subsection e.(1) the certification provided in section f.

(4) Not less than 30 days before the date set for trial under subsection e.(1), the parties shall meet to discuss the disposition of the case and shall file with the Court a disposition conference report as prescribed by local rule.

(5) If the report required by subsection e.(4) is not filed, the Court shall set and hold a pretrial conference within 10 days of the date on which the report was due.

f. Whenever under this rule a time is or has been provided for completion of discovery, each party shall file with the Court, on or before the date provided, a certification that discovery has been completed. In the event it is necessary to qualify this certification to file it within the time limits prescribed, the qualification shall be specific and the time within which the qualification shall be satisfied shall be stated.

g. Provided that the trial date will not be affected, discovery time limits may be extended by agreement of the parties or by the Court upon a showing of good cause.

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(2) The parties shall have no less than 90 days under this section to complete discovery, which shall be completed ~~30~~ days before the date set for trial under subsection e.(1).

(3) Each party shall file with the Court 45 days before the date set for trial under subsection e.(1) the certification provided in section f.

(4) Not less than 30 days before the date set for trial under subsection e.(1), the parties shall meet to discuss the disposition of the case and shall file with the Court a conference report as prescribed by subsection e.(4) is not set and hold a pretrial of the date on which the

Change 166 b to 45 days → (2) to 30 ✓

f. or has been provided for rty shall file with the ded, a certification that discovery has been completed. In the event it is necessary to qualify this certification to file it within the time limits prescribed, the qualification shall be specific and the time within which the qualification shall be satisfied shall be stated.

g. Provided that the trial date will not be affected, discovery time limits may be extended by agreement of the parties or by the Court upon a showing of good cause.

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

h. All motions for continuance of the trial date shall be made in writing and ~~signed by the client, and~~ shall contain a statement ~~certification~~ by counsel that a copy has been mailed or delivered ~~[illegible]~~ to the client. The motion shall comply with the applicable TRCP ~~or request shall state the reason for the delay. The Court, in granting the delay, shall make a finding on the record as to the reasons for the delay.~~

i. Failure of a party to file the certification reports or other documents required by the Court or otherwise required by this rule shall be deemed a failure to comply with an order of the Court within the Texas Rules of Civil Procedure.

j. The Court has the authority to impose all appropriate sanctions in accordance with paragraph 2.b. of Rule 215 of the Texas Rules of Civil Procedure.

RULE 4. (Family) The control of the flow of ~~divorce~~ Family Law cases shall be subject to the following:

a. Beginning with the filing of an answer, or appearance, or in default of an answer beginning with the date on which an answer is due, each party shall have 60 days to file a disposition proposal in each case, unless:

(1) one of the parties files a motion to enlarge time to complete the disposition proposal or to permit mediation or counseling; or unless

(2) the parties shall have filed a completed joint disposition proposal.

h. All motions for continuance of the trial date shall be made in writing and ~~signed by the client, and~~ shall contain a statement or certification by counsel that a copy has been mailed or delivered to the client. The motion ~~or request shall state the reason for the delay. The Court, in granting the delay, shall make a finding on the record as to the reasons for the delay.~~ shall comply with the applicable TRCP.

i. Failure of a party to file the certification reports or other documents required by the Court or otherwise required by this rule shall be deemed a failure to comply with an order of the Court within the Texas Rules of Civil Procedure.

j. The Court has the authority to impose all appropriate sanctions in ac[illegible] e 215 of the Texas Rules [illegible] Put in TRCP

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RULE ~~4~~. (Family) The c[illegible] shall be subject to the following [illegible] conflict w/251 $252

a. Beginning with [illegible] ice, or in default of an [illegible] which an answer is due [illegible] to file a disposition proposal in each case, unless: $254

(1) one of the parties files a motion to enlarge time to complete the disposition proposal or to permit mediation or counseling; or unless

(2) the parties shall have filed a completed joint disposition proposal.

b. The motion as provided in subsection a.(1) shall outline the times within which each specific item of a completed proposal shall be ready or the time limits in which mediation or counseling shall be attempted. If the motion is unopposed, the grounds stated in the motion will be prima facie sufficient for the Court to enlarge time.

c. The disposition proposal required by section a. shall include the following:

(1) a proposed property disposition in the form provided by local rule;

(2) a proposed child support order, when necessary to a disposition, in a form provided by local rule;

(3) a proposed ~~child custody~~ conservatorship order, when necessary to a disposition, in a form provided by local rule;

(4) where the parties are submitting separate proposals, counsel shall meet to consider a joint proposal and include in each separate proposal a statement as to the time and place where the counsel for the parties met to consider a joint proposal; and

(5) a statement as to the specific matters upon which the parties do agree and the contested issues to be tried.

d. In the absence of a disposition proposal by a party, the Court has authority to impose all appropriate sanctions in accordance with paragraph 2.b. of Rule 215, Texas Rules of Civil Procedure.

e. When one of the parties has moved for an enlargement of time to file a disposition proposal or to permit counseling or mediation, the Court shall determine whether the reasons

stated for the additional time justify the delay and record the justification in a finding for the record before granting additional time. Representation by counsel that counseling or mediation is in progress will be sufficient to justify an enlargement of time. When granting additional time, the Court shall provide a specific time when the disposition proposal shall be filed as well as a specific time for any further proceedings which it deems necessary. In any case in which additional time is granted, the Court shall set time limits for all further proceedings.

f. Local rules shall provide a process for ruling on the motion to enlarge time, as provided in subsection a.(1) of this rule, within 15 days of its submission as well as for the further scheduling of the case.

g. All family law matters other than divorce will be the subject of local rules to assure their timely disposition.

RULE 5. (Suit on Liquidated Monetary Claim) In all cases for the collection of a debt, including but not limited to a suit on a promissory note, open account, stated account, or contract requiring payment of a specific sum, as well as any suit brought by a taxing authority for the collection of taxes, the control of the flow of cases shall be subject to the following:

Rule 185

a. In such a case the plaintiff shall entitle the original petition as an "original petition in suit upon a debt," which will cause the action to be subject to the provisions of this Rule.

b. Cases subject to this Rule shall be carried on one of four dockets:

(1) the "service pending docket," for cases where one or more answers are not due;

(2) the "active docket," for cases where all answers are due or have been filed for all named defendants;

(3) the "suspense docket," for cases where the parties have made application to defer ~~entry~~ signing of judgment on the ground that the parties have entered into a payment schedule to discharge the claim; or

(4) the "bankruptcy docket" for cases stayed in a bankruptcy proceeding.

c. At the end of 180 days after a suit upon a debt is transferred from the service pending docket to the active docket, it shall be dismissed unless the Court finds:

(1) that the suit is set for disposition by summary judgment or trial, or has been disposed of and is awaiting ~~entry~~ signing of judgment;

(2) that the plaintiff has attempted to secure disposition of the case by summary judgment or trial but has been unable to do so, either because a trial setting, though requested, has not been given, or a continuance has been granted by the Court; or

(3) that the plaintiff has certified, in writing, that a defendant has raised an issue of fact which precludes the granting of a summary judgment to the plaintiff.

d. If the plaintiff certifies in writing that a defendant has asserted an issue of fact in the case which precludes the granting of a summary judgment, then the case shall be deleted from the "active docket" of suits on a debt and shall be transferred to the docket for civil cases generally, and effective upon notice of such transfer being given to the parties, the timetables for ordinary civil cases shall apply to the suit. Such certification by the plaintiff shall in no event be taken as an admission that a fact issue exists, or that summary judgment may properly be denied, or that a motion for judgment, directed verdict or judgment n.o.v. is not proper, nor shall such a certification constitute waiver of compliance on appeal at any action of the trial court.

e. When a suit on a debt or for the collection of taxes has been on the "active docket" for 180 days, the clerk shall issue a notice to all parties of intention to dismiss the case, without prejudice, for want of prosecution, upon not less than 21 days' notice. If any party requests a trial setting before dismissal occurs, ~~then~~ the case shall not be dismissed but rather shall be tried when set, subject to any continuances granted by the Court, which continuances shall specify the new trial setting.

f. If a suit is dismissed under this Rule, it may be reinstated in accordance with Rule 165a, Texas Rules of Civil Procedure.

g. When the Court grants the application to defer entry of judgment under subsection b.(3) of this Rule, the clerk shall list the case as inactive for 180 days. The case may be

continued as inactive for an additional 180-day period, subject to the provisions of local rules for certification that the agreement reported under subsection b.(3) continues in effect.

RULE 7. The Presiding Judges of the Administrative Regions shall be responsible for the expeditious management of the District and Statutory County Courts, as defined in Art. 200a-1, within their respective Regions. To carry out this responsibility, the Presiding Judges shall:

a. Maintain a continuing knowledge of the operation of the rules and standards adopted by the Supreme Court as they apply to trial courts of the Presiding Judge's Region.

b. Advise the Supreme Court as to the needs of the courts in the Presiding Judge's Region.

c. Review each month the reports of caseload and activities provided by the local administrative judges to determine whether the courts of the several counties of the Region are complying with the Administrative Rules.

d. Advise the local administrative judges of the several counties of the Region as to any substantial non-compliance with the Administrative Rules and ask for a report on the reasons for the non-compliance from the local administrative judges.

e. Receive and review the local rules adopted by the judges of counties within the Region to determine if they are consistent with the Rules of the Supreme Court and of the Administrative Region.

f. Receive complaints from affected persons about any non-compliance with the Rules of the Supreme Court and ascertain, where possible, if the complaints have merit.

g. Employ such administrative personnel as are necessary to carry out the responsibilities required under these rules.

h. Allocate the costs of the Region's support staff among the counties, advising each of the counties as to the share which they must bear in advance of each fiscal year.

i. Be responsible for the lawful expenditure of the sums allocated by the counties for the administration of the Region.

RULE 8. The Presiding Judge of each Administrative Region shall adopt and publish rules relating to the following matters:

a. Form and frequency of reports to the Administrative Region headquarters.

b. Provisions for regular meetings, at least semi-annually, of the local administrative judges of the Region to consult regarding the administration of courts within the Region.

c. Standards for the qualifications of administrative personnel of the courts.

d. Minimum qualifications for personnel assigned by county officials to direct court support services.

e. Receive and review the local rules adopted by the judges of counties within the Region to determine if they are consistent with the Rules of the Supreme Court and of the Administrative Region.

f. Receive complaints from affected persons about any non-compliance with the Rules of the Supreme Court and ascertain, where possible, if the complaints have merit.

g. Employ such administrative personnel as are necessary to carry out the responsibilities required under these rules.

h. Allocate the costs of the Region's support staff among the counties, advising each of the counties as to the share which they must bear in advance of each fiscal year.

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c. Standards for the qualifications of administrative personnel of the courts.

d. Minimum qualifications for personnel assigned by county officials to direct court support services.

e. Procedures for determining and submitting budgetary requirements to the county governments.

f. Control of the content, adoption and issuance of rules and standing orders by courts and by local administrative judges.

g. The adoption of local administrative rules.

h. Regular meetings of local administrative judges with the judges in their counties.

RULE 8. The local administrative judges of the counties shall be responsible to the Presiding Judge of their Administrative Region for the expeditious management of the trial courts in their counties. To carry out these responsibilities, they shall:

a. Call regular meetings of the judges of the county to discuss and solve problems facing the courts of their county. They shall keep minutes of these meetings and cause the minutes to be distributed to the judges of the county within 72 hours after the close of the meetings.

b. Be responsible for the adoption of local rules. If the judges of the county cannot agree on uniform policies by majority vote, the local administrative judge shall declare the rules ~~to be in effect~~ which he believes most nearly implements the administrative rules of the Supreme Court and of the Administrative Region.

c. Submit the local rules adopted by their courts to the Presiding Judge of the Administrative Region for review, comment, and approval before they are ~~transmitted~~ furnished to the Supreme Court for approval pursuant to Tex. R. Civ. P. 3a.

d. Monitor the operation of the rules and report to their own courts and to the Presiding Judge of the Administrative Region any substantial non-compliance with the fair and consistent application of the local, regional or Supreme Court Rules.

e. Be the principal liaison officers of the judges with county government officials. They should initiate and lead the effort to coordinate with the bar and others whose activities directly affect the operation of the courts in the county.

f. Work with the County and District Clerks to maintain the necessary support for the courts. In particular they shall review with the County and District Clerks the information requirements of their systems and the state system. In appropriate circumstances they will issue necessary orders to insure that the record and information requirements of the courts are met.

g. Prepare and submit to the Presiding Judge of the Administrative Region requests for visiting judges and shall provide, where appropriate, an analysis of the factors which make the assignment of a visiting judge necessary.

h. Prepare such reports as are required by the Presiding Judge of the Administrative Region concerning the operation of the courts of the county.

i. Review for accuracy and completeness the reports prepared for the state Office of Court Administration, making note of any matter needing attention either locally or regionally.

j. Advise the Presiding Judge of the Administrative Region as to all problems which they believe need attention at any level of operations.

k. Supervise the preparation of budget requests, the presentation thereof to appropriate authorities and the expenditure of funds on behalf of the courts.

l. Appoint such committees as are necessary to execute the business of the courts.

RULE 10. Local rules adopted by the courts of each county shall be in writing and shall include the following:

a. Provisions for the assignment, docketing, transfer, and hearing of all cases, subject to jurisdictional limitations of the district courts and statutory county courts;

b. A provision for a fair distribution of the work among the judges who have authority to decide the matters making up the work of the courts in the county.

c. A provision for a distribution and redistribution of work to avoid any one court being substantially overburdened in achieving the standards provided by these rules.

d. Specific forms and procedures to be used by the courts for all similar cases to the end that the courts shall take

control of a case when it is filed and maintain control of the case until finally disposed, in compliance with Rules 3, 4, and 5.

e. Time limits within which hearings and submissions should be made and matters decided and for the setting of firm trial dates which all parties may rely upon to be ready for trial.

f. The hours and places of holding court for all of the district and statutory county courts of the county.

g. The designation of and the responsibility for assignments to court divisions responsible for certain matters and the responsibility for emergency and special matters.

h. Plans for judicial vacation, sick leave, attendance at educational programs, and similar matters.

i. Local rules shall not conflict with these rules.

These rules become effective _____ and apply to cases filed on or after that date.

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CANON 3C, DISQUALIFICATION-RECUSAL

(1) DISQUALIFICATION

~~A judge should~~ Judges shall disqualify ~~himself~~ themselves in a all proceedings [~~in which his impartiality might reasonably be questioned, including, but not limited to, instances~~] where:

[~~(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,~~]

[~~(b)~~] (a) they have ~~he~~ served as a lawyer in the matter in controversy, or a lawyer with whom ~~he~~ they previously practiced law served during such association as a lawyer concerning the matter; ~~or the judge or such lawyer has been a material witness concerning it;~~

[~~(c)~~] (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy, or ~~a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.~~

(c) where either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) RECUSAL

~~A judge should~~ Judges shall recuse ~~himself~~ themselves in a proceedings ~~in which his~~ where their impartiality might reasonably be questioned, including but not limited to, instances where ~~he has~~ they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

* This suggestion resulted from discussions between Luke Soules and Justice Kilgarlin.

Change (2) to (3) and (3) to (4)

resignations had been tendered, were authorized to appoint successors, and when three of these appointees refused to accept their appointments and qualify, the four then members were authorized to proceed to appoint members to the three unfilled vacancies. Op.Atty.Gen.1939, No. 761.

A teacher's contract approved at a meeting of board of trustees of rural consolidated common school district at which meeting three of the seven trustees voted in favor of the employment, two voted against, and the remaining two, although present, did not vote, is valid. Op.Atty.Gen.1939, No. 994.

Art. 15. Disqualifications

No judge or justice of the peace shall sit in any case wherein he may be interested or where either of the parties may be connected with him by affinity or consanguinity within the third degree, or where he shall have been counsel in the case.

Const. art. 5, sec. 11.

Historical Note

Derivation. This article was derived from the following sources:

Vernon's Civ.St.1914, Rev.Civ.St.1911, art. 1516—in part—which read as follows: "No judge of the supreme court shall sit in any cause wherein he may be interested in the question to be determined, or where either of the parties may be connected with him by affinity or consanguinity, within the third degree, or where he shall have been of counsel in the cause."

Vernon's Civ.St.1914, Rev.Civ.St.1911, art. 1584—in part—which read as follows: "No judge of the court of civil appeals shall sit in any cause wherein he may be interested in the question to be determined, or where either of the parties may be connected by affinity or consanguinity within the third degree, or where he shall have been of counsel in the cause."

Vernon's Civ.St.1914, Rev.Civ.St.1911, art. 1675, which read as follows: "No judge of the district court shall sit in any cause wherein he may be interested, or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree."

Vernon's Civ.St.1914, Rev.Civ.St.1911, art. 1736, which read as follows: "No judge of the county court shall sit in any case wherein he may be interested, or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree."

Vernon's Civ.St.1914, Rev.Civ.St.1911, art. 2290, which read as follows: "No justice of the peace shall sit in any cause where he may be interested, or where he may be related to either party within the third degree of consanguinity or affinity."

Constitutional Provisions

Const. art. 5, § 11, reads in part as follows: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such degree as may be prescribed by law, or when he shall have been counsel in the case."

Cross References

Criminal cases, disqualification of judge or justice of the peace, see Vernon's Ann. C.C.P. art. 30.01.

Exchange of districts by judges, see art. 1916.

Justices of peace, disqualification, see art. 2378.

Special judges, see arts. 1885 et seq. and 1930 et seq.

Library References

Judges ⇐39 et seq.
Justices of the Peace ⇐37.

C.J.S. Judges § 72 et seq.
C.J.S. Justices of the Peace § 44.

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Judges ⇨39 et seq.
Justices of the Peace ⇨37.

C.J.S. Judges § 72 et seq.
C.J.S. Justices of the Peace § 44.

Notes of Decisions

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1. Construction and application

An attorney is not a party to a suit within the meaning of the statute. Winston v. Masterson (1894) 87 T. 200, 27 S.W. 768; Patton v. Collier (1897) 13 C.A. 544, 38 S.W. 53.

This provision applies although the person related is administrator only. Dennard v. Jordan (1896) 14 C.A. 398, 37 S.W. 876.

The word "party" herein, and in Const. art. 5, § 11, was not limited to those named as parties in the pleadings, but included all persons directly interested in the subject-matter and result of the suit, including a purchaser of property sold at a guardian's sale pursuant to an order of the court. Jirou v. Jirou (Civ.App.1911) 136 S.W. 493.

The word "party" as used in this article includes all persons directly interested in subject matter and result of suit regardless of any appearance of their names in record. Postal Mut. Indemnity Co. v. Ellis (1943) 140 T. 570, 169 S.W.2d 482.

The rules announced in constitution art. 5, § 11, and this article upon subject of disqualification of a judge by reason of interest in case or by reason of relationship to one of parties are mandatory. Fry v. Tucker (1947) 146 T. 18, 202 S.W.2d 218.

The judiciary must not only attempt to give all parties a fair trial but it must also try to maintain trust and confidence of the public at a high level. Indemnity Ins. Co. of North America v. McGee (1962) 163 T. 412, 356 S.W.2d 666.

It was object of section of Const. art. 5, § 11 providing that no judge shall sit in any case where either of the parties may be connected with him by consanguinity within the third degree, to place judicial officers beyond the temptation which circumstances might throw in their way. Id.

2. Disqualification in general

A judge is not disqualified to try a suit brought by him in his official capacity, for the use of the county, on a retail liquor dealer's bond. Grady v. Rogan (1884) 2 App.C.C. § 260; Peters v. Duke (1882) 1 App.C.C. § 304; Clack v. Taylor County (1886) 3 App.C.C. § 201.

A county judge who in his official character has conducted proceedings for the opening of a road, and has instructed and advised that suit be brought for the recovery of money wrongfully paid for the right of way, and has employed counsel to represent the interests of the county in a suit brought in his court for the recovery of such money, is not thereby disqualified from trying the case. Clack v. Taylor County (1886) 3 App.C.C. § 201.

The fact that a county judge has presided at the trial of a cause in a justice's court does not disqualify him from hearing such cause on appeal. Beckham v. Rice (1893) 1 C.A. 281, 21 S.W. 389.

Judge held not disqualified to hear a cause. Blackwell v. Farmers' & Merchants' Nat. Bank (1904) 97 T. 445, 79 S.W. 518.

A judge's disqualification to try a case did not disqualify him to call the special term of court at which it was tried. U. S. Fidelity & Guaranty Co. v. Henderson County (Civ.App.1923) 253 S.W. 835.

Note 2

It is the policy of the courts to hold that trial judge is qualified to act whenever it is at all possible. Marsh v. Ferguson (Civ. App.1924) 262 S.W. 805.

In a suit to cancel a deed because of grantor's mental incapacity, that trial judge entertained an opinion as to grantor's mental condition did not disqualify him from hearing the case. Senter v. Isham (Civ.App.1924) 263 S.W. 618.

Appellate judge could properly sit in case and write opinion on appeal from judgment on second trial, though first trial was had in trial court before him as district judge. Love v. Gamer (Civ.App.1933) 64 S.W.2d 393.

County judge who presided over highway condemnation proceedings, but who had no financial interest in the case other than as a taxpayer and as member of commissioners' court which was requested to secure right of way and as county judge, was not disqualified from presiding over the condemnation proceedings. Thompson v. State (Civ.App.1942) 165 S.W.2d 131.

In landowner's action against company for trespass as result of company having dug a hole and placed telephone pole on land claimed by owner as his own and on which company allegedly had no right to place any part of its telephone line, even though trial judge had, on the first trial before court without a jury, declared a mistrial because he had recalled that owner had told him all about case, there was no abuse of discretion by trial judge in refusing to certify his disqualification on a second trial before jury. Pan Am. Petroleum Corp. v. Mitchell (Civ.App.1960) 338 S.W.2d 740.

Chief Justice of Court of Civil Appeals who, although he sat at submission of case, did not for personal reasons participate in opinion, was not disqualified from participating in second opinion, substituted for first after the disqualification of an Associate Justice from participating on appeal came to attention of court. Goslin v. Beazley (Civ.App.1960) 339 S.W.2d 689, ref. n. r. e., appeal dismissed, certiorari denied 82 S. Ct. 16, 368 U.S. 7, 7 L.Ed.2d 16.

Trial judge did not err in refusing to disqualify himself in suit for cancellation of deed because he had recused himself as presiding judge in another suit and had drawn will for grantor's husband, which matters were only collaterally involved. Hooks v. Brown (Civ.App.1961) 348 S.W.2d 104, ref. n. r. e.

3. Bias and prejudice

That attorney for plaintiffs in child custody suit had supported judge in his recent campaign for re-election was not sufficient as a matter of law to require judge to recuse himself on ground of bias, prejudice and lack of impartiality, particularly where one of defendants' attorneys had been even more active in campaign for re-election of judge. Coker v. Harris (Civ.App.1955) 281 S.W.2d 100, ref. n. r. e.

Intervenor's affidavit that he believed judge was biased and prejudiced against him because such judge in another case had found intervenor in contempt of court and had refused most of all of his attorney's objections alleged no constitutional or statutory ground for disqualification. Quarles v. Smith (Civ.App.1964) 379 S.W.2d 91, ref. n. r. e.

Prejudice of trial court toward party, if there was any, would not alone constitute error. Id.

4. Interest—In general

A mere interest in the question involved in a pending suit, there being no actual interest in the subject-matter of litigation, does not disqualify a judge. McFaddin v. Preston (1881) 54 T. 403; Taylor v. Williams (1883) 26 T. 582; Dicks v. Austin College (1881) 1 App.C.C. § 1068.

Vernon's Civ.St.1914, Rev.Civ.St.1911, art. 1675 disqualified a district judge interested in the "cause," not one "interested in the question to be determined," as would disqualify the judges of the supreme court and courts of civil appeals, under Vernon's Civ. St.1914, Rev.Civ.St.1911, arts. 1516 and 1584. New Odorless Sewerage Co. v. Wisdom (1902) 30 C.A. 224, 70 S.W. 355.

Where a judicial officer has not so direct an interest in the case or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain—then he is not disqualified to sit. City of Oak Cliff v. State (1904) 97 T. 391, 79 S.W. 1068.

That two of justices of this court were connected with appellant's codefendant in local capacity held not to disqualify them. Gulf Coast Transp. Co. v. Standard Milling Co. (Civ.App.1917) 197 S.W. 874.

Judge should not try a case in which there is the least ground for his disqualification, and if error is ever made as to disqualification it should be in favor of disqualification rather than against it. Cotulla State Bank v. Herron (Civ.App.1918) 202 S.W. 797.

Where no issue was raised during the trial as to the presiding judge's liability, a mere possibility of liability, which must be established in another suit, does not disqualify him. Davis v. Wylie & Jackson (Civ.App.1922) 241 S.W. 1114.

Interest of a judge in a case in common with others, in a public matter, does not disqualify him. Interest to disqualify a judge from sitting in a case must be direct, real, and certain, in the subject-matter of the litigation, not merely incidental, remote, contingent, or possible, under Const. art. 5, § 11. Hubbard v. Hamilton County (1924) 113 T. 547, 261 S.W. 990.

In suit against executive committee to enjoin unlawful loyalty requirements upon candidates and voters in primary, judge held not disqualified because nominee and candidate in general election. Clancy v. Clough (Civ.App.1930) 30 S.W.2d 569.

The interest of a judge in order to disqualify him must in general be a direct pecuniary or property interest in the subject matter of litigation and a remote or problematic interest or one merely in the legal question involved will not suffice. Wagner v. State (Civ.App.1943) 217 S.W.2d 463, ref. n. r. e.

Interest of judge as citizen of city and patron of its water system and as patron of water improvement district was in common with that of public and did not disqualify him from sitting in action between water improvement districts, water control and improvement districts, navigation districts and others for determination of water rights, and possibility that judge might install individual irrigation system if it should be determined that he had riparian rights to river water was also too remote and speculative to disqualify him. Hidalgo County Water Imp. Dist. No. 2 v. Blalock (1957) 157 T. 206, 301 S.W.2d 593.

Where county judge was disqualified to preside over probate proceedings in which he desires to file for record the birth certificates of himself and his brothers and sisters, he should certify his disqualification to the Governor, and it would then be the duty of the Governor to appoint a suitable person to serve as county judge in his place. Op.Atty.Gen., 1940, No. O-2673.

5. —— Party to original transaction or case entered

In a suit upon a bond executed to the county judge, for the hire of a county convict, the county judge is not disqualified from trying the case. Peters v. Duke (1882) 1 App.C.C. § 304; Grady v. Rogan (1884) 2 App.C.C. § 260.

County judge held not disqualified by interest to try a suit brought by him, as nominal plaintiff, for the use of the county. McInnes v. Wallace (Civ.App.1898) 44 S.W. 537.

Where a judge of the county court was made a party in case by allegations of a cross-action of a suit in the justice court, he should have held himself disqualified to sit in case on appeal to county court. First Nat. Bank v. Herrell (Civ.App.1917) 190 S. W. 797.

Where a district judge acquired land before suit involving its title was filed, and disposed of it before case was tried, he had no such immediate and direct interest as disqualified him from trying case, even if he conveyed his interest by general warranty deed. Clegg v. Temple Lumber Co. (Civ.App.1917) 195 S.W. 646.

Judge filing primary election contest cannot call special term of court for purpose of trying such contest. Moore v. McCallum (1926) 116 T. 142, 287 S.W. 493.

Judge, who owned undivided interest in land covered by Mexican and Spanish land grants but who, prior to action involving question of whether lands riparian to Rio Grande River had an appurtenant right to irrigate with river waters, sold lands and disposed of his interest in vendor's liens, was not disqualified to sit in the case. State v. Valmont Plantations (Civ.App. 1961) 346 S.W.2d 853, affirmed 163 T. 381, 355 S.W.2d 502.

6. —— Opinions, rulings or orders in case, interest

Where an action was brought to recover two tracts of land the fact that a judge had an interest in one of them did not disqualify him, under Const. art. 5, § 11 and Rev. St.1879, art. 1090 to try the cause on a severance, where the only interest claimed by the defendant as to whom it was severed was in the other tract. Grigsby v. May (1892) 84 T. 240, 19 S.W. 343.

The answer and cross-bill in a suit to restrain the enforcement of a judgment held not to state any cause of action against the judge who issued the temporary injunction, but obviously set up merely for the purpose of disqualifying him, and therefore not to interest him in the suit so as to disqualify him. Kruegel v. Bolanz (1907) 100 T. 572, 102 S.W. 110.

A judge is not disqualified from proceeding with the trial of an action because he has already expressed an opinion therein. Montfort v. Daviss (Civ.App.1920) 218 S.W. 806.

The mere granting of leave to file an amendment to pleading is merely a formal order where nothing is decided, and one which an interested judge may enter. Reeves v. State (Civ.App.1924) 258 S.W. 577.

7. —— Taxpayer, interest as

A judge owning taxable property in a city against which suit is brought to annul the

corporation and remove its officers is disqualified to try the cause. State v. City of Cisco (Civ.App.1896) 33 S.W. 244. Citing Wetzel v. State (1893) 5 C.A. 17, 23 S.W. 825; Austin v. Nalle (1893) 85 T. 520, 22 S. W. 669, 960; Casey v. Kinsey (1893) 5 C.A. 3, 23 S.W. 815.

A taxpayer in a city who is not an inhabitant of the city is not disqualified to sit in a case against the city which does not directly involve a tax. City of Dallas v. Peacock (1896) 89 T. 58, 33 S.W. 220; Clack v. Taylor County (1886) 3 App.C.C. § 201.

Justices of Court of Civil Appeals owning motor vehicles on which they pay taxes are not disqualified by "interest" in suit by a county to restrain its tax collector from turning over proceeds of motor vehicle tax to state highway department, under Const. art. 5, § 11, and this article, as to disqualification of judges. Hubbard v. Hamilton County (1924) 113 T. 547, 261 S.W. 990; Robbins v. Limestone County (1924) 113 T. 542, 261 S.W. 994.

In a suit to cancel the bonded indebtedness of a city for which a special tax has been levied, a judge owning taxable property in such city has a direct pecuniary interest in the result, and is not competent to sit as a judge. City of Austin v. Nalle (1893) 85 T. 534, 22 S.W. 669, 960.

On appeal to the Court of Civil Appeals in condemnation proceedings instituted by a county, a judge who owns land in such county is not interested in the question to be determined within the meaning of this article. Herf v. James (1894) 86 T. 230, 24 S.W. 396.

A judge, a taxpayer of a city, held not disqualified in an action against the city to recover on its bonds. Thornburgh v. City of Tyler (1898) 16 C.A. 439, 43 S.W. 1054.

A district judge is not disqualified to try a suit for taxes against a citizen of the town or city in which he resides. His interest was only in the "question" and not in the "cause." Nalle v. City of Austin (1906) 41 C.A. 423, 93 S.W. 143.

Under Dallas Charter, art. 2, § 5, in suit to determine whether ordinance authorizing the issuance of bonds was legally adopted, taxpayers of Dallas held disqualified to sit as judges, in view of Const. art. 5, § 11, whether the ordinance was submitted to the electors under the initiative and referendum provisions of the charter (article 8) or not. Under Const. art. 5, § 11, taxpayers of the city of Dallas held disqualified to sit in the Court of Civil Appeals in review of a judgment holding that an ordinance for the issuance of bonds submitted to the electors under Dallas Charter, art. 8, had not been adopted. Holland v. Cranfill (Civ.App.1914) 167 S.W. 308.

In taxpayers' suit to enjoin county officials from making contract with paving company, trial judge held not disqualified for interest as taxpayer. Orndorff v. McKee (Civ.App.1916) 188 S.W. 432.

A judge is not disqualified, because a citizen and taxpayer, to sit in a suit to enjoin the city from expending money to construct a lighting plant. Williamson v. Cavo (Civ. App.1919) 211 S.W. 795.

Judges, who are taxpayers of a city, although interested in a suit brought in behalf of the taxpayers of such city as a class to enjoin a purposed expenditure of the public funds and donation of land, they are not so immediately and directly "interested" as to be disqualified to try and hear the suit, under Const. art. 5, § 11, and this article. A judge, who is a resident of a city and a taxpayer, although interested in a suit brought by certain persons in behalf of the taxpayers of the city as a class, is not a "party," to the suit, so as to be disqualified to hear it. City of Dallas v. Armour & Co. (Civ.App.1920) 216 S.W. 222.

In taxpayers' suit attacking a county road construction contract, held that the judge trying the case, a property taxpayer of the contracting county, was not disqualified, the validity of the bonds for the road construction and of the tax levies made to secure their payment not being involved. Owen v. Fleming-Stitzer Road Building Co. (Civ.App.1923) 250 S.W. 1038.

District judge was not disqualified to try an action against a city for personal injuries and render judgment for the plaintiff merely because he was a taxpayer on property within the city. City of Henderson v. Fields (Civ.App.1924) 258 S.W. 523.

In a county's action to establish funds deposited in a bank, closed for liquidation by the banking commissioner, as a general deposit payable from the depositors' guaranty fund, the trial judge was not disqualified because he resided and paid taxes in such county. Chapman v. Eastland County (Civ.App.1924) 260 S.W. 889, reversed on other grounds 276 S.W. 634.

Justices of Court of Civil Appeals at San Antonio held not disqualified under Const. art. 5, § 11, and this article, on ground of personal interest as taxpayers in such city, from rendering decision in bond election contest. Garess v. Tobin (Civ.App.1924) 261 S.W. 430.

Members of Court of Civil Appeals at San Antonio held not disqualified, by interest as taxpayers in that city, to sit in bond election contest, which does not involve validity

of bonds issued or tax levied to pay them. Wendover v. Tobin (Civ.App.1924) 261 S.W. 434.

A judge's interest as taxpayer disqualifies him to sit in taxpayer's suit, though the suit is nominally for plaintiff's interest and not for all similarly situated. Judge owning property in city held disqualified to sit in taxpayer's action to declare null and void attempted tax levy. Marsh v. Ferguson (Civ.App.1924) 262 S.W. 805.

Interest of judges of Court of Civil Appeals as taxpayers of city, in suit by taxpayer attacking validity of bond issues for city improvements, held not to disqualify them. Bramlett v. City of Dallas (Civ. App.1939) 11 S.W.2d 209.

That judge owned taxable property in county did not disqualify him to try suit to cancel contract whereby county hired relator to prepare data on delinquent taxes for 20 per cent. of taxes collected. Elliott v. Scott (1929) 119 T. 94, 25 S.W.2d 150.

Where judge's pecuniary interests are not specially affected, a judge is not, by reason of being a taxpayer, disqualified from sitting in a case although he may have a merely incidental, remote, contingent or possible pecuniary interest in the subject matter of the suit. Wagner v. State (Civ. App.1949) 217 S.W.2d 463, ref. n. r. e.

Where quo warranto proceedings were brought to question the validity of formation of junior college district and trial judge owned property within purported boundaries of district which would be subject to tax in event district was held to be valid, trial judge had no direct personal interest in quo warranto proceedings which would disqualify him. Id.

8. —— Policyholder, interest as

A judge holding a policy in a mutual life insurance company held disqualified to preside at the trial of an action to recover on a policy of insurance issued by that company. New York Life Ins. Co. v. Sides (1907) 46 C.A. 216, 101 S.W. 1163.

A judge holding a benefit certificate in a mutual benefit society held disqualified to preside in an action against the society. Sovereign Camp, Woodmen of the World, v. Hale (1909) 56 C.A. 447, 120 S.W. 539.

Judge held not shown disqualified to try action on life policy because holding policy in the company, it not being shown payment of policy sued on would have any direct effect on any fund in which he might participate. Kansas City Life Ins. Co. v. Jinkens (Civ.App.1918) 202 S.W. 772.

In insurance company's suit on premium note assigned to it by another insurance company, Chief Justice of Court of Civil Appeal, holder of policies in the assignor company, and whose son-in-law, was its vice-president and acting manager, and had discussed the transaction in his presence, was disqualified to sit in the case. California State Life Ins. Co. v. Kring (Civ.App. 1919) 208 S.W. 372.

9. —— Pecuniary interest of judge

A sale of land confirmed by the judge who purchased it is void. Frieburg v. Isbell (Civ.App.1894) 25 S.W. 988, citing Templeton v. Giddings (1890) 12 S.W. 851; Burks v. Bennett (1884) 62 T. 279.

A judge who with others had signed a subscription contract for the payment of money on certain conditions, the subscribers being severally bound, is competent to try a suit against another subscriber on the same instrument. Dicks v. Austin College (1881) 1 App.C.C. § 1068.

A judge who holds an approved claim against an estate is disqualified from any action therein. His orders affecting the administration of the estate are coram non judice and void. Burks v. Bennett (1884) 62 T. 277.

A judge in possession of the land in controversy cannot try a case between other parties claiming title thereto. Casey v. Kinsey (1893) 5 C.A. 3, 23 S.W. 818.

Under Act Dec. 29, 1849 (Hart Dig. art. 336), where the chief justice of the county court was a creditor of the estate, he was disqualified to act in a proceeding to sell land thereof. Moody v. Looscan (Civ.App. 1898) 44 S.W. 621.

Special judge presiding over administration of decedent's estate held disqualified by reason of claim against the estate, so as to avoid a sale of realty. City of El Paso v. Ft. Dearborn Nat. Bank (Civ.App.1903) 71 S.W. 799.

Pecuniary interest of judge's father-in-law in proceeding to have person adjudged of unsound mind, because father-in-law was named as executor of such person's will, held too contingent and uncertain to disqualify the judge. Wolnitzek v. Lewis (Civ.App.1916) 183 S.W. 819.

Execution purchaser of land subsequently sold under prior deed of trust, who thereafter was elected district judge, held not disqualified in an action involving such land. Lee v. British & American Mortgage Co. (Civ.App.1918) 200 S.W. 430.

In action by a county against the sureties of a bank to recover on bonds given by the bank as a depository of county funds, the fact that the trial judge owned land situat-

ed within two miles of a proposed highway, to the construction of which the commissioner's court appropriated whatever sum belonging to the county should be recovered, did not disqualify him. Blakeney v. Johnson County (Civ.App.1923) 253 S.W. 333.

Trial judge pecuniarily interested is disqualified, however small his interest may be. Marsh v. Ferguson (Civ.App.1924) 262 S.W. 805.

Fact that trial judge is creditor of party to suit does not disqualify him, unless he has direct interest in cause of action or subject-matter. Dial v. Martin (Civ.App. 1931) 37 S.W.2d 166, reversed on other grounds 57 S.W.2d 75, 89 A.L.R. 571.

10. Relationship—In general

The judge's relationship to the garnishee does not disqualify him in the main action. Patterson v. Seeton (1898) 19 C.A. 430, 47 S.W. 732.

When the great-grandfather is the common ancestor of the county judge and of a party to a suit being tried before him, the former is disqualified to try the case since the common law method of computing degrees of relationship is the rule in Texas. Baker v. McRimmon (Civ.App.1899) 48 S.W. 742.

That county judge's grandfather and plaintiff's grandmother were brother and sister shows that the judge and plaintiff were related by consanguinity within the third degree, disqualifying the former to try the case. Barnes v. Riley (Civ.App.1912) 145 S.W. 292.

Persons unnamed in a suit by plaintiffs suing for themselves and in behalf of others interested, are not "parties" within Const. art. 5, § 11, disqualifying judge related to parties. International & G. N. Ry. Co. v. Anderson County (Civ.App.1915) 174 S.W. 305.

Where a district judge is related within the third degree to parties to a suit for an injunction and receiver, he is thereby disqualified from hearing the injunction suit. Woodward v. Smith (Civ.App.1923) 253 S. W. 847.

In a quo warranto proceeding under art. 5977, to remove a sheriff for misconduct, private relators have no private interest in the proceeding, and are not parties to the cause, so that their relationship to the judge would disqualify him, especially where, upon objection, the pleadings are amended so as to eliminate parties related to the judge, and costs were paid up to that date. Reeves v. State (Civ.App.1924) 258 S.W. 577.

The trial judge erroneously overruled suggestion of disqualification by reason of relationship to chairman of board of trustees within the prohibited degree specified. Campbell v. Moore (Civ.App.1929) 12 S.W.2d 806.

A judge was not disqualified to try suit for recovery of interests in oil and gas leasehold estates because his son was associated with one of defendants in business ventures not involving such leaseholds, where son was not interested in leaseholds and verdict would not affect his interests, though judgment against such defendant would result detrimentally to such ventures. Norris v. Cox (Civ.App.1939) 131 S. W.2d 1028.

The rule disqualifying a judge from sitting in trial of case because of relationship to one of the parties, prevents a judge from deciding any question affecting a person related to him within prohibited degree directly interested in subject matter and result of suit, regardless of appearance or nonappearance of the person's name in the record. Fry v. Tucker (1947) 146 T. 18, 202 S.W.2d 218.

Where appeal from probate court order refusing to set aside appointment of administrator de bonis non, certiorari to set aside such order and appeal from order appointing temporary administrator were tried together, disqualification of trial judge to hear the appeal and certiorari directed at order refusing to set aside appointment of administrator de bonis non by relationship to a party thereto also disqualified judge to try appeal from the order appointing temporary administrator. Id.

Fact that judge is related to some unnamed or inchoate party to class suit who may be affected by judgment is insufficient to disqualify judge from hearing case. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App.1962) 354 S.W.2d 420, error refused.

Judge was not disqualified from appointing attorney for water control and improvement district in pending class suit, on ground that his relatives within third degree were parties to such suit, where such relatives were not named as parties and merely owned property within boundaries of and used water furnished by District. Id.

An attorney employed to handle workmen's compensation claimant's case by attorney retained by claimant was a "party" to the suit within Const. art. 5, § 11 providing that no judge shall sit in any case where either of the parties may be connected with him by consanguinity within third degree, and therefore judge who was a first cousin of attorney hired by attorney re-

tained by client was disqualified to hear the cause. Indemnity Ins. Co. of North America v. McGee (1962) 163 T. 412, 356 S.W.2d 666.

Attorney appointed to represent defendants cited by publication in action in trespass to try title was not a "party" and fixing of attorney's fee by judge who was attorney's father did not render judgment void. Niles v. Dean (Civ.App.1963) 363 S.W.2d 317.

Attorney is not a "party" to suit so as to disqualify judge who is related to him, even though such attorney is to receive contingent fee based on amount of recovery. Id.

11. —— Corporate officer or stockholder, relationship to

A judge is not disqualified because he is related to the president of and stockholder in a company which is a party to the suit. Wise County Coal Co. v. Carter Bros. (1887) 3 App.C.C. § 666.

A judge who is the brother-in-law of a stockholder and president of a corporation is not disqualified to try an action to which such corporation is a party. Lewis v. Hillsboro Roller-Mill Co. (Civ.App.1893) 23 S.W. 328.

Appointment of a receiver for corporation by a judge related to some of the stockholders who were not parties, held valid. Ex parte Tinsley (1897) 37 Cr.R. 517, 40 S.W. 306, 66 Am.St.Rep. 818.

Judge who was son-in-law of certificate holder in association, whose name did not appear in pleadings, held disqualified from sitting in suit to enjoin shareholders' meeting. Stephenson v. Kirkham (Civ.App.1927) 297 S.W. 265.

Judge related as brother-in-law to certificate members of marketing association not party to suit against association held not disqualified from trying suit. Texas Farm Bureau Cotton Ass'n v. Williams (1928) 117 T. 218, 300 S.W. 44.

Judgment and appointment of receiver for joint-stock association, in which judge's father-in-law owned shares, were properly set aside. Grubstake Inv. Ass'n v. Kirkham (Civ.App.1928) 10 S.W.2d 184.

12. —— Surety, relationship to

A surety on a claimant's bond is such a party to the suit for the trial of the right of property that his relationship to the judge will disqualify him from trying the suit. Hodde v. Susan (1883) 58 T. 389.

A judge who presided at trial of cause, who was related within third degree to a surety on appellant's bond, should have excused himself as disqualified, and declined to make any order in case. First Nat. Bank v. Herrell (Civ.App.1917) 190 S.W. 797.

A surety on an appeal bond is a "party" to an action, but in an action for damages for wrongful sequestration, judgment in original proceeding will not be held void on ground of disqualification of county judge because of relationship with surety on appeal bond. Fred Mercer Dry Goods Co. v. Fikes (Civ.App.1919) 211 S.W. 830.

13. —— Attorney on contingent fee, relationship to

An attorney, having a contingent fee, is not a party to the suit whose relationship disqualifies the judge. Winston v. Masterson (1894) 87 T. 200, 27 S.W. 765.

A judgment rendered by a state judge does not deprive the defeated party of his property without due process of law, in violation of fourteenth amendment to the federal constitution, merely because the judge was the father-in-law of the attorney of the successful party, who was entitled to receive a part of the judgment for his fees. Missouri, K. & T. Ry. Co. of Texas v. Mitcham (1909) 57 C.A. 134, 121 S.W. 871.

Trial judge, who was brother to plaintiff's counsel in suit on insurance policy, held not disqualified by reason of such relationship. Missouri State Life Ins. Co. v. Rhyne (Civ.App.1925) 276 S.W. 737, reversed on other grounds in part and affirmed in part, 291 S.W. 845.

An attorney who is to receive a contingent fee based on amount of recovery is not so directly interested in subject matter of litigation as to make him a "party" thereto within meaning of this article. Postal Mut. Indemnity Co. v. Ellis (1943) 140 T. 570, 169 S.W.2d 482.

Where plaintiff and his attorney invoked jurisdiction of court for decision on amount of fee to be paid by plaintiff to attorney in compensation case, judicial determination of amount of such fee was required and attorney was a "party" to litigation within meaning of this article, and decision of judge who was father of attorney was void. Id.

An attorney with contingent fee contract is not so directly interested in subject matter of lawsuit as to make him a "party" within meaning of this article disqualifying a judge who is related to a party in case tried before him, except where judge must approve the attorney's fee. Dow Chemical Co. v. Benton (1962) 163 T. 477, 357 S.W.2d 565.

Note 14

14. —— Marriage, relationship through

A judge who is cousin to the wife of a party to suit is disqualified. Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. Lineal consanguinity is that relationship which exists among persons where one is descended from the other. In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree. Thus, brothers are related in the first degree. The mode of computing degrees of collateral consanguinity is to begin with the common ancestor and reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred between them. Thus, an uncle and nephew are related in the second degree. First cousins are related by affinity in the second degree. T. T. R. R. Co. v. Overton (1878) 1 App.C.C. § 533.

In a suit against the husband of a sister to the wife of a district judge, if the defendant represents a right claimed by himself and wife in community, and if the judgment to be rendered against the husband would affect the community estate of himself and wife even to the extent of costs, then the wife must be considered, within the meaning of article 5, section 11, of the Constitution, a party to the suit, and the district judge is disqualified from trying the cause. Schultze v. McLeary (1889) 73 T. 92, 11 S.W. 924.

The wife of a person injured held a party to the suit, within the statute disqualifying a judge because of relationship to either of the parties within the third degree. Where the great-grandmother of plaintiff's wife, who was interested in an action and of the judge who tried the same were the same person the judge was disqualified by relationship within the third degree. Gulf, C. & S. F. Ry. Co. v. Looney (1906) 42 C.A. 234, 93 S.W. 691.

A judge who is the father-in-law of a daughter of an intestate is disqualified from hearing an action by the widow suing in her capacity as survivor and representative of the community estate on a note executed to the intestate in his lifetime, under Const. art. 5, § 11, prohibiting a judge from sitting in any case where either of the parties may be connected with him by affinity or consanguinity, etc., though the daughter is not named as a party. Duncan v. Herder (1909) 57 C.A. 542, 122 S.W. 904.

A district judge who was a second cousin of plaintiff's wife was disqualified to try the case, so that orders made therein were coram non judice. Ex parte West (1911) 62 Cr.R. 485, 132 S.W. 339.

A judge is related to his wife's first cousin by affinity, although not to the husband of such cousin, and, where a judgment against the husband would adversely affect the community interest of his wife's cousin, he is disqualified. Seabrook v. First Nat. Bank of Port Lavaca (Civ.App.1915) 171 S. W. 247.

Judge held not disqualified because proceeding was instigated by his father-in-law, unless the father-in-law had a direct pecuniary interest in the result of the trial. Wolnitzek v. Lewis (Civ.App.1916) 183 S.W. 819.

The county court judge whose daughter was the wife of a litigant's son was not related by "affinity" to the litigant to disqualify him from sitting in the cause. Williams v. Foster (Civ.App.1921) 233 S.W. 120.

Judge held disqualified from acting in any litigation involving his brothers-in-law. Milan v. Williams (1930) 119 T. 60, 24 S.W. 2d 391.

Proof that contestant's wife was a sister of the wife of an uncle of trial judge's wife did not establish that trial judge was related by "affinity" to contestant, so as to disqualify trial judge from sitting in election contest. Harwell v. Morris (Civ.App.1940) 143 S.W.2d 809.

Where county judge, before whom proceeding was had to show that one previously declared to be of unsound mind, had recovered his sanity, was the husband of the aunt of the wife of the one previously adjudged insane, the county judge was related to the one previously adjudged insane "within third degree by affinity" under this article and Vernon's Ann.C.C.P. art. 30.01, and hence his judgment showing recovery of sanity was void. Irons v. State (1941) 142 Cr.R. 227, 152 S.W.2d 359.

Trial judge was disqualified by relationship from disposing of proceeding to which husband of his wife's first cousin was a party, on ground that any order taxing costs against cousin's husband would affect community rights of cousin, and neither fact that trial judge at time he tried case, did not know that he was disqualified, nor fact that possibility of collecting costs taxed against such cousin's husband and his wife was doubtful, would abrogate the rule. Fry v. Tucker (1947) 146 T. 18, 202 S. W.2d 218.

Where claimant in workmen's compensation case was represented by law firm a partner of which had relationship to the trial judge by fact that such judge was a first cousin to the wife of said partner,

compensation judgment awarding attorneys' fee was null and void. Texas Emp. Ins. Ass'n v. Scroggins (Civ.App.1959) 326 S.W.2d 606.

That judge presiding over case brought by Texas Water Commission to determine rights of thousands of landowners to use waters of Rio Grande, became as result of marriage, related by affinity in second degree to two owners of land lying in water districts named as parties in suit did not disqualify judge, and disqualification of judge would not follow if it were later determined that persons to whom he became related and others similarly situated were necessary parties to suit. Hidalgo and Cameron Counties Water Control and Improvement Dist. No. 9 v. Starley (1964) 373 S.W.2d 731.

That brother of mother of woman married by judge presiding in case brought by Texas Water Commission to determine rights of thousands of landowners to use water of Rio Grande was named as party in his capacity as director of water district involved did not disqualify judge, under circumstances. Id.

15. Acting as counsel

That the presiding judge has heretofore as counsel, given an opinion in regard to the validity of the title to the land in controversy is not a ground of disqualification. H. & T. Central Ry. Co. v. Ryan (1876) 44 T. 426; Lee v. Heuman (1895) 10 C.A. 666, 32 S.W. 93. Nor is it a ground of disqualification that he has acted as an attorney for a part owner of the land in litigation, but who was not interested in the pending suit. Glasscock v. Hughes (1881) 55 T. 461. But if he has at any time been consulted by and given advice to one of the litigants as to the matters in dispute, although without fee, he is disqualified. Slaven v. Wheeler (1882) 58 T. 23; Newcome v. Light (1882) 58 T. 141, 44 Am.Rep. 604.

A judge is not disqualified by reason of his name having been inadvertently signed to a pleading. Railway Co. v. Mackney (1892) 83 T. 410, 18 S.W. 949.

A county judge is not disqualified to try a suit to rescind a sale induced by false representations because he is the attorney for a party prosecuting a suit in the district court to recover goods sold to the same buyer on the ground that he had made false statements as to his financial condition. Meyers v. Bloon (1899) 20 C.A. 531, 50 S.W. 217.

A county judge who prepared a motion for new trial in behalf of a sheriff in an action against him in justice court, was thereby disqualified to try the case on appeal to county court, even though he knew nothing about the facts and did not consider himself the sheriff's attorney. Gaines v. Hindman (Civ.App.1903) 74 S.W. 583.

When county judge is attorney for a party in the district court he cannot take his client's affidavit to his inability to give security for costs in lieu of writ of error bond. Kalklosh v. Bunting (1905) 40 C.A. 233, 88 S.W. 389.

Justice of the supreme court held not disqualified to sit in certain case by reason of having been counsel in a certain previous case. City of Austin v. Cahill (1905) 99 T. 172, 89 S.W. 552.

The acting county attorney of a county is not disqualified from acting as special judge in the trial of a case, pursuant to an appointment by the governor. McCammant v. Webb (Civ.App.1912) 147 S.W. 693.

Judge held not disqualified to appoint a receiver of a railroad company because at some time prior thereto he had been consulted by persons who had subscribed money to aid in its construction, concerning their liability on their subscriptions. Dutts v. Davis (Civ.App.1912) 149 S.W. 741.

Under Const. art. 5, § 11, and this article, that a trial judge has been of counsel between the parties in a different case does not disqualify him. Stockwell v. Glaspey (Civ.App.1913) 160 S.W. 1151.

If a judge has been of counsel in case in behalf of one party he is disqualified to try case, and his order dismissing it was void. Kruegel v. Williams (Civ.App.1917) 194 S. W. 683.

District judge held not disqualified because he was employed while an attorney by counsel for plaintiff, where he was not a member of firm and had no interest in the case. Merchants' Nat. Bank of Brownsville v. Cross (Civ.App.1926) 283 S.W. 555.

Judge, even if of counsel in case concerning disputed boundary, was not thereby disqualified in subsequent case involving different parties and different land. Ruth v. Carter-Kelly Lumber Co. (Civ.App.1926) 286 S.W. 905.

Judge was not disqualified, as to former client, where alleged misrepresentations of third party in respect of land were not discovered until after close of transaction handled by judge. King v. Sieber (Civ.App. 1932) 50 S.W.2d 473.

Trial judge, who had been law partner of attorney for litigant, held not disqualified, so as to warrant setting aside judgment, where evidence showed partnership had been dissolved as to new business before litigation in question was intrusted to coun-

sel. Walker County Lumber Co. v. Sweet (Civ.App.1933) 63 S.W.2d 1061.

In order for a trial judge to come within inhibitions against sitting as judge in a case in which he had been counsel, it is necessary that judge had acted as counsel for some of parties in suit before him in some proceeding in which issues were same as in case before him. Matlock v. Sanders (Civ.App.1955) 273 S.W.2d 956.

Fact that trial judge had been counsel for certain persons in a voluntary partition of lands, a portion of which were involved in a suit between different parties in form of trespass to try title, did not disqualify the judge from trying the case to try title. Id.

It is not necessary that the formal relation of attorney and client exist in order for a judge to become disqualified; one who performs acts appropriate to counsel may become disqualified. Pinchback v. Pinchback (Civ.App.1961) 341 S.W.2d 519, ref. n. r. e.

Judge, who, prior to appointment to bench, signed and filed pleadings on behalf of parties to suit, was attorney in case prior to his becoming judge and was disqualified from appointing attorney for one party in such suit. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App.1962) 354 S.W.2d 420, error refused.

16. Acts of disqualified judge

The acts of judges subject to any constitutional disqualification are void. Chambers v. Hodges (1859) 23 T. 104; Newcome v. Light (1882) 58 T. 141, 44 Am.Rep. 604; Templeton v. Giddings (1890) 12 S.W. 851; Andrews v. Beck (1889) 23 T. 455; Burks v. Bennett (1884) 62 T. 277; Gains v. Barr (1884) 60 T. 676; Jouett v. Gunn (1896) 13 C.A. 81, 35 S.W. 194; Nona Mills Co. v. Wingate (1908) 51 C.A. 609, 113 S.W. 182; Lee v. British-American Mortgage Co. (1909) 51 C.A. 272, 115 S.W. 220.

That the regular district judge appeared to some extent as one of the counsel for the successful party held no ground for the reversal of a correct judgment. McAllen v. Raphael (Civ.App.1906) 96 S.W. 760.

Though the judge who granted the order for issuance of a writ of certiorari and approved the bond was disqualified by interest, and therefore the order and bond were void, yet another and qualified judge having presided when motion to dismiss the proceeding was made, and he having made an order allowing the filing of a new bond, which he approved, and made an order adopting and continuing in force the writ theretofore issued, this was in effect an approval of the application for the writ and an authorization of the writ, and relieved the proceeding of objection on account of the disqualification of the first judge. Comstock v. Lomax (Civ.App.1911) 135 S.W. 185.

A disqualified judge cannot enter a decree or order agreed to by the parties, and any judgment rendered by him must be reversed. Seabrook v. First Nat. Bank of Port Lavaca (Civ.App.1915) 171 S.W. 247.

An order extending the time for filing the statement of facts and bills of exception, made by a judge who is disqualified to sit on account of having represented one of the parties in the action, is void. Dolsons v. Sheridan Stove Mfg. Co. (Civ.App.1915) 173 S.W. 662.

That judge in garnishment proceedings is related to garnishee, or is in some way connected with, or interested in, subject-matter of proceedings, does not render void judgment in original suit against defendant. Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co. (Civ.App.1916) 189 S.W. 784.

Where judge who dismissed cause was disqualified by having acted as counsel, motion filed at subsequent term to set aside judgment should have been granted. Kruegel v. Williams (Civ.App.1917) 194 S.W. 683.

Where a county judge of the county where appellant resides is disqualified to try the case because of some of the conditions specified in Constitution and this article, he is for the same reason prohibited from performing any judicial act which a trial judge or court must perform before jurisdiction of the appellate court attaches, and an affidavit of inability to give appeal bond, pursuant to art. 2266 (See, now, Vernon's Ann.Rules Civ.Proc., rule 355), made before him, is of no more value than if made before a notary public or clerk of a court. The determination of the sufficiency of the strict proof of inability to give security for appeal costs, is a judicial act which a disqualified county judge cannot perform. Wells v. Arledge (Civ.App.1924) 259 S.W. 991.

Entry of judgment by special judge legally disqualified to sit in case held void. Alsup v. Hawkeye Securities Fire Ins. Co. (Civ.App.1926) 283 S.W. 618.

Judgment rendered by judge related to defendant was void and left case remaining undisposed of. Weil v. Lewis (Civ.App. 1928) 2 S.W.2d 566.

Regular judge disqualified in another case held authorized to try case at same time that special judge was trying other case. Dodrill v. Jenkins (Civ.App.1931) 40 S.W.2d 981.

A judicial act of discretion exercised by a judge disqualified under this article and Const. art. 5, § 11, prohibiting him from sitting in a case wherein he is related to either party is void. Postal Mut. Indemnity Co. v. Ellis (1943) 140 T. 570, 169 S.W.2d 482.

Any order or judgment entered by a trial judge in any case in which he is disqualified is void. Fry v. Tucker (1947) 146 T. 18, 202 S.W.2d 218.

Where, even though original order appointing attorney to represent party in pending class suit was void as being entered by disqualified judge, subsequently assigned qualified judge entered order confirming original appointment and re-appointing such attorney, attorney was validly appointed as of date of such subsequent order. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App.1962) 354 S.W.2d 420, error refused.

Whether Justice of Court of Civil Appeals sitting in case involving insolvent insurer should have recused himself because of his background of service with the attorney general during days of insurance company failures was matter solely for his determination. Langdeau v. Dick (Civ.App.1962) 356 S.W.2d 945, ref. n. r. e.

17. Justices of the peace

See Notes of Decisions under art. 2378.

18. Objections and waiver

The incompetency of the judge cannot be waived by consent of parties. Chambers v. Hodges (1859) 23 T. 104.

An objection to the district judge because disqualified to try the case, made for the first time in the supreme court and sought to be supported by affidavit will not be sustained, the record showing no objection, or disqualification of the trial judge. Austin v. Nalle (1893) 85 T. 522, 22 S.W. 668, 960.

Where a judge was absolutely disqualified by relationship, it was immaterial that defendant did not raise the objection until its motion for a new trial. Gulf, C. & S. F. Ry. Co. v. Looney (1906) 42 C.A. 234, 95 S.W. 691.

The disqualification of a judge is a matter affecting the jurisdiction and power of the court to act, and cannot be waived. Lee v. British-American Mortgage Co. (1909) 51 C.A. 272, 115 S.W. 320.

The question of the disqualification of the trial judge may be raised by a motion for new trial. Seabrook v. First Nat. Bank of Port Lavaca (Civ.App.1915) 171 S.W. 247.

Where no issue was raised during the trial as to the presiding judge's liability, a mere possibility of liability, which must be established in another suit, does not disqualify him. Davis v. Wylie & Jackson (Civ.App.1922) 241 S.W. 1114.

Failure to raise in trial court issue of trial judge's disqualification held to preclude raising of that issue in Court of Civil Appeals. Kaufman County v. Gaston (Civ. App.1925) 273 S.W. 273.

Disqualification of judge affects jurisdiction and cannot be waived. King v. Wise (Civ.App.1928) 1 S.W.2d 732.

Trial judge held not disqualified, where only record evidence of disqualification because he was director in insolvent bank was its unverified assertion in motion for new trial filed by plaintiff who dismissed as to defendant banking commissioner. Brenan v. Eubank (Civ.App.1933) 56 S.W.2d 513.

Disqualification of judge under this article and Const. art. 5, § 11, prohibiting him from sitting in any case wherein he may be interested or where either of parties may be related to him, affects judge's jurisdiction and power to act and cannot be waived. Postal Mut. Indemnity Co. v. Ellis (1943) 140 T. 570, 169 S.W.2d 482.

The question of disqualification of a judge by reason of his interest in case or by reason of relationship to one of the parties may be raised subsequent to his actions in the case. Fry v. Tucker (1947) 146 T. 18, 202 S.W.2d 218.

The disqualification of a judge by reason of his interest in the case or by reason of relationship to one of the parties cannot be waived in order to give validity to his actions. Id.

19. Presumptions and burden of proof

The disqualification, if contested, must be shown by testimony upon a proper issue arising on the suggestion. Slaven v. Wheeler (1882) 58 T. 26; Henderson v. Lindley (1889) 75 T. 198, 12 S.W. 979; Wright v. Sherwood (Civ.App.1896) 37 S.W. 468.

A judge is presumed to be qualified until the contrary is shown. Pinchback v. Pinchback (Civ.App.1961) 341 S.W.2d 549, ref. n. r. e.

Judge is presumed to be qualified until contrary is shown. Quarles v. Smith (Civ. App.1961) 379 S.W.2d 91, ref. n. r. e.

20. Evidence and determination of qualification

The judge cannot make an order dismissing the suit as to a party whose relationship disqualifies him, and then adjudicate upon the rights of the remaining parties.

Note 20

Gains v. Barr (1884) 60 T. 676; Garrett v. Gaines (1851) 6 T. 435.

An issue as to the disqualification of a judge to sit as such in a clause pending in his court should be tried and determined by him, and the facts in evidence on the issue should be incorporated in the record on appeal. The statement of the judge should be under oath. His statement appended to a bill of exceptions will not be regarded. Slaven v. Wheeler (1882) 58 T. 23.

Where a motion alleging the disqualification of a district judge to sit in a case on account of interest therein was controverted by written pleadings, an issue of fact requiring the hearing of evidence thereon was presented. Taylor v. Batte (Civ.App.1941) 145 S.W.2d 1116.

A judge may not decline to hear evidence with respect to a dispute in facts which will determine whether he is disqualified, even if he personally knows that he is not disqualified. Pinchback v. Pinchback (Civ. App.1961) 341 S.W.2d 549, ref. n. r. e.

21. Review

The allegations of facts, which were duly controverted, in a motion alleging disqualification of district judge to sit in a case, were not alone sufficient to establish disqualification, and in absence of statement of facts on appeal it was presumed such facts were found against the movants. Taylor v. Batte (Civ.App.1941) 145 S.W.2d 1116.

The existence of a judge's disqualification may be urged at any time by any party, or by the judge himself, and therefore fact that motion to disqualify was not filed until after summary judgment was ordered did not affect the judge's duty to determine whether he was disqualified. Pinchback v. Pinchback (Civ.App.1961) 341 S.W.2d 549, ref. n. r. e.

Where plaintiffs moved to disqualify judge, and alleged facts in support of motion, and defendants replied to motion, denying many of allegations and denying that judge was disqualified, it was error for judge to deny motion without a hearing and a full investigation. Id.

Art. 16. Oath of office

Each officer in this State, whether elected or appointed shall, before entering upon the duties of his office, take and subscribe the oath prescribed by Article 16, Section 1, of the Constitution of this State; and if he shall be required by law to give an official bond, said oath shall be filed with said bond.

Historical Note

Derivation. As to oath of office required to be taken by judges of district courts, including special judges, see Vernon's Civ. St.1914, Rev.Civ.St.1911, art. 1673.

The derivation of that part of this article which provides for the filing of the oath with the official bond is not traceable to any particular provision of either Rev.Civ. St.1911 or subsequent acts of the Legislature.

Constitutional Provisions

Const. art. 16, § 1, requires members of the legislature and all other officers, before entering upon the duties of their offices, to take the oath prescribed therein.

Cross References

Bond required of county judges, see article 1928.

Library References

Officers ⇨36(1), 37.

C.J.S. Officers §§ 38, 39.

common law and must be subject to strict construction, and necessary statutory basis for award of fees may not be supplied by implication but can be found only in express terms of statute in question. Epperson v. Greer (App.1981) 626 S.W.2d 884.

528. Arbitration and award

Statutes relating to arbitration and award should be construed liberally. Carpenter v. North River Ins. Co. (Civ.App.1968) 436 S.W.2d 549, ref. n.r.e.

529. Local governments

Statutes respecting power of local governments to create a debt must be strictly and narrowly construed. Lopez v. Ramirez (Civ.App.1977) 558 S.W.2d 954.

530. Forfeitures, particular statutes

In construing § 5.03(a)(5) of art. 4476–15 governing forfeiture of vehicle used for transportation for delivery of contraband narcotic, Court of Civil Appeals was required to adhere to rule that statute imposing penalties or forfeitures is strictly construed in determining whether it applies to persons or actions not clearly included in language of the statute. Amrani-Khaldi v. State (Civ.App.1978) 575 S.W.2d 667.

531. Consumer credit

Legislature intended by penalty provisions in credit code to penalize creditor, who included provisions for collection of unearned time price differential on acceleration of obligation in retail installment contract, in order to protect citizens from abusive practices in credit transactions. Jim Walter Homes, Inc. v. Schuenemann (Sup. 1984) 668 S.W.2d 324.

Art. 11c. Repealed by Acts 1985, 69th Leg., p. 3361, ch. 479, § 224, eff. Sept. 1, 1985

Section 1 of Acts 1985, 69th Leg., ch. 479, repealing this article, enacts Titles 1 and 3 of the Government Code.

For disposition of the subject matter of the repealed article, see Disposition Table preceding V.T.C.A. Government Code.

Former art. 11c, relating to references in law to the General Appropriations Acts, was derived from Acts 1981, 67th Leg., p. 1006, ch. 383, §§ 3, 4.

MISCELLANEOUS

Art. 12. [3935–36] Fiscal year

Cross References

State taxation, application of this article, see V.T.C.A. Tax Code, § 101.006.

Art. 15. Disqualifications

Cross References

Civil cases, recusal or disqualification of trial judge, see Vernon's Ann.Rules Civ. Proc., rule 18a.

Disqualification of judge, see Title 14 Appendix B, Code of Judicial Conduct, Canon 3, subd. C.

Law Review Commentaries

Annual survey of Texas law:

Disqualification of trial judge. Ernest E. Figari, Jr., 35 Southwestern L.J. (Tex.) 381 (1981).

Divorce proceedings. Joseph W. McKnight, 35 Southwestern L.J. (Tex.) 121 (1981).

Disqualification of judges. Robert W. Calvert, 47 Texas Bar J. 1330 (1984).

Notes of Decisions

Hearing 18.5

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2. Disqualification in general

Statement made by trial judge that he felt that award of exemplary damages was too high and that attorneys should endeavor to work out something reasonable merely informed attorneys that judge, in interest of justice, was willing to let a judgment for plaintiff stand if amount of recovery were reduced, and statement did not disqualify judge from acting on defendant's motion for new trial. Brown v. American Finance Co. (Civ.App.1968) 432 S.W.2d 564, ref. n.r.e.

If attorney for defendant, against whom verdict was given, made statement to plain-

tiff's attorney that he had been told by trial judge that a new trial would be granted, statement was plain hearsay so far as judge was concerned, and it could not be accepted as ground for holding that judge was disqualified as a matter of law and that order for granting a new trial was void. Id.

Disqualification of Texas judge is to be determined with reference to Const. Art. 5, § 11 and this article, rather than to equal protection, due process, or privileges and immunities clauses of Federal Constitution. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Code of Judicial Conduct adopted by American Bar Association does not have status of law in Texas. Id.

There is no compulsion for judge to step aside when not legally disqualified. Id.

Unless legally disqualified, it is duty of judge to preside. Id.

Where judge disqualified himself under this article, such disqualification, and want of the power of the court to act thereafter, could not be waived by the parties. Chilicote Land Co. v. Houston Citizens Bank & Trust Co. (Civ.App.1975) 525 S.W.2d 941.

Where judge disqualified himself under this article providing for disqualification, he was incapacitated from taking any action in the cause which required exercise of judicial discretion, and, under constitutional and statutory provisions, the disqualification destroyed the power of the court to act and rendered purported judgment signed by him void. Id.

A judge is not disqualified by mere pendency of another lawsuit brought against him by one of parties to suit before him. Citizens Law Institute v. State (Civ.App. 1977) 559 S.W.2d 381.

Filing of unsworn motion alleging that trial judge had been named defendant in another lawsuit brought against him by party to suit before judge did not require disqualification of trial judge. Id.

Grounds enumerated in Const.Art. 5, § 11, prohibiting judge from sitting in any case in which he may be interested, or where party is related to judge by consanguinity or affinity in degree prescribed by law, or when he shall have been counsel in the case, and in this article tracking constitutional relationship which disqualifies are mandatory, inclusive and exclusive. Rocha v. Ahmad (App. 4 Dist.1983) 662 S.W.2d 77.

Judges of Court of Appeals were not disqualified from sitting on case in which lawyer who had contributed to their campaign was involved as counsel. Rocha v. Ahmad (App. 4 Dist.1983) 662 S.W.2d 77.

Husband failed to allege any of the three disqualifying circumstances, interest, consanguinity, or "of counsel," provided in Const. Art. 5, § 11 governing disqualification of judge. Gaines v. Gaines (App. 13 Dist.1984) 677 S.W.2d 727.

3. Bias and prejudice

Alleged bias or prejudice of judge does not disqualify judge. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Bias is not legal ground for disqualification of judge. Hoover v. Barker (Civ.App. 1974) 507 S.W.2d 299, ref. n.r.e.

Even if judges had decided a previous case against mandamus petitioner, such would not be sufficient to show bias and to require justices to disqualify themselves. Stein v. Frank (Civ.App.1978) 575 S.W.2d 399.

4. Interest—In general

Disqualifying interest of judge must be direct, real and certain interest in subject matter and result of instant litigation, not merely indirect, incidental, remote, possible or speculative. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

5. —— Party to original transaction or case entered

Appointment by trial judge of his son-in-law as guardian ad litem did not disqualify trial judge as attorney was not party to suit, and judgment entered in cause after such appointment was not void. Canavati v. Shipman (Civ.App.1980) 610 S.W.2d 200.

9. —— Pecuniary interest of judge

Even though trial judge was involved in litigation with the condemnor in condemnation proceeding involving his own land and erection of transmission line, judge was not disqualified from sitting in proceeding involving other condemnees and condemnor to determine damages caused to condemnees' land by taking of easement for transmission line, where judge could not obtain any pecuniary benefits from proceeding. Texas Elec. Service Co. v. Boyce (Civ. App.1972) 486 S.W.2d 111.

Judge's financial involvement with alleged default debtor of defendant bank, and judge's brother's indebtedness to defendant bank, did not constitute disqualifying "interest" in case under Const. Art. 5, § 11 and this article. Maxey v. Citizens Nat.

Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Interest of judge required for disqualification is of pecuniary nature, capable of estimated value, that judge may gain or lose by judgment rendered in case. Id.

Pecuniary interest sufficient to disqualify a judge from sitting in case must be a direct, real and certain interest in subject matter of that case and must be capable of monetary valuation. Narro Warehouse, Inc. v. Kelly (Civ.App.1975) 530 S.W.2d 146, ref. n.r.e.

To disqualify judge from sitting in case, pecuniary gain or loss to judge must be an immediate result of judgment to be rendered, and not result remotely, or at some future date, from general operation of law upon status fixed by the judgment. Id.

Interest required for disqualification of judge is one of pecuniary nature at time of suit. Id.

Trial judge in action for damages for breach of contract to convey real estate did not err in failing to disqualify himself on allegations of bias and pecuniary interest. Irwin v. Whirley (Civ.App.1976) 538 S.W.2d 150.

10. Relationship—In general

Where county judge's wife was first cousin of condemnee, judge was disqualified to try the condemnation case and judgment rendered was void. Natural Gas Pipeline Co. of America v. White (Civ.App.1969) 439 S.W.2d 475.

Under provisions of Const. Art. 5, § 11 and this article that no judge shall sit in any case when he shall have been counsel in the case, it is not necessary that formal relationship of attorney and client exist for disqualification; trial judge who performs acts normally engaged in by counsel such as being consulted or giving advice in a matter which is the subject of litigation may become disqualified. Conner v. Conner (Civ.App.1970) 457 S.W.2d 593, error dismissed.

Fact that county court judge, who, with other county officials, was named as defendant in federal declaratory action, was represented by attorney who also represented state in condemnation case did not disqualify county judge from sitting in condemnation case on theory that the legal services rendered free to judge in federal action constituted gift of monetary value, in absence of allegation that judge stood to gain or lose anything of monetary value in condemnation case because of any such alleged gift or had any direct, real and certain interest in subject matter of the condemnation suit. Narro Warehouse, Inc. v. Kelly (Civ.App.1975) 530 S.W.2d 146, ref. n.r.e.

11. —— Corporate officer or stockholder, relationship to

Facts that trial judge had disqualified himself in a previous suit involving corporation, that his brother was a member of the judiciary of county which was corporation's sublessee, and that he was acquainted with party seeking appointment of receiver for corporation and a witness for such party were not sufficient reasons to disqualify trial judge from hearing suit for appointment of receiver for corporation. Citizens Bldg., Inc. v. Azios (Civ.App.1979) 590 S.W.2d 569.

13. —— Attorney in contingent fee, relationship to

Trial judge did not err in permitting his son to participate actively in trial of case as one of several attorneys representing plaintiffs in products liability action, where it was shown that attorneys were representing plaintiffs on contingent fee contract but that trial judge would not be asked to approve contract or set such fee. F. M. C. Corp. v. Burns (Civ.App.1969) 444 S.W.2d 315.

14. —— Marriage, relationship through

Trial judge's son-in-law, who was attorney for husband in divorce proceeding, was not a "party" within meaning of Const. Art. 5, § 11, and this article. Martinez v. Martinez (Civ.App.1980) 608 S.W.2d 719.

In divorce proceeding in which no attorney fees were awarded, trial judge, whose son-in-law was attorney for the husband, was not disqualified, though it was asserted that attorney fees could have been awarded. Id.

15. Acting as counsel

Judge was not disqualified by reason of the fact that he allegedly was the prosecutor in defendant's prior 1962 conviction for unlawfully breaking and entering a motor vehicle. Griffin v. State (Cr.App.1972) 487 S.W.2d 81.

Where alleged ancestor in title of party asserting ownership of certain land had consulted with trial judge, at time he was practicing attorney, and obtained from him written title opinion which dealt with identical fact in dispute, trial judge had been "counsel in the case" within meaning of provision of Const. Art. 5, § 11, governing disqualification of judges, notwithstanding that trial judge was unaware that he had been prior counsel and that opinion may have been written by someone else in his attorney's

office. Williams v. Kirven (Civ.App.1976) 532 S.W.2d 159, ref. n.r.e.

If trial judge gave advice as attorney to matter in dispute, even if no fee was charged for such advice, trial judge is disqualified to sit in such manner which has ripened into suit. Id.

16. Acts of disqualified judge

In divorce action in which trial judge approved party's property settlement agreement, whereby husband retained ranch, where it was not shown that trial judge had ever represented husband or advised either of parties with respect to conveyance of surface rights to ranch land to husband from his parents, trial judge was not disqualified even though he had acted as notary public in acknowledging execution of surface deed and deed of trust and filled out a check signed by husband in part payment of the purchase price of the land. Conner v. Conner (Civ.App.1970) 457 S.W.2d 593, error dismissed.

18. Objections and waiver

Disqualification of judge cannot be waived. Natural Gas Pipeline Co. of America v. White (Civ.App.1969) 439 S.W.2d 475.

Alleged agreement to waive trial judge's disqualification under this article and Const. Art. 5, § 11, because judge's wife was related by blood to one of the parties to be sued was invalid. Cain v. Franklin (Civ.App. 1972) 476 S.W.2d 952, ref. n.r.e.

Trial judge's disqualification to hear suit because judge's wife was related by blood to one of the parties thereto could not be waived, and a judgment rendered by judge so disqualified was void. Id.

Complaint that trial judge was without right to sit for another district judge was not fundamental error and could not be urged for the first time on appeal. Foster v. Laredo Newspapers, Inc. (Civ.App.1975) 530 S.W.2d 611, reversed on other grounds 541 S.W.2d 809, certiorari denied 97 S.Ct. 1160, 429 U.S. 1123, 51 L.Ed.2d 573.

Where no objection is made in trial court to right of judge from another district to sit in case, and no question as to his qualification is made, all objections and exceptions to his power and authority to try case are considered waived. Id.

18.5. Hearing

Where facts alleged to disqualify judge are unchallenged or admitted, question of disqualification is one of fact and no hearing is required. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Mere assertion that upon hearing disqualifying interest of judge might be made to appear did not require hearing. Id.

19. Presumptions and burden of proof

Presumption of integrity accompanying act performed by judge under sanction of official oath cannot be overcome by inference, conjecture or speculation; challenge of disqualification must be by allegations of fact of positive and unequivocal character. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

21. Review

A reviewing court must scrutinize a record closely when there has been a motion for disqualification of judge. Texas Elec. Service Co. v. Boyce (Civ.App.1972) 486 S.W.2d 111.

Judges of Court of Civil Appeals were not disqualified from considering issues raised on appeal of case involving rates of light and power company, even though all judges of court were customers of such company. City of Houston v. Houston Lighting & Power Co. (Civ.App.1975) 530 S.W.2d 866, ref. n.r.e.

Although question of qualification of appellate judges to act on litigation involving rate request of utility of which judges were customers was not formally raised on appeal of case, question was fundamental, presented itself, and would be considered. Id.

Art. 16a. Certification of County and Precinct Officers-Elect to Secretary of State

(a) On or immediately after January 1 following a general election for state and county officers, each county clerk shall deliver to the secretary of state a certified statement containing:

(1) the name of each candidate elected to a county or precinct office;

(2) the office to which the candidate has been elected; and

(3) the date of the person's qualification for office.

(b) The secretary of state shall prescribe the necessary forms and instructions for the transmittal of the statement.

Added by Acts 1985, 69th Leg., p. 1703, ch. 211, § 4, eff. Jan. 1, 1986.

jury upon demand by either party to divorce suit. Skop v. Skop, Civ.App., 201 S.W.2d 77.

5. Transfer of case to another court

When a case, in which a trial by jury has been demanded and fee paid, has been transferred to another court, the party is entitled to a trial by jury. Warner v. Crosby, 75 T. 295, 12 S.W. 745.

Where a case docketed as a jury case for five years was then consolidated with a subsequent suit and transferred to the same district, held, that plaintiff was entitled to a jury trial in the consolidated action, though the record did not show payment of the jury fee. Arlington Heights Realty Co. v. Citizens' Ry. & Light Co., Civ.App., 160 S.W. 1109.

6. Waiver or forfeiture of right

One who was negligent in not being present at the trial in person or by attorney cannot complain that his case was not retained on the jury docket. Harris v. Kellum & Rotan Inv. Co., Civ.App., 43 S.W. 1027.

Where defendant had performed every requirement for a jury trial, but was absent on the day of the trial, it was error to try the cause without a jury, since her right was not forfeited by absence. Fitzgerald v. Wygal, 24 C.A. 372, 59 S.W. 621.

A jury trial at one term is not waived by a failure to demand it at a preceding term, as is made plain by the provision that at each term the docket is to be called to give parties the opportunity to make the demand. San Jacinto Oil Co. v. Culberson, 100 T. 462, 101 S.W. 198.

Failure to object to the discharge of the last jury for the term when present and failure to deposit a jury fee until after its discharge justified the trial court in refusing defendant's demand for a jury. Downs v. Wilson, Civ.App., 183 S.W. 803.

Where plaintiffs did not object to discharge of jury for term, and failed to demand jury trial on first day of term, in accordance with Vernon's Ann.Civ.St. art. 2125, their negligence in allowing jury to be discharged, etc., was sufficient ground for denial of their demand for jury trial at second term. Blair v. Paggi, Civ.App., 219 S.W. 287.

Defendant, against whom a default was rendered under Vernon's Ann.Civ.St. art. 2154, for failure to appear and answer in an accounting suit, not having demanded a jury, under art. 2157, to assess damages, was not entitled to a writ of inquiry therefor, though he could have demanded one. Dunn v. Gasso, Civ.App., 241 S.W. 201.

Where a case which was one of fact was an appearance case, and a jury trial was demanded while the jury was in the box, and the fee tendered, on default day for the term, refusing a jury trial on the ground that it had been waived at a previous term of court was error. Davis v. Kight, Civ.App., 252 S.W. 227.

§ 11. Disqualification of judges; exchange of districts; holding court for other judges

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when

required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

INTERPRETIVE COMMENTARY

The common law of disqualification of judges was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else. Bracton tried unsuccessfully to incorporate into English law the view that mere "suspicion" by a party was a basis for disqualification. A judge should disqualify, said Bracton, if he is related to a party, if he is hostile to a party, if he has been counsel in a case. Nevertheless, it was Coke who, with reference to cases in which the judge's pocketbook was involved, set the standards for his time in his injunction that "no man shall be a judge in his own case." Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest.

Pecuniary interest took many forms. A judge might be disqualified because he received the fine which he had power to inflict. Or he might be disqualified in an ejectment case in which he was lessor of the plaintiff. It was even held that a judge was disqualified for interest because as a taxpayer his decision might affect his taxes. This case went too far, for if judges were disqualified as taxpayers some suits could scarcely be decided. Mindful of this difficulty, Parliament in 1743 provided that taxpaying justices of the peace might sit in these local government cases. Thus grew the modern rule of "necessity", that judges should not decline to sit where no substitute was readily available.

A variant of "interest" is "relationship", the problem posed where a judge participates in a case involving his relative. Oddly enough, the English courts held early that a judge was not disqualified by relationship, but that a jury was. In connection with jury disqualification the courts were faced with deciding what degree of relationship necessitated disqualification; it was noted in 1572 that "all inhabitants of the earth are descended from Adam and Eve, and so are cousins of one another," but "the further removed blood is, the more cool it is." The line was drawn in that case at the ninth degree.

In short, English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted.

In America, the contemporary disqualification practice of both federal and state courts is broader than that of the English common law. Not only has the principle of pecuniary interest been extended

to keep pace with changing economic institutions, but relationship between judge and litigant and a variety of other types of judicial bias have been prohibited in modern practice.

Each state has some statutory or constitutional law on the subject of disqualification of judges, but all shadings of view on particular grounds for disqualification exist. These divergencies stem from two fundamentally different policies which govern the field. All courts want justice done, but the conflict of values comes over method: if disqualification of judges is too easy, both the cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly but unfairly.

This problem was recognized as early as 1845 in Texas, when the authors of the first state constitution tried to draw a line where they believed the privilege of disqualification might be abused. That they were successful as far as the feelings of Texas were concerned can be deduced from the fact that the provisions on disqualification of judges of the Constitution of 1845 were carried forward into all the later constitutions of Texas including the present one. An amendment of Art. 5, Sec. 11 occurred in 1891, to include the Court of Criminal Appeals and the Court of Civil Appeals which superseded the old Appellate Court.

Historical Note

This section, as originally adopted in 1876, read as follows:

"Sec. 11. No Judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity, within such degree as may be prescribed by law, or where he shall have been counsel in the case. When the Supreme Court, or the Appellate Court, or any two of the members of either, shall be thus disqualified to hear and determine any case or cases in said Court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law, for the trial and determination of said cause or causes. When a Judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try the case; or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the District Judges may exchange districts, or hold courts for each other, when they may deem it expedient, and shall do so when directed by law. The disqualification of Judges of inferior tribunals shall be remedied, and vacancies in their offices shall be filled, as prescribed by law."

The amendment adopted in 1891, substituted "the Court of Criminal Appeals, the Court of Civil Appeals," for "the Appellate Court," and "any member of either," for "any two of the members of either." It also made verbal changes, adding "either", before "by affinity or consanguinity", changing "said cause or causes", to read "such cause or causes", and changing "directed by law", to read "required by law".

Earlier Constitutions:

Const.1845, art. IV, § 14.
Const.1861, art. IV, § 14.
Const.1866, art. IV, § 12.
Const.1869, art. V, § 11.

Cross References

Disqualification of judges, see Vernon's Ann.Civ.St. art. 15; Vernon's Ann.C.C.P. arts. 552–559.
Exchange of districts, see Vernon's Ann.Civ.St. art. 1916.
Holding court for or with other district judge, see Vernon's Ann.Civ.St. art. 1916.
Special judges,
County court, see Vernon's Ann.Civ.St. arts. 1930–1933.
District court, see Vernon's Ann.Civ.St. arts. 1885–1893.

Notes of Decisions

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1. Construction and application

Constitution controls Vernon's Ann.C.C.P. art. 552. Ex parte Kelly, 111 Cr.R. 54, 10 S.W.2d 728.

2. Legislature's power

While district courts, their jurisdiction, and the qualifications of district court judges, were fixed by Constitution, Legislature was given exclusive authority to create such courts, to fix their territorial jurisdiction, and to determine their number. Pierson v. State, 147 Cr.R. 15, 177 S.W.2d 975.

3. Disqualification in general

A county judge who in his official character has conducted proceedings for the opening of a road, and has instructed and advised that suit be brought for the recovery of money wrongfully paid for the right of way, and has employed counsel to represent the interests of the county in a suit brought in his court for the recovery of such money, is not thereby disqualified from trying the case. Clack v. Taylor County, 3 App.C.C. § 261.

The fact that a county judge has presided at the trial of a cause in a justice's court does not disqualify him from hearing such cause on appeal. Beckham v. Rice, 1 C.A. 281, 21 S.W. 389.

On a prosecution for violating the local option law a judge is not disqualified by reason of previous public statements and actions concerning such law. Bateman v. State, Cr.App., 44 S.W. 290.

A judge is not disqualified at a trial for keeping a disorderly house by reason of having attended a meeting of the judges of the state called to devise ways for suppressing disorderly houses. Dailey v. State, Cr.App., 55 S.W. 821.

The grounds of the disqualification of the judges of the courts in this State are specified in the constitution and they are exclusive of all others; and the fact that a judge may have tried the case in a lower court or participated in the decision in such court is not made one of them. Galveston & H. Inv. Co. v. Grymes, 94 T. 618, 63 S.W. 860, 64 S.W. 778.

On a prosecution for a violation of the local option law, the judge held not disqualified from presiding at the trial. Burrell v. State, Cr.App., 65 S.W. 914.

On criminal prosecution, a remark of the trial judge held not to have disqualified him from trying the case. Bismarck v. State, 45 Cr.R. 54, 73 S.W. 965.

A district judge was not disqualified to pass upon a motion to quash the panel of jurors because it invoked the legality of his own act in selecting a jury. Freeman v. McElroy, Civ.App., 149 S.W. 428.

Conditions given by this section for disqualification of judge are exclusive, and prejudice of judge is not ground for disqualification. Berry v. State, 83 Cr.R. 210, 203 S.W. 901.

A judge is not disqualified from proceeding with the trial of an action because he has already expressed an opinion therein. Montfort v. Daviss, Civ.App., 218 S.W. 806.

Where no issue was raised during the trial as to the presiding judge's liability, a mere possibility of liability, which must be established in another suit, does not disqualify him. Davis v. Wylie & Jackson, Civ.App., 241 S.W. 1114.

It is the policy of the courts to hold that trial judge is qualified to act whenever it is at all possible. Marsh v. Ferguson, Civ. App., 262 S.W. 895.

In a suit to cancel a deed because of grantor's mental incapacity, that trial judge entertained an opinion as to grantor's mental condition did not disqualify him from hearing the case. Senter v. Isham, Civ.App., 263 S.W. 618.

Trial judge held not shown to be disqualified, where there was neither allegation nor proof that judge had ever been of counsel for either of parties in case, that he was related to either of them, or that he had any pecuniary interest in subject-matter of suit or its outcome. Ferguson v. Chapman, Civ.App., 94 S.W.2d 593.

Assignments seeking to raise question of disqualification of trial judge, alleging such charges as bias and prejudice, were insufficient, since grounds set forth in Constitution and statute enumerate only instances in which an interest, not pecuniary, will disqualify judge. Id.

The statutory grounds of disqualification of judge in criminal cases are exclusive. Ex parte Largent, 114 Cr.R. 592, 102 S.W. 2d 419, certiorari denied 63 S.Ct. 72, 317 U.S. 668, 87 L.Ed. 536, rehearing denied 63 S.Ct. 413, 317 U.S. 713, 87 L.Ed. 568.

Record showing only that trial judge had told father to follow instructions of his attorney did not support contention made for first time on appeal that judge was disqualified to try case involving custody of minor child as between divorced parents because judge allegedly had discussed the facts with father before father took child from mother. Thompson v. Haney, Civ. App., 191 S.W.2d 491.

The rules announced in this section and Vernon's Ann.Civ.St. art. 15, upon subject of disqualification of a judge by reason of interest in case or by reason of relationship to one of parties are mandatory. Fry v. Tucker, 146 T. 18, 202 S.W.2d 218.

County sheriff is officer of district court, and therefore district judge properly concerned himself with preserving dignity and respect of his court and all of its officers by attending conference of county official which resulted in attempt to procure sheriff's resignation, and fact that judge had participated in such conference would not disqualify him to hear proceeding brought by sheriff for injunction to restore him to office. Willborn v. Deans, Civ.App., 240 S. W.2d 791, ref. n. r. e.

4. Interest of judge

A judge who with others had signed a subscription contract for the payment of money on certain conditions, the subscribers being severally bound, is competent to try a suit against another subscriber on the same instrument. Dicks v. Austin College, 1 App.C.C. § 1068.

Prejudice not based on the property interest is not a legal disqualification. Johnson v. State, 31 Cr.R. 456, 20 S.W. 985.

A judge in possession of the land in controversy cannot try a case between other parties claiming title thereto. Casey v. Kinsey, 5 C.A. 3, 23 S.W. 818.

A justice cannot try a case in which he is the party injured. Ex parte Ambrose, 32 Cr.R. 468, 24 S.W. 291.

A sale of land confirmed by the judge who purchased it is void. Frieburg v. Isbell, Civ.App., 25 S.W. 958.

Where a judicial officer has not so direct an interest in the case or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain—then he is not disqualified to sit. City of Oak Cliff v. State, 97 T. 391, 79 S.W. 1068.

A judge holding a policy in a mutual life insurance company held disqualified to preside at the trial of an action to recover on a policy of insurance issued by that company. New York Life Ins. Co. v. Sides, 46 C.A. 246, 101 S.W. 1163.

A judge holding a benefit certificate in a mutual benefit society held disqualified to preside in an action against the society. Sovereign Camp, Woodmen of the World, v. Hale, 56 C.A. 447, 120 S.W. 559.

Where a judge was the owner of certain property in a city when he granted an injunction restraining a railroad company from removing its general offices from the city, on the theory that such removal would constitute a breach of the contract made by the railroad company's predecessors, he was disqualified to act under this section on account of his interest. Kansas City M. & O. Ry. Co. of Tex. v. Cole, Civ.App., 145 S.W. 1098.

Note 4

Where a judge of the county court was made a party in case by allegations of a cross-action of a suit in the justice court, he should have held himself disqualified to sit in case on appeal to county court. First Nat. Bank v. Herrell, Civ.App., 190 S.W. 797.

Where a district judge acquired land before suit involving his title was filed, and disposed of it before case was tried, he had no such immediate and direct interest as disqualified him from trying case, even if he conveyed his interest by general warranty deed. Clegg v. Temple Lumber Co., Civ.App., 195 S.W. 646.

Execution purchaser of land subsequently sold under prior deed of trust, who thereafter was elected district judge, held not disqualified in an action involving such land. Lee v. British & American Mortgage Co., Civ.App., 200 S.W. 430.

Judge held not shown disqualified to try action on life policy because holding policy in the company, it not being shown payment of policy sued on would have any direct effect on any fund in which he might participate. Kansas City Life Ins. Co. v. Jinkens, Civ.App., 262 S.W. 772.

In action by a county against the sureties of a bank to recover on bonds given by the bank as a depository of county funds, the fact that the trial judge owned land situated within two miles of a proposed highway, to the construction of which the commissioners' court appropriated whatever sum belonging to the county should be recovered, did not disqualify him. Blakeney v. Johnson County, Civ.App., 253 S.W. 333.

Interest of a judge in a case in common with others, in a public matter, does not disqualify him. Interest to disqualify a judge from sitting in a case must be direct, real, and certain, in the subject-matter of the litigation, not merely incidental, remote, contingent, or possible, under this section. Hubbard v. Hamilton County, 113 T. 517, 231 S.W. 990.

Judge filing primary election contest cannot call special terms of court for purpose of trying such contest. Moore v. McCallum, 116 T. 142, 287 S.W. 493.

The words "may be" imply that if there is a doubt of a judge being interested in the case he is thereby disqualified. Lindsley v. Lindsley, Civ.App., 152 S.W.2d 415, reversed on other grounds 139 T. 512, 163 S.W.2d 633.

The interest sufficient to disqualify a judge from sitting in a case must be a direct, real and certain interest in the subject matter of the litigation, not merely indirect or incidental or remote or contingent or possible. Id.

"Interested in the case" means a direct interest in the case or matter to be adjudicated so that the result must necessarily affect the judge's personal or pecuniary loss or gain. Ex parte Largent, Cr.App., 162 S.W.2d 413.

The interest of a judge in order to disqualify him must in general be a direct pecuniary or property interest in the subject matter of litigation, and a remote or problematic interest or one merely in the legal question involved will not suffice. Wagner v. State, Civ.App. 217 S.W.2d 463, ref. n. r. e.

5. —— Nominal parties, disqualification of

A judge is not disqualified to try a suit brought by him in his official capacity, for the use of the county, on a retail liquor dealer's bond. Grady v. Rogan, 2 App.C.C. § 260; Peters v. Duke, 1 App.C.C. § 304; Clack v. Taylor County, 3 App.C.C. § 201.

In a suit upon a bond executed to the county judge, for the hire of a county convict, the county judge is not disqualified from trying the case. Peters v. Duke, 1 App.C.C. § 304; Grady v. Rogan, 2 App. C.C. § 260.

County judge held not disqualified by interest to try a suit brought by him, as nominal plaintiff, for the use of the county. McInnes v. Wallace, Civ.App., 44 S.W. 537.

The answer and cross-bill in a suit to restrain the enforcement of a judgment held not to state any cause of action against the judge who issued the temporary injunction, but obviously set up merely for the purpose of disqualifying him, and therefore not to interest him in the suit so as to disqualify him. Kruegel v. Bolanz, 100 T. 572, 102 S.W. 110.

6. —— Taxpayers, interest as

A taxpayer in a city who is not an inhabitant of the city is not disqualified to sit in a case against the city which does not directly involve a tax. City of Dallas v. Peacock, 89 T. 58, 33 S.W. 220; Clack v. Taylor County, 3 App.C.C. § 201.

A judge owning taxable property in a city against which suit is brought to annul the corporation and remove its officers is disqualified to try the cause. State v. City of Cisco, Civ.App., 33 S.W. 244.

A judge, a taxpayer of a city, held not disqualified in an action against the city to recover on its bonds. Thornburgh v. City of Tyler, 16 C.A. 439, 43 S.W. 1054.

The interest which disqualifies a district judge to try a case is in the "cause" and not in the question involved in the cause. Therefore a district judge who is a tax payer in a city is not disqualified to try a case brought by such city against a citizen thereof to recover city taxes alleged to

be due by the latter to the former. Nalle v. City of Austin, 41 C.A. 423, 93 S.W. 143.

Under Dallas Charter, art. 2, § 5, in suit to determine whether ordinance authorizing the issuance of bonds was legally adopted, taxpayers of Dallas held disqualified to sit as judges, in view of this section, whether the ordinance was submitted to the electors under the initiative and referendum provisions of the charter (article 8) or not. Holland v. Cranfill, Civ.App., 167 S.W. 308.

In taxpayers' suit to enjoin county officials from making contract with paving company, trial judge held not disqualified for interest as taxpayer. Orndorff v. McKee, Civ.App., 188 S.W. 432.

A judge is not disqualified, because a citizen and taxpayer, to sit in a suit to enjoin the city from expending money to construct a lighting plant. Williamson v. Cavo, Civ.App., 211 S.W. 735.

Judges, who are taxpayers of a city, although interested in a suit brought in behalf of the taxpayers of such city as a class to enjoin a purposed expenditure of the public funds and donation of land, they are not so immediately and directly "interested" as to be disqualified to try and hear the suit, under this section and Vernon's Ann.Civ.St. art. 15. A judge, who is a resident of a city and a taxpayer, although interested in a suit brought by certain persons in behalf of the taxpayers of the city as a class, is not a "party," to the suit, so as to be disqualified to hear it. City of Dallas v. Armour & Co., Civ.App., 216 S.W. 222.

In taxpayers' suit attacking a county road construction contract, held that the judge trying the case, a property taxpayer of the contracting county, was not disqualified, the validity of the bonds for the road construction and of the tax levies made to secure their payment not being involved. Owen v. Fleming-Stitzer Road Building Co., Civ.App., 250 S.W. 1038.

District judge was not disqualified to try an action against a city for personal injuries and render judgment for the plaintiff merely because he was a taxpayer on property within the city. City of Henderson v. Fields, Civ.App., 258 S.W. 525.

In a county's action to establish funds deposited in a bank, closed for liquidation by the banking commissioner, as a general deposit payable from the depositors' guaranty fund, the trial judge was not disqualified because he resided and paid taxes in such county. Chapman v. Eastland County, Civ.App., 260 S.W. 889.

This section disqualifying judge from sitting in case in which interested was not changed by amendment of 1891, held strongly persuasive that it should be interpreted as theretofore practically construed, and hence as not disqualifying judge owning taxable property in city from sitting in case in which money judgment could be rendered against city. Garess v. Tobin, Civ.App., 261 S.W. 430.

A judge's interest as taxpayer disqualifies him to sit in taxpayer's suit, though the suit is nominally for plaintiff's interest and not for all similarly situated. Judge owning property in city held disqualified to sit in taxpayer's action to declare null and void attempted tax levy. Marsh v. Ferguson, Civ.App., 262 S.W. 805.

Where judge's pecuniary interests are not specially affected, a judge is not, by reason of being a taxpayer, disqualified from sitting in a case although he may have a merely incidental, remote, contingent or possible pecuniary interest in the subject matter of the suit. Wagner v. State, Civ.App., 217 S.W.2d 463, ref. n. r. e.

Where quo warranto proceedings were brought to question the validity of formation of junior college district and trial judge owned property within purported boundaries of district which would be subject to tax in event district was held to be valid, trial judge had no direct personal interest in quo warranto proceedings which would disqualify him. Id.

7. —— Creditor, interest as

A judge who holds an approved claim against an estate is disqualified from any action therein. His orders affecting the administration of the estate are coram non judice and void. Burks v. Bennett, 62 T. 277.

Under Act Dec. 29, 1849 (Hart Dig. art. 336), where the chief justice of the county court was a creditor of the estate, he was disqualified to act in a proceeding to sell land thereof. Moody v. Looscan, Civ. App., 44 S.W. 621.

Special judge presiding over administration of decedent's estate held disqualified by reason of claim against the estate, so as to avoid a sale of realty. City of El Paso v. Ft. Dearborn Nat. Bank, Civ.App., 71 S.W. 799.

8. —— Fees and commissions, interest by reason of

The county judge is not disqualified from trying a cause by reason of the fees allowed him. Bennett v. State, 4 Cr.R. 72.

The drainage law by allowing the county judge certain commissions on the sale of bonds is not in violation of this section providing that no judge shall sit in any case in which he may be interested. Wharton County Drainage Dist. No. 1 v. Higbee, Civ.App., 149 S.W. 381.

Justice taxing fees against convicted defendant held disqualified for pecuniary

interest making judgment void. Ex parte West, 111 Cr.R. 129, 12 S.W.2d 216.

9. —— Question involved, interest in

A mere interest in the question involved in a pending suit, there being no actual interest in the subject-matter of litigation, does not disqualify a judge. McFaddin v. Preston, 54 T. 403; Taylor v. Williams, 26 T. 583.

The interest which disqualifies a district judge is not interest in a question to be determined, but interest in the cause itself on trial. So held in affirming the competency of a district judge to try an action to recover possession of a portion of a tract of land, against a defendant to whom plaintiff's tendered a severance from other defendants, although the judge himself was interested in the title to other portions of the same tract embraced in plaintiff's bill but not involved in the severance. Grigsby v. May, 84 T. 240, 19 S.W. 343.

Rev.Civ.St.1911, art. 1675, disqualifies a district judge interested in the "cause," not one "interested in the question to be determined," as would disqualify the judges of the Supreme Court and Courts of Civil Appeals (under Rev.Civ., arts. 1516 and 1584). New Odorless Sewerage Co. v. Wisdom, 30 C.A. 224, 70 S.W. 355.

Under this section and Vernon's Ann.Civ. St. art. 15, a trial judge is not disqualified by his interest in the question involved, as distinguished from the result of the suit. Stockwell v. Glaspey, Civ.App., 160 S.W. 1151.

10. Relationship to parties

The judge cannot make an order dismissing the suit as to a party whose relationship disqualifies him, and then adjudicate upon the rights of the remaining parties. Gains v. Barr, 60 T. 676; Garrett v. Gaines, 6 T. 435.

A surety on a claimant's bond is such a party to the suit for the trial of the right of property that his relationship to the judge will disqualify him from trying the suit. Hodde v. Susan, 58 T. 389.

In a suit against the husband of a sister to the wife of a district judge, if the defendant represents a right claimed by himself and wife in community, and if the judgment to be rendered against the husband would affect the community estate of himself and wife even to the extent of costs, then the wife must be considered, within the meaning of article 5, section 11, of the Constitution, a party to the suit, and the district judge is disqualified from trying the cause. Schultze v. McLeary, 73 T. 92, 11 S.W. 924.

Vernon's Ann.Civ.St. art. 15, relating to disqualification of judge, applies although the person so related is administrator only. Dennard v. Jordan, 14 C.A. 398, 37 S.W. 875.

The judge's relationship to the garnishee does not disqualify him in the main action. Patterson v. Seeton, 19 C.A. 430, 47 S.W. 732.

Where a judge is disqualified to sit in a criminal case because of consanguinity to defendant, the consent of the parties cannot remove his incapacity. Gresham v. State, 43 Cr.R. 466, 66 S.W. 845.

A judge who is the father-in-law of a daughter of an intestate is disqualified from hearing an action by the widow suing in her capacity as survivor and representative of the community estate on a note executed to the intestate in his lifetime, under this section, though the daughter is not named as a party. Duncan v. Herder, 57 C.A. 542, 122 S.W. 904.

The word "party" in this section was not limited to those named as parties in the pleadings, but included all persons directly interested in the subject-matter and result of the suit, including a purchaser of property sold at a guardian's sale pursuant to an order of the court. Jirou v. Jirou, Civ.App., 136 S.W. 403.

Persons unnamed in a suit by plaintiffs suing for themselves and in behalf of others interested are not "parties" within this section, disqualifying judge related to parties. International & G. N. Ry. Co. v. Anderson County, Civ.App., 174 S.W. 305.

Judge held not disqualified because proceeding was instigated by his father-in-law, unless the father-in-law had a direct pecuniary interest in the result of the trial. Wolnitzek v. Lewis, Civ.App., 183 S.W. 812.

That judge in garnishment proceedings is related to garnishee, or is in some way connected with, or interested in, subject-matter of proceedings, does not render void judgment in original suits against defendant. Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co., Civ.App., 198 S.W. 784.

A surety on an appeal bond is a "party" to an action, but in an action for damages for wrongful sequestration, judgment in original proceeding will not be held void on ground of disqualification of county judge because of relationship with surety on appeal bond. Fred Mercer Dry Goods Co. v. Pikes, Civ.App., 211 S.W. 830.

The county court judge whose daughter was the wife of a litigant's son was not related by "affinity" to the litigant to disqualify him from sitting in the cause. Williams v. Foster, Civ.App., 223 S.W. 120.

In a quo warranto proceeding under Vernon's Ann.Civ.St. art. 5977, to remove a sheriff for misconduct, private relators have no private interest in the proceeding,

and are not parties to the cause, so that their relationship to the judge would disqualify him, especially where, upon objection, the pleadings are amended so as to eliminate parties related to the judge, and costs were paid up to that date. Reeves v. State, Civ.App., 258 S.W. 577.

Where plaintiffs were brothers-in-law of presiding judge, judge was disqualified from acting in any litigation before his court involving such plaintiffs. Milan v. Williams, 119 T. 60, 24 S.W.2d 391.

A judge was not disqualified to try suit for recovery of interests in oil and gas leasehold estates because his son was associated with one of defendants in business ventures not involving such leaseholds, where son was not interested in leaseholds and verdict would not affect his interests, though judgment against such defendant would result detrimentally to such ventures. Norris v. Cox, Civ.App., 131 S.W.2d 1028.

Provision of Constitution and provision of statute which relate to the disqualification of judges from sitting in a case when related to the parties are "mandatory". Adcock v. State, 146 Cr.R. 84, 172 S.W.2d 193.

Disqualification of district judge by relationship to a party thereto to hear appeal from probate court order refusing to set aside appointment of administrator de bonis non or order such proceeding tried jointly with appeal from order appointing temporary administrator of same estate did not disqualify judge to hear appeal from order appointing temporary administrator to which judge's relative was not a party or invalidate trial of such appeal. Fry v. Tucker, Civ.App., 197 S.W.2d 375, affirmed in part, reversed in part on other grounds 146 T. 18, 202 S.W.2d 218.

The rule disqualifying a judge from sitting in trial of case because of relationship to one of the parties prevents a judge from deciding any question affecting a person related to him within prohibited degree directly interested in subject matter and result of suit, regardless of appearance or nonappearance of the person's name in the record. Fry v. Tucker, 146 T. 18, 202 S.W.2d 218.

Trial judge was disqualified by relationship from disposing of proceeding to which husband of his wife's first cousin was a party, on ground that any order taxing costs against cousin's husband would affect community rights of cousin, and neither fact that trial judge, at time he tried case, did not know that he was disqualified, nor fact that possibility of collecting costs taxed against such cousin's husband and his wife was doubtful, would abrogate the rule. Id.

Where appeal from probate court order refusing to set aside appointment of administrator de bonis non, certiorari to set aside such order and appeal from order appointing temporary administrator were tried together, disqualification of trial judge to hear the appeal and certiorari directed at order refusing to set aside appointment of administrator de bonis non by relationship to a party thereto also disqualified judge to try appeal from the order appointing temporary administrator. Id.

11. —— Degree of relationship

A judge who is cousin to the wife of a party to a suit is disqualified. Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. Lineal consanguinity is that relationship which exists among persons where one is descended from the other. In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree. Thus, brothers are related in the first degree. The mode of computing degrees of collateral consanguinity is to begin with the common ancestor and reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred between them. Thus, an uncle and nephew are related in the second degree. First cousins are related by affinity in the second degree. T. T. R. R. Co. v. Overton, 1 App.C.C. § 533.

When the great-grandfather is the common ancestor of the county judge and of a party to a suit being tried before him, the former is disqualified to try the case under Vernon's Ann.Civ.St. art. 1, since the common law method of computing degrees of relationship is the rule in Texas. Baker v. McRimmon, Civ.App., 48 S.W. 742.

Where the great-grandmother of plaintiff's wife, who was interested in an action and of the judge who tried the same were the same person the judge was disqualified by relationship within the third degree. Gulf, C. & S. F. Ry. Co. v. Looney, 42 C.A. 234, 95 S.W. 691.

A district judge who was a second cousin of plaintiff's wife was disqualified to try the case, so that orders made therein were coram non judice. Ex parte West, 60 Cr. R. 485, 132 S.W. 339.

That county judge's grandfather and plaintiff's grandmother were brother and sister shows that the judge and plaintiff were related by consanguinity within the third degree, disqualifying the former to try the case. Barnes v. Riley, Civ.App., 145 S.W. 292.

A judge is related to his wife's first cousin by affinity, although not to the husband of such cousin, and, where a judgment against the husband would adversely

affect the community interest of his wife's cousin, he is disqualified. Seabrook v. First Nat. Bank of Port Lavaca, Civ.App., 171 S.W. 247.

A judge who presided at trial of cause, who was related within third degree to a surety on appellant's bond, should have excused himself as disqualified, and declined to make any order in case. First Nat. Bank v. Herrell, Civ.App., 190 S.W. 797.

Where a district judge is related within the third degree to parties to a suit for an injunction and receiver, he is thereby disqualified from hearing the injunction suit. Woodward v. Smith, Civ.App., 253 S.W. 847.

Where county judge, before whom proceeding was had to show that one previously declared to be of unsound mind had recovered his sanity, was the husband of the aunt of the wife of the one previously adjudged insane, the county judge was related to the one previously adjudged insane "within third degree by affinity" under Vernon's Ann.Civ.St. art. 15; Vernon's Ann.C.C.P. art. 552, and hence his judgment showing recovery of sanity was void. Irons v. State, 142 Cr.R. 227, 152 S.W.2d 350.

Juror whose sister had married second cousin of deceased was not disqualified as being related to deceased in third degree from serving at trial of defendant accused of murdering deceased. Cortez v. State, 144 Cr.R. 116, 161 S.W.2d 495.

Judge was related by affinity within the third degree to his wife's first cousin and hence was disqualified to dispose of matters involved in proceeding to which such cousin's husband was a party, though cousin herself was not named as a party and any adjudication therein, with the exception of court costs, could affect only the alleged separate estate of her husband. Fry v. Tucker, Civ.App., 197 S.W.2d 375, affirmed in part, reversed in part on other grounds, 146 T. 18, 202 S.W.2d 218.

12. —— Attorney related to judge

An attorney, having a contingent fee, is not a party to the suit whose relationship disqualifies the judge. Winston v. Masterson, 87 T. 200, 27 S.W. 768.

A judgment rendered by a state judge does not deprive the defeated party of his property without due process of law, in violation of fourteenth amendment to the federal constitution, merely because the judge was the father-in-law of the attorney of the successful party, who was entitled to receive a part of the judgment for his fees. Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C.A. 134, 121 S.W. 871.

Trial judge, who was brother to plaintiff's counsel in suit on insurance policy, held not disqualified by reason of such relationship. Missouri State Life Ins. Co. v. Rhyne, Civ.App., 276 S.W. 757.

Where plaintiff and his attorney invoked jurisdiction of court for decision on amount of fee to be paid by plaintiff to attorney in compensation case, judicial determination of amount of such fee was required and attorney was a "party" to litigation within meaning of statute disqualifying judges who are related to parties, and decision of judge who was father of attorney was void. Postal Mut. Indemnity Co. v. Ellis, 140 T. 570, 169 S.W.2d 482.

13. —— Corporate officer or stockholder related to judge

A judge is not disqualified because he is related to the president of and stockholder in a company which is a party to the suit. Wise County Coal Co. v. Carter Bros., 3 App.C.C. § 306.

A judge who is the brother-in-law of a stockholder and president of a corporation is not disqualified to try an action to which such corporation is a party. Lewis v. Hillsboro Roller-Mill Co., Civ.App., 23 S.W. 338.

Appointment of a receiver for corporation by a judge related to some of the stockholders who were not parties held valid. Ex parte Tinsley, 37 Cr.R. 517, 40 S.W. 306, 66 Am.St.Rep. 818.

The fact that the trial judge in garnishment was the father-in-law of the cashier, who was a stockholder in the garnishee bank, would not disqualify the judge under this section because of affinity or consanguinity. Kingman-Texas Implement Co. v. Herring National Bank, Civ.App., 153 S.W. 391.

Judge related within prohibited degrees to stockholder of capital stock corporation held not disqualified from trying case wherein corporation was party. Texas Farm Bureau Cotton Ass'n v. Williams, 117 T. 218, 300 S.W. 44.

14. Counsel in case

That the presiding judge has heretofore, as counsel, given an opinion in regard to the validity of the title to the land in controversy is not a ground of disqualification. H. & T. C. Ry. Co. v. Ryan, 44 T. 426; Lee v. Heuman, 10 C.A. 666, 32 S.W. 93. Nor is it a ground of disqualification that he has acted as an attorney for a part owner of the land in litigation, but who was not interested in the pending suit. Glasscock v. Hughes, 55 T. 461. But if he has at any time been consulted by and given advice to one of the litigants as to the matters in dispute, although without fee, he is disqualified. Slaven v. Wheeler, 58 T. 23; Newcome v. Light, 58 T. 141, 44 Am.Rep. 604.

This disqualification exists if the judge has before his election been consulted as

an attorney, and has given advice as to a matter in dispute, which afterwards results in a suit between the parties at variance, even though he has charged no fee for his advice. That "the presiding judge had heretofore, as counsel, given an opinion in regard to the validity of the title to the land in controversy," is not equivalent to "where he shall have been of counsel in the case" (Const. of 1869, art. V, § 11), and is not a ground of disqualification, and an order for change of venue for such reason is not legal, and when objected to is a cause of reversal. Railroad v. Ryan, 44 T. 426.

A District Judge cannot preside on the trial of a criminal case wherein he has been of counsel. Thompson v. State, 9 Cr. R. 619. But such disqualified judge may receive an indictment from the grand jury, and make orders preliminary to the trial of the case. Cox v. State, 8 Cr.R. 659.

An attorney for a prisoner discovered some interlineations and alterations in the prisoner's bail-bond, and in conversation with other attorneys for the prisoner maintained the invalidity of the bond in consequence. He held no conversation with the prisoner on the subject. Held, that he was not disqualified to sit as judge in a suit on the bond. Hobbs v. Campbell, 79 T. 309, 15 S.W. 282.

A judge is not disqualified by reason of his name having been inadvertently signed to a pleading. Railway Co. v. Mackney, 83 T. 410, 18 S.W. 949.

This section, when construed with Vernon's Ann.C.C.P. 1925, arts. 25 and 32, does not disqualify one who was district attorney and judge-elect at the time the offense was committed, but who did not appear against the accused, from conducting the trial after his term as judge began. Utzman v. State, 32 Cr.R. 426, 24 S.W. 412.

A county judge is not disqualified to try a suit to rescind a sale induced by false representations, because he is the attorney for a party prosecuting a suit in the district court to recover goods sold to the same buyer on the ground that he had made false statements as to his financial condition. Meyers v. Bloon, 20 C.A. 554, 50 S.W. 217.

A county judge having been counsel for defendant held disqualified from presiding at a certain trial. Woody v. State, Cr. App., 69 S.W. 155.

A county judge who prepared a motion for new trial in behalf of a sheriff in an action against him in justice court was thereby disqualified to try the case on appeal to county court, even though he knew nothing about the facts and did not consider himself the sheriff's attorney. Gaines v. Hindman, Civ.App., 74 S.W. 583.

Judge held not disqualified to hear a cause involving the issue whether the maker of a note promised after his discharge in bankruptcy to pay it because a law firm of which he was then a member appeared as attorneys in proceedings prior to the bankruptcy of the maker. Blackwell v. Farmers' & Merchants' Nat. Bank, 97 T. 445, 79 S.W. 518.

When county judge is attorney for a party in the district court he cannot take his client's affidavit to his inability to give security for costs in lieu of writ of error bond. Kalklosh v. Bunting, 40 C.A. 233, 88 S.W. 389.

A judge is disqualified to try a case where, as an attorney before he became judge, he was consulted by and advised one of the parties, in regard to a deposition that was being taken in a case between the same parties and involving the same subject-matter. It is immaterial what was said in the consultation or what the advice was. It may have been considered by him a matter not affecting the case or one too trivial for the party (who consulted him) to notice. Having been consulted in regard to the matter and having counseled the party in regard to it constituted him counsel in the case and disqualified him from afterwards sitting in the case as a judge. Johnson v. Johnson, Civ.App., 59 S.W. 1104.

That the regular district judge appeared to some extent as one of the counsel for the successful party held no ground for the reversal of a correct judgment. McAllen v. Raphael, Civ.App., 96 S.W. 760.

A county judge is not disqualified from acting in a criminal case because he is attorney for plaintiff in a civil action against accused in the district court. McIndoo v. State, 66 Cr.R. 307, 147 S.W. 235.

Judge held not disqualified to appoint a receiver of a railroad company because at some time prior thereto he had been consulted by persons who had subscribed money to aid in its construction, concerning their liability on their subscriptions. Butts v. Davis, Civ.App., 149 S.W. 741.

Under this section, and Vernon's Ann. Civ.St. art. 15, that a trial judge has been of counsel between the parties in a different case does not disqualify him. Stockwell v. Glaspey, Civ.App., 160 S.W. 1151.

The Assistant County Attorney, who in discharge of his duty assisted the grand jury in investigation of the case and wrote the indictment returned, which was superseded by another found by the succeeding grand jury, is within Vernon's Ann.C.C.P. art. 552, disqualifying a judge to sit in case where he has been counsel for the state. Patterson v. State, 83 Cr.R. 169, 202 S.W. 88.

District judge held not disqualified because he was employed while an attorney by counsel for plaintiff, where he was not

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a member of firm and had no interest in the case. Merchants' Nat. Bank of Brownsville v. Cross, Civ.App., 283 S.W. 555.

Judge, even if of counsel in case concerning disputed boundary, was not thereby disqualified in subsequent case involving different parties and different land. Ruth v. Carter-Kelly Lumber Co., Civ. App., 286 S.W. 905.

Where accused and another were jointly indicted coindictee's attorney who, on absence of acting judge, became special judge, held disqualified from sitting at trial of accused. Parrish v. State, 127 Cr.R. 138, 75 S.W.2d 262.

A judge of the district court who, as district attorney, actively participated in the investigation and preparation of murder prosecution as counsel for the state, prior to his qualifying as judge, was disqualified from sitting in or acting in the capacity of a judge in the case. Koll v. State, 143 Cr.R. 101, 157 S.W.2d 377.

To come within the meaning of "counsel in the case", it must appear that the judge acted as counsel in the very case that is before him. Ex parte Largent, 144 Cr.R. 592, 162 S.W.2d 419, certiorari denied 63 S.Ct. 72, 317 U.S. 668, 87 L.Ed. 536, rehearing denied 63 S.Ct. 413, 317 U.S. 713, 87 L.Ed. 568.

Under provision of statute and constitutional provision relating to disqualification of judges, where judge in liquor prosecution had been assistant county attorney who prosecuted and secured convictions of defendant for prior liquor violations, defendant sought by motion at start of trial to have judge disqualified, and rulings on evidence, instructing jury, and hearing motion for new trial called for exercise of judicial discretion, the entire proceedings were a nullity and the judgment of conviction void. Adcock v. State, 146 Cr.R. 84, 172 S.W.2d 103.

In liquor prosecution, where county judge had been assistant county attorney at time of prior liquor prosecution against same defendant, the county judge was disqualified. Woodland v. State, 147 Tex. Cr.R. 84, 178 S.W.2d 528.

Mere fact that trial judge was assistant county attorney at time the alleged offenses involved arose or were filed did not make him "counsel" for the state, but, if he had participated in preparation or investigation of the case, he would be counsel for the state. Prince v. State, 158 Cr.R. 65, 252 S.W.2d 945.

On motion for trial judge to recuse himself, record established disqualification of judge on ground that while assistant county attorney he had assisted in prosecution of a companion case. Id.

In order for a trial judge to come within inhibitions against sitting as judge in a case in which he had been counsel, it is necessary that judge had acted as counsel for some of parties in suit before him in some proceeding in which issues were same as in case before him. Matlock v. Sanders, Civ.App., 273 S.W.2d 956.

Fact that trial judge had been counsel for certain persons in a voluntary partition of lands, a portion of which were involved in a suit between different parties in form of trespass to try title, did not disqualify the judge from trying the case to try title. Id.

15. Waiver of disqualification

The incompetency of the judge cannot be waived by consent of parties. Chambers v. Hodges, 23 T. 104.

The disqualification of a judge is a matter affecting the jurisdiction and power of the court to act, and cannot be waived. Lee v. British-American Mortgage Co., 51 C.A. 272, 115 S.W. 329.

This section relating to interest is a declaration of public policy, and the disqualification cannot be waived. Lindsley v. Lindsley, Civ.App., 152 S.W.2d 415, reversed on other grounds 139 T. 512, 163 S.W.2d 633.

Disqualification of judge under this section and Vernon's Ann.Civ.St. art. 15, prohibiting him from sitting in any case wherein he may be interested or where either of parties may be related to him, affects judge's jurisdiction and power to act and cannot be waived. Postal Mut. Indemnity Co. v. Ellis, 140 T. 570, 169 S.W.2d 482.

Where disqualification of judge arises from a constitutional or statutory provision, it cannot be waived even by consent of parties litigant. Woodland v. State, 147 Cr.R. 84, 178 S.W.2d 528.

The disqualification of a judge by reason of his interest in the case or by reason of relationship to one of the parties cannot be waived in order to give validity to his actions. Fry v. Tucker, 146 T. 18, 202 S.W.2d 218.

16. Objections

The question of disqualification of a judge by reason of his interest in case or by reason of relationship to one of the parties may be raised subsequent to his actions in the case. Fry v. Tucker, 146 T. 18, 202 S.W.2d 218.

17. Determination of disqualification

The disqualification, if contested, must be shown by testimony upon a proper issue arising on the suggestion. Henderson v. Lindley, 75 T. 188, 12 S.W. 979; Wright v. Sherwood, Civ.App., 37 S.W. 168.

An issue as to the disqualification of a judge to sit as such in a cause pending in his court should be tried and determined by him; his evidence should be given under oath, and the facts in evidence on the issue should be incorporated in the record on appeal. Slaven v. Wheeler, 58 T. 23.

Judge should not try a case in which there is the least ground for his disqualification, and if error is ever made as to disqualification it should be in favor of disqualification rather than against it. Cotulla State Bank v. Herron, Civ.App., 202 S.W. 797.

Doubt regarding disqualification of judge should be resolved in favor of disqualification rather than for qualification of judge. Lindsley v. Lindsley, Civ.App., 152 S.W.2d 415, reversed on other grounds 139 T. 512, 163 S.W.2d 633.

18. Acts of disqualified judge

The acts of judges subject to any constitutional disqualification are void. Chambers v. Hodges, 23 T. 104; Newcome v. Light, 58 T. 141, 44 Am.Rep. 604; Templeton v. Giddings, Sup., 12 S.W. 851; Andrews v. Deck, 23 T. 455; Burks v. Bennett, 62 T. 277; Gains v. Barr, 60 T. 676; Jouett v. Gunn, 13 C.A. 84, 35 S.W. 191; Nona Mills Co. v. Wingate, 51 C.A. 609, 113 S.W. 182; Lee v. British-American Mortgage Co., 51 C.A. 272, 115 S.W. 320.

Though the judge who granted the order for issuance of a writ of certiorari and approved the bond was disqualified by interest, and therefore the order and bond were void, yet another and qualified judge having presided when motion to dismiss the proceeding was made, and he having made an order allowing the filing of a new bond, which he approved, and made an order adopting and continuing in force the writ theretofore issued, this was in effect an approval of the application for the writ and an authorization of the writ, and relieved the proceeding of objection on account of the disqualification of the first judge. Comstock v. Lomax, Civ.App., 135 S.W. 185.

A disqualified judge cannot enter a decree or order agreed to by the parties, and any judgment rendered by him must be reversed. Seabrook v. First Nat. Bank of Port Lavaca, Civ.App., 171 S.W. 247.

An order extending the time for filing the statement of facts and bills of exception, made by a judge who is disqualified to sit on account of having represented one of the parties in the action, is void. Dolsons v. Sheridan Stove Mfg. Co., Civ. App., 178 S.W. 663.

If a judge has been of counsel in case in behalf of one party he is disqualified to try case, and his order dismissing it was void. Kruegel v. Williams, Civ.App., 194 S.W. 683.

Where a county judge of the county where appellant resides is disqualified to try the case because of some of the conditions specified in Constitution and statute, he is for the same reason prohibited from performing any judicial act which a trial judge or court must perform before jurisdiction of the appellate court attaches, and an affidavit of inability to give appeal bond, pursuant to Vernon's Rev.Civ.St. 1925, art. 2266, made before him, is of no more value than if made before a notary public or clerk of a court. The determination of the sufficiency of the strict proof of inability to give security for appeal costs is a judicial act which a disqualified county judge cannot perform. Wells v. Arledge, Civ.App., 259 S.W. 991.

Any judicial act or discretion exercised by disqualified judge is void. King v. Wise, Civ.App., 1 S.W.2d 732.

Act of judge subject to constitutional disqualification is void as between parties, and can be attacked in collateral proceeding. Weil v. Lewis, Civ.App., 2 S.W.2d 506.

Proceedings before special judge, not shown by clerk's minutes to have been elected in substantial compliance with statute, are void. Warner v. Buckley, Civ. App., 42 S.W.2d 116.

A judgment, entered by a judge who is disqualified by constitutional inhibition against permitting a judge to sit who has been counsel in the case, is void. Williams v. Sinclair-Prairie Oil Co., Civ.App., 135 S.W.2d 211.

A district attorney could not, after his appointment as judge, approve an appeal bond in a case in which district attorney had participated, since his act would involve exercise of judicial discretion. Wallace v. State, 138 Cr.R. 625, 138 S.W.2d 116.

The acts of a judge subject to any constitutional disqualification are void. Lindsley v. Lindsley, Civ.App., 152 S.W.2d 415, reversed on other grounds 139 T. 512, 163 S.W.2d 633.

A disqualified judge may perform any acts as are ministerial, but may not perform any acts that call for the exercise by him of a judicial discretion. Koll v. State, Cr.App., 157 S.W.2d 377.

Acts of a disqualified judge constituting an exercise of "judicial discretion" and therefore prohibited include changing the venue of a case, drawing the venire, and approving an appeal bond. Id.

Judge of the Fifteenth District Court of Grayson County who was disqualified to act in murder prosecution because he had investigated the murder while he was district attorney, performed an act of "judicial discretion" rather than a "ministerial

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act" when he transferred the murder prosecution to the Fifty-Ninth District Court of Grayson County, requiring reversal of murder conviction, where the transfer was authorized only by virtue of power conferred by statute. Id.

A judicial act of discretion exercised by a judge disqualified under this section and Vernon's Ann.Civ.St. art. 15, prohibiting him from again sitting in a case wherein he is related to either party is void. Postal Mut. Indemnity Co. v. Ellis, 140 T. 570, 169 S.W.2d 482.

Where a county judge hearing second liquor prosecution was disqualified because he had been assistant county attorney at time of first prosecution, judgment rendered on second prosecution was void and subject to collateral attack. Woodland v. State, 147 Cr.R. 84, 178 S.W.2d 528.

Where second conviction for violation of liquor law was void because of disqualification of judge who had been assistant county attorney at time of first prosecution, the second conviction was not available to state for enhancement of punishment in third prosecution. Id.

Judge disqualified by relationship to one of the parties thereto to hear appeal from probate court order refusing to set aside appointment of administrator de bonis non, lacked jurisdiction to make parties to such appeal parties to another appeal and certiorari proceeding involving propriety of same appointment and appointment of temporary administrator in same estate or to assess any costs against such parties in any of the proceedings. Fry v. Tucker, Civ.App., 197 S.W.2d 375, affirmed in part, reversed in part on other grounds 146 T. 18, 202 S.W.2d 218.

Any order or judgment entered by a trial judge in any case in which he is disqualified is void. Fry v. Tucker, 146 T. 18, 202 S.W.2d 218.

19. —— Permissible acts

A judge disqualified to sit in a criminal case may nevertheless set it on the docket. Taylor v. State, 81 Cr.R. 359, 195 S.W. 1147.

A judge's disqualification to try a case did not disqualify him to call the special term of court at which it was tried. U. S. Fidelity & Guaranty Co. v. Henderson County, Civ.App., 253 S.W. 835.

The mere granting of leave to file an amendment to pleading is merely a formal order where nothing is decided, and one which an interested judge may enter. Reeves v. State, Civ.App., 258 S.W. 577.

Where conditions precedent were complied with, act by city commissioners of entering order calling election on question of their recall was plain "ministerial duty," which could be enforced by mandamus, although they were interested in result of election. Miller v. State, Civ.App., 53 S.W.2d 838.

A judgment in suit by next friend of an insane person to cancel certain oil and gas leases and to recover certain mineral estate entered by judge who had been of counsel was void under constitutional provision that no judge shall sit in any case when he shall have been counsel in case. Williams v. Sinclair-Prairie Oil Co., Civ.App., 135 S.W.2d 211.

The entry of an order by a judge, requiring court reporter to make a statement of facts, after filing by defendant of pauper's affidavit, constituted performance of a purely "ministerial act" which judge could perform notwithstanding that he had been an attorney in case, and refusal of judge to enter such order, although requested to do so on several occasions justified reversal of conviction. Wallace v. State, 138 Cr.R. 625, 133 S.W.2d 116.

Under this section prohibiting a judge sitting in any case in which he was counsel, incapacity of a disqualified judge extends only to any action involving exercise of judicial discretion, and hence such a judge may perform purely ministerial acts. Id.

The term "ministerial act" which a disqualified judge is not forbidden to do, includes the making of orders preliminary to the trial, the transferring of such a case to a court having jurisdiction thereof, the setting of a case for trial, the reinstating of a case which has been improperly dismissed, and the receiving of a report of the grand jury embracing an indictment on the trial of which he would be disqualified from sitting as trial judge, especially in absence of any challenge in limine. Koll v. State, Cr.App., 157 S.W.2d 377.

20. Special judge

Vernon's Ann.Civ.St. art. 1885, does not conflict with this section and must be complied with when the district judge is disqualified by reason of being a party to a suit pending in his court. Kruegel v. Nash, Civ.App., 72 S.W. 601, 602; Oates v. State, 56 Cr.R. 571, 121 S.W. 370; Alley v. Mayfield, 62 C.A. 231, 131 S.W. 295.

These amendments to the constitution repealed only such existing laws as were repugnant to them; and at the time they went into effect there were statutes in existence which prescribed, that when the county judge should be disqualified to try any case, it should be transferred to the district court, and that such court should have original jurisdiction thereof. If the provision in reference to disqualification of county judge had been mandatory, since it applies especially to the county judge, we should construe it as pointing out the only method by which the disqualification of

that officer was to be remedied. But the language is: "A competent person may be appointed in such manner as may be prescribed by law." This is the language of permission and not of command, and we construe it as having been intended to confer a discretionary power upon the legislature over the subject-matter, and not to limit the more general power conferred by section 16. Dulaney v. Walsh, 90 T. 333, 38 S.W. 748.

The acting county attorney of a county is not disqualified from acting as special judge in the trial of a case, pursuant to an appointment by the governor. McCammant v. Webb, Civ.App., 147 S.W. 693.

Notwithstanding Vernon's Ann.C.C.P. art. 553, the local bar, under Vernon's Ann. Civ.St. art. 1887, providing that whenever the judge of the court shall be absent or unable or unwilling to hold court the practicing lawyers of such court may elect a special judge, may select a special judge where the Governor fails to designate a district judge to try the case in which the regular district judge was disqualified. Webb v. Reynolds, Civ.App., 160 S.W. 152.

Acts 34th Leg. c. 45, authorizing the appointment of a special judge where sickness or other reasons render it impossible for the disqualified judge to exchange with a regular judge, permits an appointment only when the exchange is impossible in fact. Cohn v. Saenz, Civ.App., 194 S.W. 653.

A special district judge elected by the bar to try a particular criminal case on the disqualification of the regular district judge under this section, held not to have power to sit as judge, he not having been selected by the attorneys in the case under Vernon's Ann.Civ.St. arts. 1885, 1886, and art. 1887 not applying. Strahan v. State, 87 Cr.R. 324, 221 S.W. 976.

Judge absent from the courtroom while preparing to make a trip, held absent within the statute authorizing the election of a special judge by the bar, although he was still in the city. Tucker v. State, 94 Cr. R. 119, 249 S.W. 1063.

Where special judge elected under Vernon's Ann.Civ.St. art. 1887, has apparently fully tried case, in absence of regular judge, questions as to incompleteness of statute are moot. Carroll v. State, 104 Cr. R. 11, 282 S.W. 233.

Governor's appointment of practicing lawyer to try case held void for want of constitutional conditions precedent. Harris v. State, 105 Cr.R. 342, 288 S.W. 450.

Sheriff's failure to make proclamation at courthouse door that special judge is about to be elected renders election void. Warner v. Buckley, Civ.App., 42 S.W.2d 116.

Record disclosing judgment was signed by special judge, but failing to show that regular judge of county court was disqualified or cause of disqualification, held not to disclose fundamental error. Compere v. Girand, Civ.App., 42 S.W.2d 273.

A special district judge elected by members of bar to "preside in all cases in which regular judge was disqualified" was not appointed in consonance with Vernon's Ann.Civ.St. arts. 1885, 1888 to 1891, or this section and hence judgment he rendered, in action for injuries and property damages arising out of automobile collision, was void. Younger Bros. v. Turner, Civ.App., 132 S.W.2d 632.

If a district judge before whom a cause is pending has not certified to the Governor his disqualification, Governor does not have authority to act but if Governor has received such certification, he has authority to designate some district judge in an adjoining district to exchange benches with the regular judge, and if the judges are prevented from exchanging benches and the parties to the cause fail to agree upon an attorney for the trial of the case, the Governor may, upon receipt of a certificate of inability of parties to agree, appoint a person legally qualified to act. Op.Atty.Gen., 1939, No. 1566.

Where county judge was disqualified to preside over probate proceedings in which he desires to file for record the birth certificates of himself and his brothers and sisters, he should certify his disqualification to the Governor, and it would then be the duty of the Governor to appoint a suitable person to serve as county judge in his place. Op.Atty.Gen., 1940, No. 0-2673.

21. —— Agreement on special judge

Vernon's Ann.C.C.P. art. 553, does not transcend the constitutional provision in providing that such agreement may be made by the attorneys of the parties and the attorney representing the State may make such agreement with the defendant or his attorney. Davis v. State, 44 T. 523; Early v. State, 9 Cr.R. 476, overruling Murray v. State, 34 T. 331.

Where a district judge has been of counsel, the parties may by consent appoint a proper person to try the case. Thompson v. State, 9 Cr.R. 649.

In a suit by publication, the judge being disqualified, the plaintiff selected a special judge, who proceeded to render judgment by default. The selection by the plaintiff not being an appointment by the parties, there was no jurisdiction, and the judgment rendered in the cause was void. Mitchell v. Adams, 1 U.C. 117.

A judge cannot be selected by one party in the absence of the other, and his acts are void. Latimer v. Logwood, Civ.App., 27 S.W. 960.

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Where a special judge was agreed upon by all of the parties except two, and it was not shown that they were parties to the agreement, and they did not appear, the special judge was without lawful authority to determine the issues affecting their rights. Lomar v. Morris, 59 C.A. 378, 126 S.W. 663.

Under this section, and Vernon's Ann. Civ.St. art. 15, and Vernon's Ann.C.C.P. arts. 552, 553, the selection of a special judge by agreement was authorized only when the regular judge was disqualified. Summerlin v. State, 69 Cr.R. 275, 153 S.W. 890.

Under this section, where the parties to a suit in the District Court, from which the regular judge was absent under quarantine restrictions, agreed to try the case before a member of the bar, such special judge was without authority to act. Dunn v. Home Nat. Bank, Civ.App., 181 S.W. 699.

Selection of a special judge by agreement of the parties, in a case where the regular judge was not disqualified merely by his absence, was a nullity, and the acts of the special judge were void. Pickett v. Michael, Civ.App., 187 S.W. 426.

Where the record is silent as to the appointment of a special district judge by consent of the parties, the Appellate Court must presume, in the absence of exceptions, that the parties exercise their constitutional right to empower the special judge by consent to try the case. Rossetti v. Benavides, Civ.App., 195 S.W. 208.

Conceding the authority of the Legislature to pass laws facilitating the exercise of the right of the parties under this section, to select a person to try the case in lieu of a disqualified judge, such laws cannot be inconsistent with the terms or restrictive of the right given by the Constitution so that Vernon's Ann.C.C.P. art. 553, is invalid so far as it makes such right conditional on the impossibility of securing a judge by exchange of districts, and the parties may select a person to try the case without complying with that article. Patterson v. State, 87 Cr.R. 95, 221 S.W. 596.

Where the parties by agreement appointed an attorney to try the case pursuant to this section, the fact that the Governor thereupon appointed him did not detract from the force of his selection by the parties. Id.

This section expressly provides that when judge of a district court is disqualified to hear and determine a case, parties may by consent appoint a proper person to try it, and Legislature was without authority to deny such right by Vernon's Ann.Civ.St. art. 1885. Woodmen of the World v. Alexander, Civ.App., 230 S.W. 343.

Where special judge who had been elected was disqualified because of counsel for defendant, it was competent for parties to select a special judge to try case by agreement, under this section. Cobb & Gregory v. Parker, Com.App., 242 S.W. 1015.

Agreement to try case before special judge need not be in writing. Yarborough v. State, Civ.App., 273 S.W. 842.

Judgment rendered by special judge selected by agreement is nullity, where regular judge not disqualified. Bailey v. Triplett Bros., Civ.App., 278 S.W. 250.

Trial by special judge selected under agreement because of disqualification of presiding judge held not void, where record showed nothing to contradict disqualification. Maxey v. State, 104 Cr.R. 661, 285 S.W. 617.

Parties could not confer jurisdiction on attorney to try case, where presiding judge was not disqualified and proceedings before special judge were a nullity. Grogan v. Robinson, Civ.App., 8 S.W.2d 571.

Parties can appoint special judge by mutual consent only when regular judge is disqualified. Compere v. Girand, Civ.App., 42 S.W.2d 278.

The power conferred by this section providing that when a judge of the district court is disqualified the parties may, by consent, appoint a proper person to try case cannot be limited by legislative act. Reynolds v. City of Alice, Civ.App., 150 S.W.2d 455.

Under provision of this section that when a judge of district court is disqualified the parties may, by consent, appoint a proper person to try case, there is no room for construction and literal terms of provision must be followed, but if there is a disqualification of regular judge parties have power to agree upon a special judge, and if regular judge deems himself disqualified and so certifies and parties proceed to trial before a special judge upon whom they have agreed, they are "estopped" to question fact of disqualification. Id.

Where term of district court at which case was to be tried was about to expire and presiding judge was disqualified and a judge from another district who might have had power to try case was unavailable, and before trial parties entered into written agreement that case should be tried before a special district judge and parties proceeded to trial under agreement without protest until after judgment was rendered, judgment could not be attacked by plaintiffs on ground that special judge lacked authority to try case. Id.

22. Exchange of districts

Rev.St.1895, art. 1114, requires special terms of the district court to be held not less than thirty days after the regular term

is adjourned. In those districts where there is no interval between the adjournment of a term in one county and the commencement of a term in another, a special judge may hold the special term in one county while the regular term is held in the other. A case of convenience is presented under the Constitution which allows district judges to exchange districts "when they deem it expedient." Munzesheimer v. Fairbanks, 82 T. 351, 18 S.W. 697.

If the provision of Vernon's Ann.C.C.P. art. 553, that "in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree on an attorney of the court for the trial thereof," should be held invalid as violating this section, its invalidity would not invalidate the balance of the section in so far as it provided for an exchange of judges under such circumstances. Oates v. State, 56 Cr.R. 571, 121 S.W. 370.

Under Vernon's Ann.Civ.St. art. 1855, V.A.T.S. Election Code, art. 9.01, Rev.Civ.St. art. 5728, and this section, which declares that district judges may hold courts for each other when expedient, a district judge of a district not embracing the county in which the contested election was held, sitting in exchange with the judge of that district, could try the case; jurisdiction being conferred on the district court and not its judge. Savage v. Umphres, 62 C.A. 209, 131 S.W. 291.

Acts 38th Leg. (1923) c. 104, creating Eleventh, Fifty-Fifth, Sixty-First, and Eightieth judicial districts, held not unconstitutional as violative of this section or art. 5, § 7. Porch v. Rooney, Civ.App., 275 S.W. 494.

This section is sufficient authority for enactment of Vernon's Ann.Civ.St. articles 200a and 2092, §§ 21, 22. Currie v. Dobbs, Civ.App., 10 S.W.2d 438.

That regular judge was not actually disqualified held immaterial, where order in transcript recited that judges exchanged benches, as authorized. Pretre v. State, 112 Cr.R. 459, 17 S.W.2d 42.

Recitals of order in record that judges deemed exchange of benches expedient and made exchange as provided by statutes are presumptively true. Id.

Constitutional right of district judges to exchange districts and hold court for one another cannot be taken away by statute. Moore v. Davis, Com.App., 32 S.W.2d 131.

That judge sitting in exchange of benches with judge of another district was not designated in accordance with statute relating to assignment of one district judge to preside over court of another district judge did not disqualify judge. Ferguson v. Chapman, Civ.App., 94 S.W.2d 593.

An exchange of districts by district judges may be effected on their own initiative or request of one of them without making and entry of formal order declaring exchange or showing of reason therefor in docket or minutes. Baldwin v. Leonard, Civ.App., 110 S.W.2d 1160.

Where defendant and his attorneys, in open court, consented and agreed to exchange of judges after commencement of trial and no objection was made nor exception taken to such procedure, defendant waived his right relative to retention of original judge, and the exchange did not amount to fundamental error, which could be raised for first time in appellate court. Randel v. State, 153 Cr.R. 252, 219 S.W. 2d 689.

If district judges deem it expedient to exchange benches during the trial of a case, their action in so doing becomes reviewable only to determine if an abuse of discretionary power has occurred. Id.

The district judges have broad discretionary powers to exchange benches or hold courts for each other. Id.

Exchange of judges during murder trial did not deny defendant's constitutional right of "trial by jury". Id.

Where regularly elected judges of two judicial district courts signed agreement to exchange benches, and one of such judges advised county attorney of his county that he was disqualified to act in proceedings on information in nature of a quo warranto to test validity of acts of school officials in attempting to detach territory from one school district and attach it to another school district, and the other judge was present and acting under exchange agreement when application for temporary injunction came on for hearing in district court in county normally presided over by judge with whom he had exchanged benches, he could hear and dispose of application in such manner as he deemed proper. Wortham Independent School Dist. v. State ex rel. Fairfield Consol. Independent School Dist., Civ.App., 244 S.W.2d 838, ref. n. r. e.

23. Holding court for another judge

That a suit filed in the district court of the one district was tried there by the judge of another district held of no consequence. Rabb v. Texas Loan & Investment Co., Civ.App., 96 S.W. 77.

A judge of one district court may preside over another district court at the request of the judge of that court, as provided by this section, and Vernon's Ann.Civ.St. art. 1916. Marx v. Weir, Civ.App., 130 S.W. 621.

Under this section, the judge of another district may sit at the request of the regular judge, though the latter is not dis-

qualified or at the time holding court for the former or another judge. Johnson v. State, 61 Cr.R. 104, 134 S.W. 225.

Under Vernon's Ann.Civ.St. art. 1916, providing that any judge of the district court may hold court for any other district judge, the regular presiding judge of a district may vacate the bench, and the judge of another district may hold court for him. Hart v. State, 61 Cr.R. 509, 134 S.W. 1178.

Vernon's Ann.Civ.St. art. 1885, does not deprive district judges of the power granted by this section of holding court for one another, and a disqualified judge may on his own motion call in a judge of an adjoining district to preside for him. Connellee v. Blanton, Civ.App., 163 S.W. 404.

The Constitution and statutes providing for the exchange of judges whenever they deem it expedient, held, there was no error in the regular judge, after impaneling the jury and hearing the pleadings read, then calling in the judge of another district to preside because physically unable to proceed, and later, after the charge was read to the jury, resuming charge of the case; both judges passing on the motion for new trial and signing the judgment. Lancaster v. Bush, Civ.App., 207 S.W. 339.

It is constitutional for judge, under statute, to go into another district and hold court simultaneously with regular district judge. Eucaline Medicine Co. v. Standard Inv. Co., Civ.App., 25 S.W.2d 259.

Where regular district judge entered default judgment with writ of inquiry, another district judge could hear writ, render judgment, and pass on motion for rehearing without regular judge being disqualified and without transferring case to other judge's court. Cyrus W. Scott Mfg. Co. v. Haynie, Civ.App., 64 S.W.2d 1030.

A judge of another district than that in which case, which regular judge of latter district was disqualified to try, was pending, had constitutional and statutory authority under this section and Vernon's Ann.Civ.St. art. 1916, to try such case, regardless of whether his designation by Governor to do so was in strict accordance with article 1885. Baldwin v. Leonard, Civ.App., 110 S.W.2d 1160.

Where district judge granted writ of habeas corpus but thereafter he became ill and requested a district judge from another district to preside for him, and the district judge from the other district assigned himself to the district court, where habeas corpus proceeding was brought, it was proper for the district judge of the other district to preside at the habeas corpus proceeding. Ex parte Blackwood, 143 Cr.R. 169, 157 S.W.2d 908.

The Legislature, under its exclusive authority under the Constitution to create district courts, has the exclusive power to destroy the courts, and has power to pass laws to prevent the governor from indirectly destroying the courts by failing to appoint a successor to a deceased district court judge as authorized by the Constitution, and Vernon's Ann.Civ.St. art. 200a, as amended in 1943, providing for the assignment of judges to another district court, where a vacancy occurs by reason of the death of the incumbent, is valid. Pierson v. State, 147 Cr.R. 15, 177 S.W.2d 975.

The common-law rule requiring that the same judge preside throughout the trial of a felony case has been abrogated by statute and constitution. Randel v. State, 153 Cr.R. 282, 219 S.W.2d 659.

A district judge in one district has constitutional authority to preside in another court in another district. Richardson v. State, 154 Cr.R. 422, 228 S.W.2d 173.

Regularly elected judge of Hill County District Court was authorized to preside over criminal prosecution in District Court of Walker County in place of duly elected judge of Walker County without necessity of entry of formal order. Isaac v. State, 158 Cr.R. 540, 257 S.W.2d 436.

24. Supreme Court Justices

Under this section, the fact that a judge may have tried a case in the lower court or participated in the decision therein, does not disqualify him from sitting in the case on appeal. Galveston & H. Inv. Co. v. Grymes, 94 T. 609, 63 S.W. 830, 64 S.W. 778.

A justice of the Supreme Court who was a resident taxpayer of the city of Dallas was not disqualified to pass on a question as to the validity of a special act authorizing the city to levy a tax sufficient to provide a sinking fund and interest on bonds. City of Oak Cliff v. State, 97 T. 301, 79 S. W. 1068.

Justice of the Supreme Court held not disqualified to sit in certain case by reason of having been counsel in a certain previous case. City of Austin v. Cahill, 99 T. 172, 89 S.W. 552.

Chief Justice of Supreme Court held not disqualified from considering mandamus proceeding by candidate, who had bolted party ticket, to have his name entered in primary election, though Chief Justice was himself candidate in primary. Love v. Wilcox, 119 T. 256, 28 S.W.2d 515, 70 A.L.R. 1484.

25. Court of Criminal Appeals, Judges of

Under this section, the disqualification of one of the judges of the Court of Criminal Appeals does not require the appointment of a special judge; but the remaining judges who are qualified, being a quorum,

may determine the case. Long v. State, 59 Cr.R. 103, 127 S.W. 551, Ann.Cas.1912A, 1214.

A judge of the Court of Criminal Appeals was not disqualified from sitting on appeal from conviction of violating ordinance, wherein validity of the ordinance was attacked but city was not a party, merely because he prepared the ordinance while in city attorney's office. Ex parte Largent, 144 Cr.R. 592, 162 S.W.2d 419.

26. Court of Civil Appeals, judges of

Where one of the judges of a Court of Civil Appeals is disqualified to sit in a case, it is not necessary to appoint a special judge in his place, but the court composed of the other two judges constitutes a lawful tribunal for the trial and determination of the case. City of Austin v. Nalle, 85 T. 538, 22 S.W. 663, 969; Holt v. Maverick, 86 T. 457, 25 S.W. 607; San Antonio St. Ry. Co. v. Adams, Civ.App., 25 S.W. 639.

Justices of the Court of Civil Appeals owning motor vehicles on which they pay taxes are not disqualified by "interest" in suit by a county to restrain its tax collector from turning over proceeds of motor vehicle tax to the state highway department, under this section, and Vernon's Ann.Civ.St. art. 1515, as to disqualification of judges. Hubbard v. Hamilton County, 113 T. 547, 261 S.W. 999; Robbins v. Limestone County, 113 T. 542, 261 S.W. 994.

Vernon's Ann.Civ.St. art. 1515, does not conflict with this section, as under the liberal provisions of article 5, § 6, the Legislature is permitted to confer such jurisdiction on the court as it may deem best; and the fact, therefore, that one member is alone disqualified to try a case, does not prevent the other members from proceeding therewith. Nalle v. City of Austin, Civ.App., 21 S.W. 375.

In a suit to cancel the bonded indebtedness of a city for which a special tax has been levied, a judge of the Court of Civil Appeals owning taxable property in such city has a direct pecuniary interest in the result, and is not competent to sit as a judge. City of Austin v. Nalle, 85 T. 534, 22 S.W. 969, 969.

On appeal to the Court of Civil Appeals in condemnation proceedings instituted by a county, a judge who owns land in such county is not interested in the question to be determined within the meaning of Vernon's Ann.Civ.St. art. 15. Herf v. James, 86 T. 230, 24 S.W. 396.

Under this section taxpayers of the city of Dallas held disqualified to sit in the Court of Civil Appeals in review of a judgment holding that an ordinance for the issuance of bonds submitted to the electors under the charter had been adopted. Holland v. Cranfill, Civ.App., 167 S.W. 368.

Under this section, where single justice of Court of Civil Appeals was recused, a special associate justice properly was appointed by the Governor to sit, and the court so composed was legally constituted, despite Vernon's Ann.Civ.St. art. 1515. Boynton Lumber Co. v. Houston Oil Co. of Texas, Civ.App., 189 S.W. 749.

That two of justices of the Court of Civil Appeals were connected with appellant's codefendant in local capacity held not to disqualify them. Gulf Coast Transp. Co. v. Standard Milling Co., Civ.App., 197 S.W. 874.

In insurance company's suit on premium note assigned to it by another insurance company, Chief Justice of Court of Civil Appeal, holder of policies in the assignor company, and whose son-in-law was its vice-president and acting manager, and had discussed the transaction in his presence, was disqualified to sit in the case. California State Life Ins. Co. v. Kring, Civ.App., 208 S.W. 372.

Justices of Court of Civil Appeals at San Antonio held not disqualified under this section, and Vernon's Ann.Civ.St. art. 15, on ground of personal interest as taxpayers in such city, from rendering decision in bond election contest. Garess v. Tobin, Civ.App., 261 S.W. 430.

Members of Court of Civil Appeals at San Antonio held not disqualified, by interest as taxpayers in that city, to sit in bond election contest, which does not involve validity of bonds issued or tax levied to pay them. Wendover v. Tobin, Civ. App., 261 S.W. 434.

Interest of judges of Court of Civil Appeals as taxpayers of city held not to disqualify them in suit attacking bond issues for city improvements. Bramlett v. City of Dallas, Civ.App., 11 S.W.2d 209.

Judge of appellate court is not disqualified to determine merits of an appeal because judgment appealed from was rendered by him as a trial judge. Burgueres v. Farrell, Civ.App., 85 S.W.2d 952, error dismissed 126 T. 209, 87 S.W.2d 463.

Action of judge before whom suit was tried, in informing defendant as to essentials of motion for new trial, time for filing motion being insufficient for defendant to obtain attorney held insufficient to disqualify him from acting as one of justices in disposing of appeal. Id.

A member of Court of Civil Appeals who was a director of charitable corporation which was beneficiary of will and which contested action of testator's widow for construction of will properly certified his disqualification to the Governor. Lindsley v. Lindsley, Civ.App., 152 S.W.2d 415, reversed on other grounds 139 T. 512, 163 S.W. 2d 633.

Note 26

Where member of Court of Civil Appeals had certified his disqualification to Governor, the certification of disqualification and the commission appointing a special associate justice could not be questioned by parties to the action as to which the judge had certified his disqualification on the theory that the grounds which the judge assigned were not grounds recognized by law for disqualification. Id.

Where member of Court of Civil Appeals certified his disqualification to the Governor and the Governor appointed special associate justice, the court consisting of two regular members and the special associate justice was a legal court with authority to determine the case as to which the member had certified his disqualification. Id.

Where certification of disqualification of member of Court of Civil Appeals and commission by Governor appointing special associate justice were in accordance with this section constitutional method of trial of member of court by impeachment and by address was only method by which it could be legally declared that the special appointment was without legal effect and force. Id.

Special Associate Justice of the Court of Civil Appeals for the 5th Supreme Judicial District is entitled to a salary of $13.69 per day from State for every day that he may be occupied in performing duties of judge. Op.Atty.Gen., 1941, No. 0-3744.

27. County attorney

County attorney performing no judicial service held not disqualified to conduct prosecution for murder on ground that he was paid by fees. Wyatt v. State, 112 Cr. R. 280, 16 S.W.2d 231.

28. Municipal officers

Members of city commission trying themselves or other members for offense in which majority of commission allegedly participated are within constitutional prohibition of judge's sitting in a case wherein he is interested, and their judgment therein would be void. State ex rel. La Crosse v. Averill, Civ.App., 110 S.W.2d 1173.

29. Fees

Vernon's Ann.C.C.P. art. 1071 providing fees upon final conviction in misdemeanor cases to the justice of the peace is unconstitutional. Op.Atty.Gen., 1941, No. 0-4091.

§ 12. Judges to be conservators of the peace; style of writs and process; prosecutions in name of state; conclusion

Sec. 12. All judges of courts of this State, by virtue of their office,[1] be conservators of the peace throughout the State. The style of all writs and process shall be, "The State of Texas." All prosecutions shall be carried on in the name and by authority of the State of Texas, and shall conclude: "Against the peace and dignity of the State." As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

1 The resolution proposing this section, Acts 22d Leg. 1891, p. 197, read as above. It is apparent that the word "shall" should be read into the first sentence making it read: "All judges of courts of this state, by virtue of their office, shall be conservators of the peace throughout the state."

INTERPRETIVE COMMENTARY

In England the conservators of the peace (*custodes pacis*) can be traced back to the assignment of knights in 1195 to enforce the oath to preserve the peace which Richard I ordered to be taken by all persons above the age of 15.

By statute I Edward III, conservators of the peace were appointed for each county to guard the peace and to hear and determine felonies. The office was reconstituted by the parliament of 1327, and its powers were extended in 1360. In modern times, from the sovereign and the lord chancellor down to the justice of the peace and the village constable, all who have to do with the repression of crime are included within the general term "conservators of the peace".

13. Timeliness of demand

Former wife who made jury demand and jury fee tender almost five months prior to date set for trial timely and properly demanded jury trial. Lopez v. Lopez (App. 4 Dist.1985) 691 S.W.2d 95.

§ 11. Disqualification of judges; exchange of districts; holding court for other judges

Cross References

Civil cases, recusal or disqualification of trial judge, see Vernon's Ann.Rules Civ. Proc., rule 18a.

Disqualification of judge, see Vernon's Ann.Civ.St. Title 14 Appendix, Code of Judicial Conduct, Canon 3, subd. C.

Law Review Commentaries

Annual survey of Texas law:

Disqualification of trial judge. Ernest E. Figari, Jr., 35 Southwestern L.J. (Tex.) 381 (1981).

Divorce proceedings. Joseph W. McKnight, 35 Southwestern L.J. (Tex.) 121 (1981).

Court reform, Texas style. Clarence A. Guittard, 21 Southwestern L.J. (Tex.) 451 (1967).

Disqualification of judges. Robert W. Calvert, 47 Texas Bar J. 1330 (1984).

Judicial recusal: Rule 18a—Substance or procedure. Sam Sparks, 12 St. Mary's L.J. 723 (1981).

Rule 18a: Recusal or disqualification of trial judge. Luther H. Soules III, 43 Texas Bar J. 1005 (1980).

Who determines judicial disqualification? Elmo Schwab, 43 Texas Bar J. 197 (1980).

Notes of Decisions

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1. Construction and application

This section and provisions of Vernon's Ann.C.C.P.1925, art. 552 (repealed; see, now, Vernon's Ann.C.C.P. art. 30.01), against judge sitting in any case where he had been of counsel for state were mandatory and must be observed. Pennington v. State (1960) 169 Cr.R. 183, 332 S.W.2d 569.

It was object of this section providing that no judge shall sit in any case where either of the parties may be connected with him by consanguinity within the third degree, to place judicial officers beyond the temptation which circumstances might throw in their way. Indemnity Ins. Co. of North America v. McGee (1962) 163 T. 412, 356 S.W.2d 666.

Canons of Judicial Ethics have not been adopted in Texas and do not have status of law. McKnight v. State (Cr.App.1968) 432 S.W.2d 69.

Grounds of this section for disqualification of judges are exclusive; that is, they specify all the circumstances that forbid a judge to sit. Williams v. State (Cr.App. 1973) 492 S.W.2d 522, certiorari denied 94 S.Ct. 378, 414 U.S. 1012, 38 L.Ed.2d 250.

Judiciary must not only attempt to give all parties fair trial, but it must also try to maintain trust and confidence of the public at a high level. Lee v. State (Cr.App.1977) 555 S.W.2d 121.

1.5. Due process

Fact that a judge other than regular judge in which civil case was filed was assigned to hear the case did not deny relator due process and equal protection of the law, even in absence of showing that the regular judge was disqualified. Manges v. Garcia (Civ.App.1981) 616 S.W.2d 380.

1.6. Jurisdiction

The 73rd District Court of Bexar County had jurisdiction to clarify portion of divorce decree of another district court. McGehee v. Epley (App. 4 Dist.1983) 655 S.W.2d 305, affirmed in part, reversed in part on other grounds 661 S.W.2d 924.

3. Disqualification in general

Where plaintiff was aware of state trial judge's alleged connection with the state court defendants during pendency of the suit and he also knew of alleged proprieties by state Supreme Court justices before that court's decision was final, it was plaintiff's duty to raise his contentions before the state forums and any adverse ruling involving any constitutional defect could then have been appealed to the United States Supreme Court. Atchley v. Greenhill (D.C. 1974) 373 F.Supp. 512, affirmed 517 F.2d 692, rehearing denied 521 F.2d 814, certiora-

ri denied 96 S.Ct. 1115, 424 U.S. 915, 47 L.Ed.2d 320.

This section is mandatory and exclusive, and specifies all the circumstances which forbid a judge to sit. Moody v. City of University Park (Civ.App.1955) 278 S.W.2d 912, ref. n.r.e.

Disqualification of trial judge invalidates judgment, and same may be attacked by independent suit, brought for that purpose, even after affirmance. Texas Co. v. Tijerina (Civ.App.1957) 301 S.W.2d 478.

Where trial judge had represented husband as counsel in husband's action for divorce prior to time trial judge had been appointed district judge and trial judge had refused to certify his disqualification to try issue of child custody, writ of mandamus to compel certification of disqualification would not lie, but writ of prohibition prohibiting judge from making further orders in case, except to certify his disqualification, or to make such ministerial orders as the parties may jointly request in writing, would lie. Turner v. Chandler (Civ.App. 1957) 304 S.W.2d 687.

A judge is not incompetent to try case because of opinions formed, held or expressed by him concerning issues involved, nor because he has personal knowledge of facts of case. Lombardino v. Firemen's and Policemen's Civil Service Commission of City of San Antonio (Civ.App.1958) 310 S.W.2d 651, ref. n.r.e.

Whether commitment for contempt for failure to make child support payments pursuant to divorce decree was void because made by judge who acted as counsel for mother of children in divorce suit, was immaterial in suit by contemner to recover mineral interest in land on ground that conveyance thereof while imprisoned for contempt was obtained by duress, undue influence and fraud, particularly where plaintiff alleged that at time he signed and acknowledged deed he was lawfully restrained of his liberty. Von Ree v. Carminati (Civ.App. 1958) 311 S.W.2d 729, ref. n.r.e.

Fact that trial judge attended indignation meeting called for purpose of encouraging stricter enforcement of liquor laws and, while there, made a speech in which he stated that he would assess certain punishment where pleas of guilty were made in liquor law violation cases, did not disqualify judge in prosecution for possession of whiskey and vodka in dry area. Templin v. State (1959) 167 Cr.R. 605, 321 S.W.2d 877.

In landowner's action against company for trespass as result of company having dug a hole and placed telephone pole on land claimed by owner as his own and on which company allegedly had no right to place any part of its telephone line, even though trial judge had, on the first trial before court without a jury, declared a mistrial because he had recalled that owner had told him all about case, there was no abuse of discretion by trial judge in refusing to certify his disqualification on a second trial before jury. Pan American Petroleum Corp. v. Mitchell (Civ.App.1960) 338 S.W.2d 740.

A judge, not being disqualified, has the duty, however embarrassing, to proceed with trial. Aldridge v. State (1961) 170 Cr.R. 502, 342 S.W.2d 104.

Trial judge did not err in refusing to disqualify himself in suit for cancellation of deed because he had recused himself as presiding judge in another suit and had drawn will for grantor's husband, which matters were only collaterally involved. Hooks v. Brown (Civ.App.1961) 348 S.W.2d 104, ref. n.r.e.

The fact that one judge of Court of Civil Appeals is alone disqualified does not prevent the other members from lawfully proceeding therein. Hoyt v. Hoyt (Civ.App. 1961) 351 S.W.2d 111, error dismissed.

If attorney for defendant, against whom verdict was given, made statement to plaintiff's attorney that he had been told by trial judge that a new trial would be granted, statement was plain hearsay so far as judge was concerned, and it could not be accepted as ground for holding that judge was disqualified as a matter of law and that order for granting a new trial was void. Brown v. American Finance Co. (Civ.App.1968) 432 S.W.2d 564, ref. n.r.e.

Statement made by trial judge that he felt that award of exemplary damages was too high and that attorneys should endeavor to work out something reasonable merely informed attorneys that judge, in interest of justice, was willing to let a judgment for plaintiff stand if amount of recovery were reduced, and statement did not disqualify judge from acting on defendant's motion for new trial. Id.

Where disqualified judge tries criminal case, proceedings are nullity and judgment is void and subject to collateral attack. Ex parte Washington (Cr.App.1969) 442 S.W.2d 391.

Constitutional and statutory provisions that judge cannot sit in case where he has been of counsel for state are mandatory and must be observed. Id.

Refusal of trial judge to disqualify himself from habeas corpus proceeding brought by adoptive mother and her husband seek-

ing to set aside a prior judgment whereby two minor children were declared to be dependent was not error on ground he had a fixed opinion that case should not be reopened, where the judge stated that he had been advised the children were placed in foster home and doing well and that he was reluctant to set a hearing unless it was absolutely necessary, but that his only consideration in the matter was best interest and welfare of the children. Shriner v. Simmons (Civ.App.1972) 483 S.W.2d 324.

Even though trial judge was involved in litigation with the condemnor in condemnation proceeding involving his own land and erection of transmission line, judge was not disqualified from sitting in proceeding involving other condemnees and condemnor to determine damages caused to condemnees' land by taking of easement for transmission line, where judge could not obtain any pecuniary benefits from proceeding. Texas Elec. Service Co. v. Boyce (Civ. App.1972) 486 S.W.2d 111.

A reviewing court must scrutinize a record closely when there has been a motion for disqualification of judge. Id.

Disqualification of Texas judge is to be determined with reference to this section and Vernon's Ann.Civ.St. art. 15, rather than to equal protection, due process, or privileges and immunities clauses of Federal Constitution. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Code of Judicial Conduct adopted by American Bar Association does not have status of law in Texas. Id.

There is no compulsion for judge to step aside when not legally disqualified. Id.

Unless legally disqualified, it is duty of judge to preside. Id.

Judge presiding at revocation of probation hearing was not disqualified because he had heard prior murder case of defendant, had formed opinion that the evidence showed violation of defendant's probation and had initiated the revocation proceedings. Williams v. State (Cr.App.1973) 492 S.W.2d 522, certiorari denied 94 S.Ct. 378, 414 U.S. 1012, 38 L.Ed.2d 250.

Where judge disqualified himself under Vernon's Ann.Civ.St. art. 15, providing for disqualification, he was incapacitated from taking any action in the cause which required exercise of judicial discretion, and, under constitutional and statutory provisions, the disqualification destroyed the power of the court to act and rendered purported judgment signed by him void. Chilicote Land Co. v. Houston Citizens Bank & Trust Co. (Civ.App.1975) 525 S.W.2d 941.

Although question of qualification of appellate judges to act on litigation involving rate request of utility of which judges were customers was not formally raised on appeal of case, question was fundamental, presented itself, and would be considered. City of Houston v. Houston Lighting & Power Co. (Civ.App.1975) 530 S.W.2d 866, ref. n.r.e.

Judges of Court of Civil Appeals were not disqualified from considering issues raised on appeal of case involving rates of light and power company, even though all judges of court were customers of such company. Id.

Where judge who had presided at trial never participated in prosecution of the case he was not disqualified from sitting even though judge had been district attorney when two other cases were pending against defendant including one which was still pending at time of trial. Holifield v. State (Cr.App.1976) 538 S.W.2d 123.

Trial judge's stated inclination not to grant probation in cases involving delivery of heroin did not disqualify him, either under this section or Vernon's Ann.C.C.P. art. 30.01 from presiding in prosecutions for delivery of heroin and possession of heroin. Vera v. State (Cr.App.1977) 547 S.W.2d 283.

Bias or prejudice of a trial judge not based upon interest is not a legal disqualification; however, any indication of prejudice or opinion of guilt on part of trial judge requires close scrutiny of his rulings on appeal. Zima v. State (Cr.App.1977) 553 S.W.2d 378.

Judge, who stipulated that defendant called his coordinator while motion to revoke defendant's probation was pending and told coordinator she was not coming to judge's court, who discussed matter on phone with defendant, who during conversation formed opinion that she was intoxicated, who "might have told her that if she called me again while she was intoxicated I would put her 10 feet under the jail," and who stated that he was not prejudiced against defendant as result of conversation, was not disqualified to preside. Id.

Judge's bias, if any, standing alone, does not constitute error; of course, a defendant may challenge erroneous ruling made by trial judge as result of prejudice, but it would be error in ruling rather than prejudice which would give defendant right to complain. Id.

Mere fact that one was the district or county attorney when a criminal case is

pending in a court in that county does not ipso facto disqualify him as a judge to preside over trial of that case. Lee v. State (Cr.App.1977) 555 S.W.2d 121.

The issue of disqualification of trial judge involves jurisdiction of court to act and should be considered by Court of Criminal Appeals as unassigned error in the interest of justice. Id.

Where trial judge, while serving in his official capacity on district attorney's staff, had reviewed case and advised defense counsel that defendant's record was "deplorable" and that he would recommend life sentence, trial judge was disqualified from presiding as judge in trial. Id.

A judge is not disqualified by mere pendency of another lawsuit brought against him by one of parties to suit before him. Citizens Law Institute v. State (Civ.App. 1977) 559 S.W.2d 381.

Filing of unsworn motion alleging that trial judge had been named defendant in another lawsuit brought against him by party to suit before judge did not require disqualification of trial judge. Id.

Where there was no allegation of a matter which would disqualify trial judge for cause and no motion to recuse was filed in trial court, trial judge was not disqualified from hearing cause. Citizens Bldg., Inc. v. Azios (Civ.App.1979) 590 S.W.2d 569.

Appointment by trial judge of his son-in-law as guardian ad litem did not disqualify trial judge as attorney was not party to suit, and judgment entered in cause after such appointment was not void. Canavati v. Shipman (Civ.App.1980) 610 S.W.2d 200.

Grounds enumerated in this section prohibiting judge from sitting in any case in which he may be interested, or where party is related to judge by consanguinity or affinity in degree prescribed by law, or when he shall have been counsel in the case, and in Vernon's Ann. Civ.St. art. 15 tracking constitutional relationship which disqualifies are mandatory, inclusive and exclusive. Rocha v. Ahmad (App. 4 Dist.1983) 662 S.W.2d 77.

Judges of Court of Appeals were not disqualified from sitting on case in which lawyer who had contributed to their campaign was involved as counsel. Rocha v. Ahmad (App. 4 Dist.1983) 662 S.W.2d 77.

Husband failed to allege any of the three disqualifying circumstances, interest, consanguinity, or "of counsel," provided in Const. Art. 5, § 11 governing disqualification of judge. Gaines v. Gaines (App. 13 Dist.1984) 677 S.W.2d 727.

4. Interest of judge

To be disqualified for interest a judge must, by the judgment in the case, gain or lose something, the value of which may be estimated, and liability of pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of law upon the status fixed by the decision. Moody v. City of University Park (Civ.App. 1955) 278 S.W.2d 912.

Judge was disqualified to sit in trial of action to recover for benefit of cooperative, moneys it had expended in defense of certain libel suits brought against directors of cooperative as individuals, even though he was only one of 5,000 members of cooperative and even if he could try case with complete fairness and impartiality as to parties. Pahl v. Whitt (Civ.App.1957) 304 S.W.2d 250.

A judge is disqualified from sitting at trial of action against mutual association of which he is a member. Id.

Stockholder in corporation is disqualified to sit as judge in case wherein corporation is party. Id.

This section providing that no judge shall sit in any case wherein he may be interested does not disqualify a judge who is interested in the question to be decided but who has no direct and immediate interest in the judgment to be pronounced. Aldridge v. State (1961) 170 Cr.R. 502, 342 S.W.2d 104.

Interest of judge as citizen of city did not disqualify him from sitting in municipal election contest. Runyon v. George (Civ. App.1961) 349 S.W.2d 107, error dismissed.

Judge's financial involvement with alleged default debtor of defendant bank, and judge's brother's indebtedness to defendant bank, did not constitute disqualifying "interest" in case under this section and Vernon's Ann.Civ.St. art. 15. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Disqualifying interest of judge must be direct, real and certain interest in subject matter and result of instant litigation, not merely indirect, incidental, remote, possible or speculative. Id.

Interest of judge required for disqualification is of pecuniary nature, capable of estimated value, that judge may gain or lose by judgment rendered in case. Id.

Interest of judge, to require his disqualification, must generally be direct pecuniary or property interest in subject matter of the litigation. Nueces County Drainage and

pending in a court in that county does not ipso facto disqualify him as a judge to preside over trial of that case. Lee v. State (Cr.App.1977) 555 S.W.2d 121.

The issue of disqualification of trial judge involves jurisdiction of court to act and should be considered by Court of Criminal Appeals as unassigned error in the interest of justice. Id.

Where trial judge, while serving in his official capacity on district attorney's staff, had reviewed case and advised defense counsel that defendant's record was "deplorable" and that he would recommend life sentence, trial judge was disqualified from presiding as judge in trial. Id.

A judge is not disqualified by mere pendency of another lawsuit brought against him by one of parties to suit before him. Citizens Law Institute v. State (Civ.App. 1977) 559 S.W.2d 381.

Filing of unsworn motion alleging that trial judge had been named defendant in another lawsuit brought against him by party to suit before judge did not require disqualification of trial judge. Id.

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Interest of judge required for disqualification is of pecuniary nature, capable of estimated value, that judge may gain or lose by judgment rendered in case. Id.

Interest of judge, to require his disqualification, must generally be direct pecuniary or property interest in subject matter of the litigation. Nueces County Drainage and

Conservation Dist. No. 2 v. Bevly (Civ.App. 1975) 519 S.W.2d 938, ref. n.r.e.

Ordinarily, interest of judge in public company or public enterprise which judge shares with other members of community is not one that disqualifies him from sitting in a case. Id.

Pecuniary interest sufficient to disqualify a judge from sitting in case must be a direct, real and certain interest in subject matter of that case and must be capable of monetary valuation. Narro Warehouse, Inc. v. Kelly (Civ.App.1975) 530 S.W.2d 146, ref. n.r.e.

To disqualify judge from sitting in case, pecuniary gain or loss to judge must be an immediate result of judgment to be rendered, and not result remotely, or at some future date, from general operation of law upon status fixed by the judgment. Id.

Interest required for disqualification of judge is one of pecuniary nature at time of suit. Id.

Trial judge, who was alleged by defendant to be disqualified, was not required to seek independent determination by another judge of his impartiality in connection with motion to revoke probation, which extraordinary relief is not contemplated by either this section or Vernon's Ann.C.C.P. art. 30.-01. Zima v. State (Cr.App.1977) 553 S.W.2d 378.

The interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest in result of case presented to the judge or court. Cameron v. Greenhill (Sup.1979) 582 S.W.2d 775.

Judge was not disqualified from trying action for probate of holographic will by having once been appointed by decedent as trustee of deed of trust and by having previously performed legal services for proponent and decedent in routine real estate transaction as such appointment and representation did not constitute proof that he was interested in action. Lade v. Keller (Civ.App.1981) 615 S.W.2d 916.

The interest required for disqualification of judge is one of pecuniary nature at time of suit, and pecuniary interest sufficient to disqualify judge from sitting in case must be direct, real and certain interest in subject matter of that case. Id.

In order for trial judge to come within constitutional and statutory prohibitions against sitting as judge in case in which he had been counsel, it is necessary that judge had acted as counsel for some of parties in suit before him in some proceeding in which issues were same as in case before him. Id.

Interest that disqualifies a judge from sitting, under this section, is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of a case presented. Chastain v. State (App. 14 Dist.1983) 667 S.W.2d 791, review refused.

Term "interested in the case," within constitutional provision prohibiting a judge from sitting in any case wherein he may be interested, means a direct interest in the case or matter to be adjudicated so that the result must, necessarily, affect his personal or pecuniary loss or gain. Prince v. State (App. 4 Dist.1984) 677 S.W.2d 181.

Refusal of trial judge to disqualify himself on ground that defendant had filed a civil suit against him in federal court was not error, absent evidence that trial judge had a pecuniary interest in outcome of case. Prince v. State (App. 4 Dist.1984) 677 S.W.2d 181.

Defendant's allegation that a prior personal and financial relationship existed between trial judge and the attorney for plaintiff and that they held a common financial interest failed to invoke provisions of Vernon's Ann. Rules Civ.Proc., rule 18a requiring a hearing before the presiding judge of the administrative judicial district, since relator failed to allege grounds for recusal or disqualification under Const. Art. 5, § 11. (Per Cantu, J., with two Justices concurring specially.) Manges v. Martinez (App. 4 Dist.1984) 683 S.W.2d 137.

6. —— Taxpayers, interest as

Where it was not shown that county judge had any interest in county condemnation proceeding other than as taxpayer and member of commissioners court, county judge's interest in case was not sufficient to constitute disqualification of judge to appoint commissioners to assess damages or to preside at trial. Gossett v. State (Civ. App.1967) 417 S.W.2d 730, ref. n.r.e.

In suit by landowner against drainage and conservation district for injunctive relief, Chief Justice and Associate Justice of Court of Civil Appeals were not disqualified to sit merely because they owned land within the drainage district and were liable for taxes within that district. Nueces County Drainage and Conservation Dist. No. 2 v. Bevly (Civ.App.1975) 519 S.W.2d 938, ref. n.r.e.

Where judge's pecuniary interest is not specially affected, judge is not by reason of being taxpayer disqualified from sitting in case though he may have merely incidental, remote, contingent or possible pecuniary interest in the subject matter of the suit. Id.

Under the provisions of this section, and the holding in Gossett v. State, the County Judge, in view of the facts submitted, was not disqualified from presiding at condemnation cases by reason of his appointment of special commissioners to assess damages in said cases. Op.Atty.Gen.1969, No. M-473.

9. —— Questions involved, interest in

In criminal libel suit based on editorial, critical, among other things of commissioners court, county judge, because of his connection with commissioners court for some 32 days, was not a party injured by the libelous statement and was not disqualified from presiding under Vernon's Ann.P.C. art. 552, providing that no judge shall sit in any case where he may be the injured party. Aldridge v. State (1961) 170 Cr.R. 502, 342 S.W.2d 104.

Judge, who owned undivided interest in land covered by Mexican and Spanish land grants but who, prior to action involving question of whether lands riparian to Rio Grande River had an appurtenant right to irrigate with river waters, sold lands and disposed of his interest in vendor's liens, was not disqualified to sit in the case. State v. Valmont Plantations (Civ.App.1961) 346 S.W.2d 853, affirmed 163 T. 381, 355 S.W.2d 502.

Justices of Court of Appeals who were neither related to any party in case nor had been counsel for any party in case, and who did not stand to gain or lose anything of a pecuniary or personal nature because of any judgment which might be rendered in case, were not disqualified, despite fact that an owner of an interest in one of parties had contributed 21.7% of total reported contributions to campaign of one of justices, and other justice had received 17.1% of his total reported campaign contributions from one of parties. River Road Neighborhood Ass'n v. South Texas Sports, Inc. (App. 4 Dist.1984) 673 S.W.2d 952.

9.5. —— Preparation of case, interest of judge

If trial judge participated in any manner in preparation and investigation of case in question when he was a prosecutor, he would be counsel for the State and hence disqualified. Gamez v. State (App.1982) 644 S.W.2d 879, review refused, appeal after remand 665 S.W.2d 124.

Court of Appeals was unable to determine whether trial judge participated in preparation and investigation of State's case while he was a prosecutor, in view of indications in record that other attorneys actually represented the State in the case and since sole indication of judge's participation was found in printed announcement-of-ready form bearing the judge's original signature or stamped facsimile thereof; accordingly, case would be remanded for evidentiary hearing on question of disqualification. Id.

Perfunctory act of judge, in his former capacity as assistant district attorney, of stamping his signature to State's announcement-of-ready form for prosecution of defendant for capital murder did not disqualify judge from presiding over defendant's trial on ground that he had been counsel for the State, since the judge had never examined State's file, had absolutely no recollection of case, and had merely helped sign announcement-of-ready forms for prosecutor who was handling arraignments on that particular day. Gamez v. State (App. 4 Dist.1983) 665 S.W.2d 124.

10. Relationship to parties

In determining whether two persons are related by affinity (marriage), relationship of affinity does not exist where more than one marriage is required to establish it. Johnson v. State (1960) 169 Cr.R. 146, 332 S.W.2d 321, followed in 332 S.W.2d 322.

Fact that judge is related to some unnamed or inchoate party to class suit who may be affected by judgment is insufficient to disqualify judge from hearing case. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App.1962) 354 S.W.2d 420, error refused.

That judge presiding over case brought by Texas Water Commission to determine rights of thousands of landowners to use waters of Rio Grande, became as result of marriage, related by affinity in second degree to two owners of land lying in water districts named as parties in suit did not disqualify judge, and disqualification of judge would not follow if it were later determined that persons to whom he became related and others similarly situated were necessary parties to suit. Hidalgo and Cameron Counties Water Control and Improvement Dist. No. 9 v. Starley (Sup.1964) 373 S.W.2d 731.

That brother of mother of woman married by judge presiding in case brought by Texas Water Commission to determine rights of thousands of landowners to use water of Rio Grande was named as party in his capacity as director of water district involved did not disqualify judge, under circumstances. Id.

Judge was not disqualified by reason of the fact that he allegedly was the prosecutor in defendant's prior 1962 conviction for

unlawfully breaking and entering a motor vehicle. Griffin v. State (Cr.App.1972) 487 S.W.2d 81.

11. —— Degree of relationship

Judge of Court of Criminal Appeals whose wife was a first cousin to wife of a brother of decedent was not related within third degree, by affinity, to the decedent and was not ineligible to participate in decision affirming murder conviction. Washburn v. State (1959) 167 Cr.R. 125, 318 S.W.2d 627, certiorari denied 79 S.Ct. 876, 359 U.S. 965, 3 L.Ed.2d 834.

Where claimant in workmen's compensation case was represented by law firm a partner of which had relationship to the trial judge by fact that such judge was a first cousin to the wife of said partner, compensation judgment awarding attorneys' fee was null and void. Texas Emp. Ins. Ass'n v. Scroggins (Civ.App.1959) 326 S.W.2d 606.

Where judge was related by affinity to defendant's wife and defendant was related by affinity to judge's wife, the judge's wife being the defendant's wife's aunt, judge was not related by affinity to defendant and judgment of conviction which he rendered was not void by reason of provisions of Vernon's Ann.C.C.P.1925, art. 552 (repealed; see, now, Vernon's Ann.C.C.P. art. 30.01) disqualifying a judge related to defendant by consanguinity or affinity within the third degree. Johnson v. State (1960) 169 Cr.R. 146, 332 S.W.2d 321, followed in 332 S.W.2d 322.

Judge was not disqualified from appointing attorney for water control and improvement district in pending class suit, on ground that his relatives within third degree were parties to such suit, where such relatives were not named as parties and merely owned property within boundaries of and used water furnished by District. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App.1962) 354 S.W.2d 420, error refused.

Where county judge's wife was first cousin of condemnee, judge was disqualified to try the condemnation case and judgment rendered was void. Natural Gas Pipeline Co. of America v. White (Civ.App.1969) 439 S.W.2d 475.

Under provisions of this section and Vernon's Ann.Civ.St. art. 15, that no judge shall sit in any case when he shall have been counsel in the case, it is not necessary that formal relationship of attorney and client exist for disqualification; trial judge who performs acts normally engaged in by counsel such as being consulted or giving advice in a matter which is the subject of litigation may become disqualified. Conner v. Conner (Civ.App.1970) 457 S.W.2d 593, error dismissed.

12. —— Attorney related to judge

Judge was not disqualified by fact that he was brother of attorney for party. Runyon v. George (Civ.App.1961) 349 S.W.2d 107, error dismissed.

An attorney employed to handle workmen's compensation claimant's case by attorney retained by claimant was a "party" to the suit within this section providing that no judge shall sit in any case where either of the parties may be connected with him by consanguinity within third degree, and therefore judge who was a first cousin of attorney hired by attorney retained by client was disqualified to hear the cause. Indemnity Ins. Co. of North America v. McGee (1962) 163 T. 412, 356 S.W.2d 666.

Attorney appointed to represent defendants cited by publication in action in trespass to try title was not a "party" and fixing of attorney's fee by judge who was attorney's father did not render judgment void. Niles v. Dean (Civ.App.1963) 363 S.W.2d 317.

Attorney is not a "party" to suit so as to disqualify judge who is related to him, even though such attorney is to receive contingent fee based on amount of recovery. Id.

Judge by presiding over criminal trial in which his son-in-law was the prosecutor did not violate judicial canon providing that judge should not suffer his conduct to justify impression that any person can improperly influence him or unduly enjoy his favor. McKnight v. State (Cr.App.1968) 432 S.W.2d 69.

Trial judge, whose son-in-law was prosecutor in criminal case, did not, by refusing to disqualify himself, deny defendant fair trial or violate defendant's constitutional rights. Id.

Prosecuting district attorney whose father-in-law was presiding judge in case was not a "party" to the case within meaning of constitutional and statutory provisions disqualifying judge from sitting in any case where either of the parties may be connected with him by affinity or consanguinity and trial judge did not err in refusing to recuse himself. Id.

Trial judge did not err in permitting his son to participate actively in trial of case as one of several attorneys representing plaintiffs in products liability action, where it was shown that attorneys were representing plaintiffs on contingent fee contract but that trial judge would not be asked to ap-

prove contract or set such fee. F. M. C. Corp. v. Burns (Civ.App.1969) 444 S.W.2d 315.

Fact that county court judge, who, with other county officials, was named as defendant in federal declaratory action, was represented by attorney who also represented state in condemnation case did not disqualify county judge from sitting in condemnation case on theory that the legal services rendered free to judge in federal action constituted gift of monetary value, in absence of allegation that judge stood to gain or lose anything of monetary value in condemnation case because of any such alleged gift or had any direct, real and certain interest in subject matter of the condemnation suit. Narro Warehouse, Inc. v. Kelly (Civ.App.1975) 530 S.W.2d 146, ref. n.r.e.

Trial judge's son-in-law, who was attorney for husband in divorce proceeding, was not a "party" within meaning of this section and Vernon's Ann.Civ.St. art. 15 providing that no judge was to sit in any case wherein he might be interested or where either of the parties could be connected with him by affinity or consanguinity within the third degree. Martinez v. Martinez (Civ.App. 1980) 608 S.W.2d 719.

In divorce proceeding in which no attorney fees were awarded, trial judge, whose son-in-law was attorney for the husband, was not disqualified, though it was asserted that attorney fees could have been awarded. Id.

13. —— Corporate officer or stockholder related to judge

Facts that trial judge had disqualified himself in a previous suit involving corporation, that his brother was a member of the judiciary of county which was corporation's sublessee, and that he was acquainted with party seeking appointment of receiver for corporation and a witness for such party were not sufficient reasons to disqualify trial judge from hearing suit for appointment of receiver for corporation. Citizens Bldg., Inc. v. Azios (Civ.App.1979) 590 S.W.2d 569.

14. Counsel in case

Trial judge, who had represented husband as counsel in husband's action for divorce and who had become district judge, was disqualified from acting as trial judge in same case involving same issues. Turner v. Chandler (Civ.App.1957) 304 S.W.2d 687.

Judge who called case for trial, impanelled jury, and sat during their voir dire examination, making decisions as to excuses of members of panel and other rulings performed and discharged duties calling for exercise of judicial discretion, and his participation in case required reversal of conviction where he had been counsel for state in case in which defendant incurred one of prior convictions alleged for enhancement, notwithstanding fact that prior convictions were abandoned after call of case for trial but before commencement of voir dire examination of jury panel and fact that illness prevented such judge from continuing with trial to its conclusion. Pennington v. State (1960) 169 Cr.R. 183, 332 S.W.2d 569.

When a judge has, while prosecuting attorney, actively participated in any prior conviction alleged in indictment for enhancement, such fact renders him disqualified to sit in case. Id.

Judge, who, prior to appointment to bench, signed and filed pleadings on behalf of parties to suit, was attorney in case prior to his becoming judge and was disqualified from appointing attorney for one party in such suit. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App. 1962) 354 S.W.2d 420, error refused.

Fact that judge who presided at trial for felony offense of drunk driving which was used to enhance petitioner's punishment in burglary conviction, represented petitioner in various other criminal actions prior to trial of felony offense did not come within constitutional provision that no judge shall sit in any case wherein he shall have been counsel so as to make felony conviction for drunk driving void. Ex parte Stubblefield (Cr.App.1967) 412 S.W.2d 63.

Statutory and constitutional prohibition (Vernon's Ann.C.C.P. art. 30.01 and this section) against a judge sitting in any case where he has been counsel is mandatory. Hathorne v. State (Cr.App.1970) 459 S.W.2d 826, certiorari denied 91 S.Ct. 1398, 402 U.S. 914, 28 L.Ed.2d 657.

Mere fact that a trial judge has personally prosecuted or defended a defendant in past cases does not disqualify him from presiding over a trial where a new offense is charged. Id.

Provisions of this section and Vernon's Ann.C.C.P. art. 30.01, prohibiting a judge from sitting in any case where he has been of counsel for State or accused, are mandatory. Ex parte McDonald (Cr.App.1971) 469 S.W.2d 173.

Where alleged ancestor in title of party asserting ownership of certain land had consulted with trial judge, at time he was practicing attorney, and obtained from him written title opinion which dealt with identical fact in dispute, trial judge had been "counsel in the case" within meaning of provision of this section, governing disqualification of

judges, notwithstanding that trial judge was unaware that he had been prior counsel and that opinion may have been written by someone else in his attorney's office. Williams v. Kirven (Civ.App.1976) 532 S.W.2d 159, ref. n.r.e.

If trial judge gave advice as attorney to matter in dispute, even if no fee was charged for such advice, trial judge is disqualified to sit in such manner which has ripened into suit. Id.

Provision of this section and of Vernon's Ann.C.C.P. art. 30.01 against judge hearing case in which he has acted as counsel requires that he shall have actually participated in very case which is before him, and it is not necessary that an objection be made. Holifield v. State (Cr.App.1976) 538 S.W.2d 123.

Where it is not shown that trial judge actually investigated, advised or participated in criminal case in any way, it is not shown that he acted as "counsel" in the case as contemplated by constitutional and statutory provisions prohibiting trial judge from acting as counsel in criminal case. Lee v. State (Cr.App.1977) 555 S.W.2d 121.

15. Waiver of disqualification

Disqualification of trial judge cannot be waived or cured, even with consent of all of parties. Pahl v. Whitt (Civ.App.1957) 304 S.W.2d 250.

Disqualification of judge cannot be waived. Natural Gas Pipeline Co. of America v. White (Civ.App.1969) 439 S.W.2d 475.

Trial judge's disqualification to hear suit because judge's wife was related by blood to one of the parties thereto could not be waived, and a judgment rendered by judge so disqualified was void. Cain v. Franklin (Civ.App.1972) 476 S.W.2d 952, ref. n.r.e.

Alleged agreement to waive trial judge's disqualification under Vernon's Ann.Civ.St. art. 15 and this section, because judge's wife was related by blood to one of the parties to be sued was invalid. Id.

Where no objection is made to right of judge from another district to sit in case, all objections to his authority to sit are waived and it is presumed that judge was in regular discharge of his duties pursuant to statute authorizing exchange of benches. Floyd v. State (Cr.App.1972) 488 S.W.2d 830.

Where judge disqualified himself under Vernon's Ann.Civ.St. art. 15, such disqualification, and want of the power of the court to act thereafter, could not be waived by the parties. Chilicote Land Co. v. Houston Citizens Bank & Trust Co. (Civ.App.1975) 525 S.W.2d 941.

Disqualification of a judge, arising from a constitutional or statutory provision, to preside over trial of a case affects jurisdiction and cannot be waived, and judgment rendered is a nullity and void and subject even to collateral attack. Lee v. State (Cr.App. 1977) 555 S.W.2d 121.

16. Objections

Complaint that trial judge was without right to sit for another district judge was not fundamental error and could not be urged for the first time on appeal. Foster v. Laredo Newspapers, Inc. (Civ.App.1975) 530 S.W.2d 611, reversed on other grounds 541 S.W.2d 809, certiorari denied 97 S.Ct. 1160, 429 U.S. 1123, 51 L.Ed.2d 573.

Where no objection is made in trial court to right of judge from another district to sit in case, and no question as to his qualification is made, all objections and exceptions to his power and authority to try case are considered waived. Id.

17. Determination of disqualification

Trial judge is proper one to pass on question of his disqualification, but Constitution does not allow him very much discretion in the matter. Pahl v. Whitt (Civ.App.1957) 304 S.W.2d 250.

18. Acts of disqualified judge

Where trial judge had represented husband as counsel in husband's action for divorce prior to time trial judge had been appointed district judge, trial judge's order granting husband custody of child and subsequent order vacating his prior order were nullities. Turner v. Chandler (Civ.App. 1957) 304 S.W.2d 687.

Official acts of district judge, while he is in possession of office under color of title and discharging ordinary functions, are conclusive as to all interested persons even though person acting as judge lacks necessary qualifications and is incapable of holding office. Ex parte Lefors (1961) 171 Cr.R. 229, 347 S.W.2d 254.

Where, even though original order appointing attorney to represent party in pending class suit was void as being entered by disqualified judge, subsequently assigned qualified judge entered order confirming original appointment and re-appointing such attorney, attorney was validly appointed as of date of such subsequent order. Hidalgo County Water Control and Imp. Dist. No. 1 v. Boysen (Civ.App.1962) 354 S.W.2d 420, error refused.

Any action taken by judge who is disqualified by Constitution or statute is null and void. Glaser v. Buckholts Independent

School Dist. (App.1981) 625 S.W.2d 419, reversed on other grounds 632 S.W.2d 146.

Any order involving judicial discretion by a constitutionally disqualified judge is a nullity and, accordingly, disregard of the constitutional disqualification is error that can be raised at any point in the proceeding. Buckholts Independent School Dist. v. Glaser (Sup.1982) 632 S.W.2d 146.

19. —— Permissible acts

In divorce action in which trial judge approved party's property settlement agreement, whereby husband retained ranch, where it was not shown that trial judge had ever represented husband or advised either of parties with respect to conveyance of surface rights to ranch land to husband from his parents, trial judge was not disqualified even though he had acted as notary public in acknowledging execution of surface deed and deed of trust and filled out a check signed by husband in part payment of the purchase price of the land. Conner v. Conner (Civ.App.1970) 457 S.W.2d 593, error dismissed.

Where it was not shown that judge who had served as first assistant to criminal district attorney had actually investigated, advised or participated in case in any way, judge was not disqualified from sitting. Rodriguez v. State (Cr.App.1972) 489 S.W.2d 121.

Expression or holding by judge of opinion on the effectiveness of the death penalty as a deterrent is not grounds for disqualification. Chastain v. State (App. 14 Dist.1983) 667 S.W.2d 791, review refused.

Recusal of judge in capital murder trial was not required on grounds that judge had made comments on television talk show to the effect that in order for death penalty to be an effective deterrent, it should be invoked more often. Chastain v. State (App. 14 Dist.1983) 667 S.W.2d 791, review refused.

20. Special judge

Special judge in probate proceeding appointed by Governor when regular county judge disqualified himself from hearing will contest was not a "county officer" within provision of Art. 16, § 14, relating to residence of county officers, and it was not necessary that the special judge, a resident of state, be a resident of county where suit was pending during his service as special judge. Edwards v. State ex rel. Lytton (Civ.App.1966) 406 S.W.2d 537, error refused.

21. —— Agreement on special judge

There was nothing in record to indicate that visiting judge, who was assigned to bench for a period of one week, and second judge, or any other judge, agreed to change benches pursuant to this section. Roberts v. Ernst (App. 1 Dist.1984) 668 S.W.2d 843.

22. Exchange of districts

It is not necessary that either docket sheet or minutes show reason for exchange of benches by district judges. Pendleton v. State (Cr.App.1968) 434 S.W.2d 694.

Formal order need not be entered for judge of one district court to preside over case in place of duly elected judge. Id.

Where indictment alleged that defendant had been previously convicted in Criminal District Court = 3 and certified copies of judgment and sentence reflected that conviction did occur in that court, there was no fatal variance notwithstanding showing that judge who heard plea was duly acting and qualified judge of Criminal District Court = 4. Id.

Expression "whenever they deem it expedient" in this section and Vernon's Ann. Civ.St. art. 1916 for exchange of district judges confers on district judges broad discretionary powers to exchange benches, or hold court for each other, which is reviewable only for abuse. Floyd v. State (Cr.App. 1972) 488 S.W.2d 830.

Though better practice would require formal order or entry on record of reasons for exchange of judges, exchange may be accomplished without such order of entry. Id.

District judges may exchange benches and hold court for each other and such exchange may be effected upon the judges' own initiative; the making and entry of a formal order is not required nor does the reason for the exchange need to be shown in the minutes. Ex parte Lowery (Civ.App. 1975) 518 S.W.2d 897.

Where judge of the 88th district court had sat for judge of the 159th district court in divorce action filed in the 159th district, only the 159th district court had continuing jurisdiction over the minor child involved in the divorce proceedings and in the ensuing contempt proceedings. Id.

In suit involving marriage and conservatorship of a minor child, it was immaterial as to whether judge tried the case as judge of the 58th district court or as "Presiding Judge" of the 317th district court as trial judge could act in either capacity. Gaspard v. Gaspard (Civ.App.1979) 582 S.W.2d 629.

Judge of 137th District Court of Lubbock County had authority to approve request, under Interstate Agreement on Detainers Act (Vernon's Ann.C.C.P. art. 51.14), for temporary custody over defendant on basis of indictment pending against defendant in 140th District Court of Lubbock County, in light of fact that judges of the district courts of such county had entered an order authorizing each of them to sit for each other in disposition of criminal cases and matters. Bokemeyer v. State (Cr.App.1981) 624 S.W.2d 909.

It was not necessary that formal order be entered for judge of one district court to preside over case in place of duly elected judge, nor was it necessary for docket sheet or minutes to show reason for exchange of benches by district judges. Davila v. State (Cr.App.1983) 651 S.W.2d 797.

District judges may change benches and hold court for each other as authorized by this section; such exchange may be effected by the judge's own initiative under existing case law, as well as under the local rules pertaining to transfer of cases within Dallas County. Akin v. Tipps (App. 5 Dist. 1984) 668 S.W.2d 432.

Under provision of State Constitution allowing district judges to exchange districts, or to hold courts for each other when they deem it expedient, it is not necessary that either the docket or minutes give a reason for the exchange of benches by the district judges, and a formal order need not be entered. Mata v. State (Cr.App.1984) 669 S.W.2d 119.

23. Holding court for another judge

Fact that one judge presided during examination of jury panel and that another judge presided without consent of defendant, during hearing of evidence and receipt of jury's verdict, did not constitute error. Bellah v. State (Cr.App.1967) 415 S.W.2d 418.

Any judge of District Court of Travis County may hear and determine any part of any case or proceeding pending in any of the district courts of county or may hear and determine any question in any case, and any judge may complete hearing and render judgment in case. Collins v. Miller (Civ. App.1969) 443 S.W.2d 298, ref. n.r.e.

Where all proceedings were had in the particular district court in which cause was pending without transfer of cause to another court, upon later determination that request for jury had not been timely filed it was immaterial that judge who entered order denying jury trial was other than judge signing order first placing cause on jury docket, because order denying jury was signed by judge who was presiding in court in which case was pending. Id.

24. Supreme Court Justices

It was not a due process violation for Justices of Supreme Court, who ordered submission of a referendum on fee assessment against state bar members at request of state bar directors, to determine legality of such assessment. Cameron v. Greenhill (Sup.1979) 582 S.W.2d 775.

25. Court of Criminal Appeals, judges of

Supreme Court members were not disqualified from considering attorney's challenge to court's authority to order a one-time fee assessment against members of State Bar for purpose of reducing any indebtedness on Texas Law Center. Cameron v. Greenhill (Sup.1979) 582 S.W.2d 775.

26. Court of Civil Appeals, judges of

Chief Justice of Court of Civil Appeals who, although he sat at submission of case, did not for personal reasons participate in opinion, was not disqualified from participating in second opinion, substituted for first after the disqualification of an Associate Justice from participating on appeal came to attention of court. Goslin v. Beazley (Civ.App.1960) 339 S.W.2d 689, ref. n.r.e., appeal dismissed, certiorari denied 82 S.Ct. 16, 368 U.S. 7, 7 L.Ed.2d 16.

Two judges of Court of Civil Appeals, could render decision where third judge chose not to participate because he had been trial judge. Hoyt v. Hoyt (Civ.App. 1961) 351 S.W.2d 111, error dismissed.

Whether Justice of Court of Civil Appeals sitting in case involving insolvent insurer should have recused himself because of his background of service with the attorney general during days of insurance company failures was matter solely for his determination. Langdeau v. Dick (Civ.App.1962) 356 S.W.2d 945, ref. n.r.e.

30. Bias and prejudice

Intervenor's affidavit that he believed judge was biased and prejudiced against him because such judge in another case had found intervenor in contempt of court and had refused most or all of his attorney's objections alleged no constitutional or statutory ground for disqualification. Quarles v. Smith (Civ.App.1964) 379 S.W.2d 91, ref. n.r.e.

Prejudice of trial court toward party, if there was any, would not alone constitute error. Quarles v. Smith (Civ.App.1964) 379 S.W.2d 91.

Alleged bias or prejudice of judge does not disqualify judge. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Bias is not legal ground for disqualification of judge. Hoover v. Barker (Civ.App. 1974) 507 S.W.2d 299, ref. n.r.e.

Unethical conduct of trial judge, who after proceeding had started to terminate mother's and father's parental rights as to minor child gave public vent to bias and prejudice which he had acquired from hearing evidence and seeing exhibits introduced into evidence was not legal ground for reversal of judgment terminating parental rights. Shapley v. Texas Dept. of Human Resources (Civ.App.1979) 581 S.W.2d 250.

Fact that judge had told defendant, who elected before trial to have punishment assessed by the judge if the jury should convict, that the judge could not consider probation if the facts proven were as alleged did not show bias requiring recusal. McClenan v. State (Cr.App.1983) 661 S.W.2d 108.

Bias may, in some cases, be a legal disqualification if it is shown to be of such a nature and such extent as to deny defendant due process of law; overruling *Vera v. State*, 547 S.W.2d 283; *Bright v. State*, 556 S.W.2d 317. McClenan v. State (Cr.App. 1983) 661 S.W.2d 108.

31. Presumptions and burden of proof

Judge is presumed to be qualified until contrary is shown. Quarles v. Smith (Civ. App.1964) 379 S.W.2d 91, ref. n.r.e.

Presumption of integrity accompanying act performed by judge under sanction of official oath cannot be overcome by inference, conjecture or speculation; challenge of disqualification must be by allegations of fact of positive and unequivocal character. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

31.5. Mandamus

Action seeking removal of trustee and a temporary restraining order was properly transferred to the 193rd District Court from the 95th District even though retired district judge who was to preside in the 193rd district was without authority to act in action, and thus, mandamus did not lie to compel 95th district judge, who originally ordered action transferred, to proceed further in such action. Akin v. Tipps (App. 5 Dist.1984) 668 S.W.2d 432.

32. District attorney

Trial judge who had been assistant district attorney at time of offense but had no recollection of working on assault with intent to murder case and who was assigned to work only on capital cases and to act as legal advisor to Commissioners Court when case was filed was not disqualified. Muro v. State (Cr.App.1965) 387 S.W.2d 674.

Conviction of prisoner was void where trial was presided over by judge who had served as district attorney in prior prosecution resulting in conviction of prisoner for burglary alleged for enhancement notwithstanding that portion of indictment alleging prior conviction was dismissed prior to trial. Ex parte Hopkins (Cr.App.1966) 399 S.W.2d 551.

Inclusion in indictment of allegations concerning prior convictions did not disqualify trial judge who was district attorney on date of prior convictions alleged for enhancement of punishment. Hathorne v. State (Cr.App.1970) 459 S.W.2d 826, certiorari denied 91 S.Ct. 1398, 402 U.S. 914, 28 L.Ed.2d 657.

33. Hearing

Where facts alleged to disqualify judge are unchallenged or admitted, question of disqualification is one of fact and no hearing is required. Maxey v. Citizens Nat. Bank of Lubbock (Civ.App.1972) 489 S.W.2d 697, reversed on other grounds 507 S.W.2d 722.

Mere assertion that upon hearing disqualifying interest of judge might be made to appear did not require hearing. Id.

34. Retired judges

"District judges," as used in this section, includes retired district judges who have timely agreed to accept assignments to hear cases. Permian Corp. v. Pickett (Civ.App. 1981) 620 S.W.2d 878, ref. n.r.e.

35. Review

Since issue of disqualification of trial judge involves jurisdiction of the court to act, it would be considered on appeal by the Court of Appeals in the interest of justice, even though no motion questioning trial judge's qualifications was brought to his attention. Gamez v. State (App.1982) 644 S.W.2d 879, review refused, appeal after remand 665 S.W.2d 124.

3a

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

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To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

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11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

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Recommendation: Adopt as a statewide Rule the following:

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Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 3a. Rules by Other Courts

(a) Each Court of Appeals, each administrative judicial district, each district court, and each county court may, from time to time, make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made shall before their promulgation be furnished to the Supreme Court of Texas for approval.

(b) If a judge of a single judicial district desires to adopt a local rule of procedure governing his judicial district, he shall request approval of such rule by filing with the Presiding Judge of the Administrative Judicial District the rule and the reason for its adoption. In a county or counties having two judicial districts, both judges must approve the proposed rule before submitting it to the Presiding Judge. In counties of three or more judicial districts, a majority of judges must approve the proposed rule before it is sent to the Presiding Judge of the Administrative Judicial District in accordance with Section 3(b), Article 200b, V.T.C.S. All requests for approval of new rules of procedure or amendments thereto shall be filed with the Presiding Judge of the Administrative Judicial District on or before December 31st of each year. The Presiding Judge shall provide written support or opposition to the proposed rule, which shall accompany the proposed rule and which shall be filed by the Presiding Judge with the Supreme Court not later than January 31st of the succeeding year. The Supreme Court shall have final authority to approve or disapprove the adoption of all local rules of procedure as provided by Section (a) of this Rule and Section 3(b), Article 200b, V.T.C.S.

CA:RULE1(69th)

Wait for action Grade

8

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

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Enclosures

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36th, 156th

Rule 8. Attorney in Charge [~~Leading Counsel Defined~~]

~~Each party shall~~ On the occasion of its first appearance through counsel, ~~designate in writing~~ the "attorney in charge" for such party. Thereafter, until such designation is changed by written notice to the court and written notice to all other parties in accordance with Rules 21a and 21b, said attorney in charge shall be responsible for the suit as to such party and ~~all~~ attorneys ~~subsequently employed to represent such party~~ shall ~~at all hearings, conferences, and trials,~~

All communications from the court or other counsel with respect to a suit ~~will~~ be sent to the attorney in charge. ~~[The attorney first employed shall be considered leading counsel in the case, and, if present, shall have control in the management of the case unless a change is made by the party himself to be entered of record.]~~

CA:RULE2(69th)

R. 8 Adopted Unanimously as changed

If the attorney in charge is not so designated, the attorney signing for such ~~leading~~ counsel first appearing in the case shall be the a-i-c.

10

THE SUPREME COURT OF TEXAS

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36th, 156th

Rule 10. Withdrawal of Counsel [~~Attorney of Record Defined~~]

Withdrawal of an attorney in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the Presiding Judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address, telephone number, and State Bar Number of the substitute attorney, with the signature of the attorney to be substituted, the approval of the client, the client's current address and telephone number, and an averment that such substitution will not delay any setting currently in effect. [~~An attorney of record is one who has appeared in the case, as evidenced by his name subscribed to the pleadings or to some agreement of the parties filed in the case; and he shall be considered to have continued as such attorney to the end of the suit in the trial court, unless there is something appearing to the contrary in the record.~~

CA:RULE3(69tn)

Rejected in favor of p. 105

10a

THE SUPREME COURT OF TEXAS

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Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 10a (new). Attorney Vacations

Each attorney practicing in the district and county courts who desires to assure himself of a vacation period not to exceed four weeks in June, July, and August, may do so automatically by designating the four weeks, in writing, addressed and mailed or delivered to the District or County Clerk, or any officer designated as the Docket Clerk in his own county, with a copy thereof to the District Clerk or Docket Clerk of any other county in which he has cases pending trial, before the 15th of May of each year. The vacation period so designated shall be honored by all judges so notified.

This provision shall not apply to vacations for attorneys engaged in a criminal case. Nothing herein provided shall prevent the various judges from recognizing vacations of attorneys as a discretionary matter.

CA:RULE4(69tn)

Approved

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THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

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Districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 10b (new). Conflict in Trial Settings

1. Attorney Already in Trial Assigned to Trial in Another Court: When the docket clerk or judge is informed that an attorney is already in trial, he clerk will determine the designation of the court, the county where it is located, and the time the attorney went to trial. If the judge or opposing attorney desires the information to be verified, the court will ascertain if the attorney is actually in trial and the probable time of release. The case may then be put on "hold", or another date may be set for trial.

If the attorney is not actually in trial, the case will be assigned to trial as scheduled, and the court shall inform all parties.

If the attorney's office cannot provide the clerk with an attorney's location, the case will nevertheless be scheduled for trial as planned, and his office so advised, with the warning that the case will be tried without further notice.

10b Rejected Unan.

2. Attorney Assigned to Two Courts Simultaneously: Whenever an attorney has two or more cases on trial dockets and is set for trial at the same time, it shall be the duty of the attorney to bring the matter to the attention of the judges concerned immediately upon learning of the conflicting settings.

3. General Priority of Cases Set for Trial -- Determination: Insofar as practicable, judges should attempt to agree on which case has priority, herwise, the following priorities shall be observed by the judges of respective courts:

(1) criminal cases have priority over civil cases and jail cases over bond cases;

(2) preferentially set cases have priority over those not given preference by statute or otherwise;

(3) the oldest case, on the basis of filing date, has priority;

(4) courts in metropolitan counties should yield to courts in rural counties in all other instances of conflicting trial settings.

4. Comity Between Federal and State Courts: The judges of local State Courts should enter into agreements with the Chief Judge of Federal Judicial Districts having jurisdiction in the same counties to establish the priorities for trial in the event of setting conflicts between the Federal and State Courts.

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BRIAN R. DAVIS
OF COUNSEL
AUSTIN, TEXAS

September 12, 1985

Mr. Guy Hopkins
Attorney at Law
103 West Phillips
Conroe, Texas 77301

Dear Mr. Hopkins:

I apologize for the tardiness of my reply to your letter of July 31. I was on vacation for a couple of weeks after your letter came in but beyond that, my excuses become rather flimsy. On the other hand, I at least have the benefit of comments by Charlie Griggs and Bill Bogle before attempting to expound further on these rule changes. My supplemental comments and redrafts are set out below.

RULE 3a

Rules by Other Courts

First, I prefer, simply as a matter of form, the redraft of the rule prepared by Bill Bogle. It sets out Rule 3a with Arabic rather than numeric subdivisions. More importantly, it accomplishes the purpose of the rule (to establish rule-making authority of the courts) and then follows with a list of provisos.

It seems to me that the original draft we were provided gets bogged down in too much detail by providing when such rules or amendments will be filed and when the Supreme Court will approve them. What difference does it make when the Supreme Court finally approves such rules?

I also share Charles Griggs' concern about the availability of these local rules and I am not certain that Bill Bogle's draft

adequately covers this point so I have proposed an additional proviso (4) which will cover this point.

Bill Bogle has deleted the original rule's requirement for uniformity within a county stating that he thinks judges ought to be able to make their rules. While we have some judges that follow this practice, we still have a set of uniform rules for our county and I tend to think that uniformity should be required. This is not to say that some particular judge may indeed require a charge prior to trial or have other requirements to obtain a trial setting which could be imposed in addition to whatever rules were adopted by the county. These presumably would be on nondispositive matters such as trial settings, pre-trial conferences, etc.

Finally, do we intend to include probate courts in this rule? I have no comment on the wisdom of that suggestion. With these thoughts in mind, my redraft of Rule 3a is included herewith.

RULE 8. Attorney In Charge.

I have looked at the current rule, as well as the proposed amendment, but I am at a loss as to what this rule is attempting to accomplish. The rule as it reads now (that the attorney first employed shall have control of the cause) implies that the rule is necessary to prevent the various lawyers for a party from fighting amongst themselves as to who will have control and management of the case. I doubt this was the purpose but, if so, I fail to see why the court should concern itself in such a squabble.

As redrafted by the judges' committee, the rule seems designed for the purpose of advising the court and other parties of the particular lawyer for a party with whom they may officially communicate with respect to that party. I do not know if there had been problems with judges claiming that they notified lawyer A of a situation and the party later claims notification should have been to lawyer B, or what. I presume this to be the problem we are attempting to address.

I agree with the comments of both Mr. Bogle and Mr. Griggs concerning whether this rule is needed at all. Perhaps this is because I do not understand the problem which is being addressed by the rule. Assuming the problem is that the court and other attorneys need to know with whom they can communicate, I have again redrafted Mr. Bogle's suggested rule. In his first sentence, I provided that when there is more than one attorney of record, that

party "shall" designate an attorney in charge. Otherwise (and assuming the rule is needed), a party could avoid application of the rule simply by failing to designate an attorney in charge. The other changes I have made in the second sentence are, in the context of the "problem" as I see it, to hold the attorney in charge with "responsibility" rather than to give him "control". My suggested redraft is attached.

RULE 10. Withdrawal of Counsel

The current Rule 10 merely states that once a lawyer is attorney of record, he remains an attorney in the case until the record reflects something to the contrary. The redraft of Rule 10 seems to concern itself with requirements for withdrawal from a case. Charles Griggs is certainly correct that the rule should concern itself with all lawyers rather than just the "attorney in charge". After making this change, I believe I prefer the original redraft because it provides two grounds for withdrawal: (a) upon a showing of good cause; and, (b) upon presentation of a notice of substitution of counsel along with an averment that the substitution will not delay a trial setting.

I believe this gives the lawyers more flexibility since under Mr. Bogle's draft good cause would be required in all instances. With agreement of a withdrawing lawyer, a substitute lawyer and the client together with an averment that the substitution will not delay a current setting, I fail to see why the party or his lawyer ought to have to show good cause to the court. If we prepared all such motions with candor, there are some causes which are good and with which all affected parties agree but which the lawyer and client might prefer not to spread upon the minutes of the court for the world to see. My proposed redraft is attached.

As a matter of expediency, I see no reason the client needs to sign a motion for substitution of counsel as long as the lawyers are willing to aver that the client is in agreement and this requirement has been deleted from the judge's committee's proposed rule.

RULE 10a. Attorney Vacations.

I agree totally with the comments of Mr. Griggs and Mr. Bogle on this rule. I concur with Bill Bogle's suggested draft

with one comment. Should designation of the vacation be effective as to a case which is already set for trial at the time the designation is made? This might be particularly a problem in view of the suggested ninety (90) day designation period. Conceivably, lawyers could use this to avoid trial settings since it is not unusual to have cases set more than ninety days in advance. I suppose it might be subject to some abuse.

RULE 10b. Conflict in Trial Settings.

I agree totally with comments made by my fellow subcommittee members concerning this new rule. I do not believe that the rule gives a judge any power which he does not already have over lawyers practicing in a particular court. I believe that judges generally know the lawyers who practice before them and they know who they may occasionally need to check up on and who they don't.

I started to say that the rule might not be so bad if subdivision 1 was deleted. However, the next subdivision requires that whenever a lawyer has two or more cases set the same time, he shall bring the matter to the attention of the judges "immediately" upon learning of the conflicting settings. Just what does this mean? The busy trial lawyer may be set in any number of courts on a given Monday morning. He usually juggles all the balls, settles a couple of cases, continues one and goes to trial in one. Generally speaking, it all seems to work out. I cannot imagine having to write letters to two judges and no telling how many opposing counsel every time a new docket setting arrives with some "conflicting" settings in order to comply with my duty to notify the judges "immediately".

With respect to the third subdivision concerning the priority of cases, I have little reason to believe that this is not the priority which is presently given cases and, whether it is or not, there would certainly need to be some proviso providing for some other order depending on the circumstances. The present draft of the rule simply requires the stated priority "insofar as practicable". I doubt this is as strong an admonition to the judges as they already feel to give priority to criminal, preferentially set, and old cases.

I will look forward to seeing you at the meeting on the 14th.

Very truly yours,

James L. Weber

JLW:ch

Enclosures

cc: Mr. Charles R. Griggs
Mr. William Bogle

Rule 3a. Rules by the Courts

Each court of appeals, administrative judicial district, district court, county court, county court at law, and probate court (?), may make and amend the rules governing practice before such courts, provided:

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial district in which the court is located; and,

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

(3) any proposed 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) all rules adopted and approved in accordance herewith are made available upon request to members of the bar.

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Unanimously Adopted

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Rule 8. Attorney in Charge.

Any party having more than one attorney of record in a case shall designate in writing to the court and to all other parties to the suit the attorney in charge. The attorney in charge shall have responsibility for the suit and communication with such party by the court and other counsel shall be primarily, but not exclusively, through such party's attorney in charge. A party's designation of an attorney in charge may be changed by written notice to the court and all other parties in accordance with Rules 21a and 21b.

Rule 10. Withdrawal of Counsel.

Withdrawal of an attorney ~~in charge~~ may be effected (a) upon motion showing good cause and under such condition imposed by the ~~Presiding Judge~~ court; or (b) upon presentation by such attorney ~~in charge~~ of a notice of substitution designating the name, address, telephone number, and State Bar 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 ~~such will not delay any setting currently in effect~~.

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

September 15, 1983

Supreme Court Justice James P. Wallace
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

I am writing to you again regarding the consideration of adopting several State Rules to delineate the following areas:

(1) Clarification of Lead Counsel and Attorney of Record

There appears to be some inconsistancy with respect to which attorney is attorney of record and lead counsel, and which are recorded only as attorneys of record. According to State Rules 8 and 10, lead counsel is the first attorney employed (does this mean just employed, or the attorney whose signature appears on the first instrument filed by a party to a suit?), and remains such until he designates another attorney in his stead. Does State Rule 65, substitution of amended instrument for the original, act to substitute the lead counsel automatically? Or simply to remove the superceded instrument? If lead counsel remains such until a separate designation is made, of record, by the counsel substituting "out", then is it necessary to provide notice under State Rule 165a of dismissal for want of prosecution to all attorneys of record, or only to lead counsel? If the intent of the rule is to insure notification be made to the party, then notification to lead counsel should suffice; if, however, the notice is intended to protect every attorney connected to the suit (multiple attorneys representing one party, potentially), then the Rule would be left as written.

Below is Rule 1.G. (1) and (4), of the Local Rules Of The United States District Court for the Southern District of Texas, amended May, 1983, effective July 1, 1983, which appears to adequately answer these questions:

1.G. Attorney in Charge.

(1) Designation and Responsibility. Unless otherwise ordered, in all actions filed in or removed to the Court, each party shall, on the occasion of his first appearance through counsel, designate as "attorney in charge" for such party an attorney who is a member of the Bar of this Court or is appearing under the terms of paragraph E of this rule. Thereafter, until such designation is changed by notice pursuant to Local Rule 1.G.(4), said attorney in charge shall be responsible for the action as to such party and shall attend or send a fully authorized representative to all hearings, conferences and the trial.

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1.G.(4) Withdrawal of Counsel. Withdrawal of counsel in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the presiding judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Regarding the problem of appropriate attorney notification, the same Rule, 1.G.(5), regarding Notices, specifies:

All communications from the Court with respect to an action will be sent to the attorney in charge who shall be reponsible for notifying his associate or co-counsel of all matters affecting the action.

(2) Attorney responsibility for the preparation and submission of a Bill of Costs:

Originally legislation was proposed to place the responsibility on each party to maintain a record and cause to have included in the judgment their recoverable costs. This legislation was not adopted. We recommend consideration of a State Rule which would require that each attorney be responsible for the inclusion of the recoverable cost in the Judgment submitted to the court. This might be attached to either State Rule 127 or State Rule 131, or be a separate rule, such as:

Rule: Parties Responsible for Accounting of Own Costs.

Each party to a suit shall be responsible for the accurate recordation of all costs incurred by him during the course of a law suit, and such shall be presented to the court at the time the Judgment is submitted.

(3) Removal of the Filing of All Depositions and Exhibits:

It is recommended that in an effort to save the counties from increasing space requirements to provide library facilities for case files, that a limit be set on the depositions, interrogatories, answers to interrogatories, requests for production or inspection and other discovery material so that only those instruments to be used in the course of the trial are filed. Again, the United States District Court for the Southern District of Texas has adopted this rule:

Rule 10., Filing Requirements.

F. Documents Not to be Filed. Pursuant to Rule 5(d), Fed. R. Civ. P., depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests and other discovery material shall not be filed with the Clerk. When any such document is needed in connection with a

pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. (Added May, 1983).

and

Rule 12. Disposition of Exhibits.

A. Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams, and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial unless otherwise ordered by the Judge.

B. Exhibits offered or admitted into evidence will be removed by the offering party within 30 days after final disposition of the cause by the Court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within 10 days after telephonic notice by the Clerk. Exhibits not so removed will be disposed of by the Clerk in any convenient manner and any expenses incurred taxed against the offering party without notice.

C. Exhibits which are determined by the Judge to be of a sensitive nature so as to make it improper for them to be withdrawn shall be retained in the custody of the Clerk pending disposition on order of the Judge.

Yours very truly,

Ray Hardy, District Clerk
Harris County, Texas

RH/ba

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pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. (Added May, 1983).

and

Rule 12. Disposition of Exhibits.

A. Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams, and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial unless otherwise ordered by the Judge.

B. Exhibits offered or admitted into evidence will be removed by the offering party within 30 days after final disposition of the cause by the Court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within 10 days after telephonic notice by the Clerk. Exhibits not so removed will be disposed of by the Clerk in any convenient manner and any expenses incurred taxed against the offering party without notice.

C. Exhibits which are determined by the Judge to be of a sensitive nature so as to make it improper for them to be withdrawn shall be retained in the custody of the Clerk pending disposition on order of the Judge.

Yours very truly,

Ray Hardy, District Clerk
Harris County, Texas

RH/ba

00000108

Craig Lewis and Frank Jones
(re: proposals from Dist. Clerk, Ray Hardy)

Proposed Rule: Parties Responsible for Accounting of Own Costs

Each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, and such record shall be presented to the Court at the time the Judgment is submitted to the Court for entry, if the Judgment is to provide for the taxing of such costs. If the Judgment provides that costs are to be borne by the party by whom such costs were incurred, it shall not be necessary for any of the parties to present a record of court costs to the Court in connection with the entry of a Judgment.

A judge of any court may include in any order or judgment all taxable costs including the following:

(1) Fees of the clerk and service fees due the county;

(2) Fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;

(3) Compensation for experts, masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes;

(4) Such other costs and fees as may be permitted by these rules and state statutes.

Proposed Rule: Documents Not To Be Filed

Depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests, and other pre-trial discovery materials propounded and answered in accordance with these rules shall not be filed with the Clerk. When any such documents are needed in connection with a pre-trial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of such material needed at a trial or hearing shall be introduced in Open Court as provided by these rules and the Rules of Evidence.

Proposed Rule 8: Attorney in Charge

Each party shall, on the occasion of its first appearance through counsel, designate in writing the "attorney in charge" for such party. Thereafter, until such designation is changed by written notice to the Court and written notice to all other parties in accordance with Rules 21a and 21b, said attorney in charge shall be responsible for the suit as to such party and shall attend or send a fully authorized representative to all hearings, conferences, and the trial.

All communications from the court or other counsel with respect to a suit will be sent to the attorney in charge.

Proposed Rule 10: Withdrawal of Counsel

Withdrawal of counsel in charge may be Effected (a) upon motion showing good cause and under such conditions imposed by the Presiding Judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, with the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Proposed Rule 14(b): Return or Other Disposition of Exhibits

(1) Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial, unless otherwise ordered by the Judge.

(2) Exhibits offered or admitted into evidence will be removed by the offering party within thirty (3) days after final disposition of the cause by the court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within ten (10) days after telephonic notice by the clerk. Exhibits not so removed will be disposed of by the clerk in any convenient manner and any expense incurred taxed against the offering party without notice.

(3) Exhibits which are determined by the Judge to be of a sensitive nature, so as to make it improper for them to be withdrawn, shall be retained in the custody of the clerk pending disposition on order of the Judge.

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April 17, 1985

Luther H. Soules, III
800 Milam Bldg.
San Antonio, Texas 78205

Re: Attorney of Record

Dear Luke:

In 1972, you advised me to never sign a pleading in court with the name of the firm, and to only sign the pleading in my name as an individual attorney. You advised me that if the firm name was subscribed to a pleading, then the Court could call any lawyer in the firm to come try the case in the event the trial attorney to whom the case was assigned had a conflict in another court.

On January 24, 1985, the Ft. Worth Court of Appeals issued its decision in A. Copeland Enterprises, Inc. v. Tindall, 683 S.W.2d 596. The Court, at page 599, makes the following statement:

> Logic dictates that an attorney who enters an appearance in a lawsuit does so on behalf of his firm as well as himself. When Appellants retained counsel it is reasonable to assume they retained the firm as a whole to represent their interest and not one particular attorney.

I first saw the case reported in Texas Lawyers Civil Digest, Volume 22, No. 8, at pages 4-5, which was published February 25, 1985.

In the above-cited case, it is not clear from the opinion how the appellants subscribed the Plaintiff's Original Petition. The court states that there were only two pleadings which were signed by appellant's counsel: a Motion to Reinstate and a Request to Enter Findings of Fact. In the Motion to Reinstate, the attorney of record was the law firm name and beneath it the signature of the attorney. The Request to Enter Findings of Fact had the attorney's name first and contained the name of the firm below the attorney's signature.

Recently, I experienced an incident where I was already set for trial in Dallas, and then Courts in Victoria and Brownsville set me for trial and hearings on the same date. The Victoria and Brownsville trial notice settings were subsequent to the Dallas trial notice setting, which was prior in time. In both instances, the Deputy Clerks of the Court made reference to the above-cited case and what they had read in Texas Lawyers Civil Digest, Volume 22, No. 8, at page 4.

The Copeland case has to do with the dismissal of a case for want of prosecution under Rules 165a and 306a, and the notice to the attorney of record pursuant to those rules. However, I have already seen and suspect that we will see more courts applying the case for purposes of resolving conflicts in court settings by taking the above-quoted language from the case to direct that someone from the law firm must appear in spite of a conflict in settings for the trial attorney.

The above-cited case is bad enough regarding the way the court interprets "attorney of record" for the purposes of Rule 165a and 306a. I would request that the Rules Advisory Committee, of which you are Chairman, amend the Rules to override the decision in this case regarding notice and dismissal for want of prosecution under Rules 165a and 306a.

I had a similar experience in Frio County. Stanley L. Blend signed and filed a petition in Frio County. A notice of docket call was sent to the law firm of Oppenheimer, Rosenberg. It was not addressed to Stanley L. Blend. The notice of docket call did not contain the law firm name or the name "Stanley L. Blend." The notice did not get to Stanley L. Blend because it was not addressed to him and his name was not contained on the docket notice, nor was the firm name contained on the docket notice. Needless to say, no one showed up at the docket call, and the case was dismissed for want of prosecution.

On a Bill of Review, the evidence was developed that the notices had been sent only in care of the firm name Oppenheimer, Rosenberg, which name did not appear in any of the pleadings. The only name that appeared in the pleadings was that of Stanley L. Blend.

Then the Court started listing the name of the subscribing attorney on subsequent docket call notices, but still only addressed the envelope containing the docket call notice to

the firm name and not to the attorney whose name was subscribed to the pleadings. Consequently, when you receive the docket call notice, you must look through the notice to see if any lawyers in the firm have cases on the docket.

On Bill of Review, the above-referenced case in Frio County was reinstated and ultimately settled to the satisfaction of the client.

The holding in the Copeland case at page 599 regarding what logic dictates is not well founded. In my experience, the statement of logic by the Copeland court at page 599 is the exception rather than the rule. Most clients who hire attorneys in our firm never ask about the law firm with which we are associated. In fact, many clients could care less about the law firm. The client is interested in you as their attorney.

I am now aware of court officials in at least two courts having taken the holding in the Copeland case and used it to resolve conflicts where counsel was set in more than one court on the same date. Court officials who use the Copeland case to tell you to send someone else to try the case are not being realistic, because it is unrealistic and illogical to assume that when a client retains counsel they retain the firm as a whole to represent their interests and not one particular attorney.

Accordingly, I request that Rule 10, defining "attorney of record," be revised to make clear that when a lawyer enters an appearance in a lawsuit in his name alone, he does so on his behalf only and does not enter an appearance on behalf of the law firm unless the firm name also is subscribed to the pleadings.

If you agree with my analysis, please bring this matter before the Rules Advisory Committee in order to achieve a change in the court's decision regarding Rules 165a and 306a, and to change Rule 10 to prevent the Copeland case from being used against counsel when there is a conflict in court settings.

Very truly yours,

Reese L. Harrison, Jr.

RLHJr:lv

13

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SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

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SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

(512) 224-9144

February 18, 1986

Honorable Linda Thomas
Judge, 256th District Court
Old Red Courthouse, 2nd Floor
Dallas, Texas 78202

Dear Linda:

Enclosed is proposed change to Rule 13 submitted by Bruce A. Pauley. Please draft, in proper form for Committee consideration appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rule changes for the March 7 and 8 meeting.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 12, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 13 and Rule 18a
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Bruce A. Pauley of Mesquite, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Bruce A. Pauley
Lyon & Lyon
Town East Tower
18601 LBJ Fwy. - Suite 525
Mesquite, Texas 75150

00000115

LYON & LYON
ATTORNEYS AND COUNSELORS AT LAW
TOWN EAST TOWER
18601 LBJ FWY. - SUITE 525
MESQUITE, TEXAS 75150

TED B. LYON, JR.
ROBERT CHARLES LYON
BRUCE A. PAULEY
MICHAEL A. YONKS

214-279-6571

February 10, 1986

Honorable James P. Wallace
Justice
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: Amendments to the Rules of Civil Procedure

Dear Justice Wallace:

It was a pleasure to see you and to have the opportunity to briefly speak with you at the Texas Law Center last Saturday. I appreciate your willingness to pass along to the proper individuals the suggestions which I have for changes in the Rules of Civil Procedure.

The changes I propose result from a case in which the plaintiff filed two Motions to Recuse the trial judge prior to trial and one Motion to Recuse the trial judge after trial but before the Motion for New Trial was heard. Subsequently, the plaintiff filed a fourth Motion to Recuse a judge who was -designated to hear the third recusal motion. Although this is a rare circumstance, I believe that certain changes in the rules are in order in order to see that it does not or cannot happen again.

I propose the following changes in Texas Rule of Civil Procudure 18a:

1. Amend Rule 18a to allow for only one recusal motion per litigant per judge.

2. Alternatively, to provide for sanctions for the second and any subsequent recusal motions if they are found by the judge designated to hear the motion to be frivolous, brought in bad faith or for the purpose of delay.

In addition I would propose that Rule 13 be amended to provide for contempt in cases where pleadings are filed for the purposes of securing a delay of the trial or of any hearing of the cause, instead of just the trial of the cause. I would also propose that the Court strongly consider adopting Federal Rule 11 verbatim.

Thank you again for your help with this matter. I hope to see you again in the near future.

With warmest personal regards, I remain

Sincerely,

LYON & LYON

Bruce A Pauley

BRUCE A. PAULEY
Attorney at Law

BAP/mf

R-13
Regentes
Ucanemail

LAW OFFICES
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NICHOLS, BALLARD & FRIEND
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS
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HOUSTON, TEXAS 77002
(713) 222-7211

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FRANK T. ABRAHAM, P.C.
W. W. WATKINS, P.C.
NICK C. NICHOLS, P.C.
ROBERT E. BALLARD, P.C.
DALE FRIEND, P.C.
EUGENE W. ONSTAD, P.C.
JOHN R. LEACH III
GRANT KAISER
CRAIG D. BALL

BERT E. [illegible]
THOMAS M. [illegible]
COUNSEL TO THE FIRM

February 3, 1983

Honorable Jack Pope
Chief Justice
Supreme Court of Texas
Capitol Station
Austin, Texas 78701

Mr. George W. McCleskey
Chairman
Advisory Committee
Texas Rules of Civil Procedure
McCleskey, Harriger, Brazill & Graff
P. O. Box6170
Lubbock, Texas 79413

Mr. Jack Eisenberg
c/o Messrs. Byrd, Davis & Eisenberg
P. O. Box 4917
Austin, Texas 78765

Dear Judge Pope, George and Jack:

The recent holding of the Dallas Court in number 05-82-00992-CV, Herritage Housing Corporation v. Harriett A. Ferguson, construing Rule 14c, seems to me to light up a problem that needs attention in Texas.

In the case mentioned the Dallas Court held that a "letter of credit" would not pass muster as a "negotiable obligation" under Rule 14c, which thus in turn could be used to supersede a judgment under Rule 364.

I have no great quarrel with the bottom line holding insofar as it interprets Rule 14c, but I do with the current restrictive interpretations of our supersedeas rules and principles as contrasted with the corresponding Federal rules. More specifically, Federal Rule 62 permits the district courts and courts of appeal to fashion stay orders that both protect the right of appeal, and, of course, the rights of the prevailing party.

It is true that in most instances the Federal courts have required cash bonds, or the equivalent thereof, but where there are serious appellate questions, and it can be made to appear that the judgment plaintiff or creditor will not suffer a loss of actual rights and remedies by fashioning a remedy less than requiring of full cash or security, the Federal courts have not been unwilling to do so.

It is also true that the prevailing party insists upon his "full pound of flesh" to prevent the appeal, particularly if the judgment rests on shaky grounds but it has always seemed to me the right to levy and execute upon the trial court judgment which remains unsuperseded can in some instances be too harsh and requires action and relief by the judgment-debtor that may be irreversible regardless of the success of the appeal.

In any event, I do suggest that both Committees give consideration to adopting a practice similar to the Federal rule which does permit some protection against the battering ram use of power to execute pending appeal.

Yours very truly,

W. James Kronzer

WJK/ja

Rejected 8 to 4

Revision Proposed by Judge Thomas R. Phillips

14c: Deposit in Lieu of Surety Bond.

I don't understand the scope of the term"surety bonds"; are supersedeas bonds included?

GRAMBLING & MOUNCE

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*ALSO MEMBER OF NEW MEXICO BAR
**ALSO MEMBER OF ARIZONA BAR

May 7, 1986

VIA FEDERAL EXPRESS

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
Attorneys at Law
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee

Dear Luke:

I am enclosing the "packet" from our "sub-committee". These are the rules wherein there has been no action by the Advisory Committee. Please copy of this letter I am supplying Judge Wallace and the members of the sub-committee with the packet. I would appreciate your having the packet duplicated for all other members.

Yours truly,

GRAMBLING & MOUNCE

BY: Sam Sparks

Sam Sparks

SS:lw

Enc.

cc: Hon. James P. Wallace
(via Federal Express w/Enc.)
Mr. David J. Beck
Mr. William V. Dorsaneo, III
Hon. David Hittner
Mr. Charles Morris
Mr. Tom L. Ragland
Mr. Harry Reasoner

TABLE OF CONTENTS

RULE 18a (h) Recusal or Disqualification of Judges

If a party files a motion to recuse under this rule and ~~it is determined by~~ the presiding judge that the motion to recuse is ~~frivolous,~~ brought ~~in bad faith or~~ for the purpose of delay, the ~~presiding~~ judge may impose any sanction as authorized by Rule 215 (2)(b).

solely

or the judge designated by him determine at the hearing and on notice of ~~the~~ an opposite parties

in the interest of justice

~~of the judge~~ or ~~done~~

hearing the matter

found without sufficient cause ~~for~~, ~~such~~

00000123

RULE 27a (new): FILING OF CASES; RANDOM ASSIGNMENT

Except as provided in this rule, all cases filed in counties having two or more district courts shall be filed in random order, in a manner prescribed by the judges of those courts. Each garnishment action shall be assigned to the court in which the principal suit is pending, and should transfer occur, both cases shall be transferred. Every suit in the nature of a bill of review or other action seeking to attach, avoid or set aside a judgment or other court order shall be assigned to the court which rendered such decree. Every motion for consolidation or joint hearing under Rule 174 (a) shall be heard in the court in which the first case filed is pending. Upon motion granted, the cases being consolidated shall be transferred to the granting court.

COMMENT: This proposal recommended by Council of Administrative Judges.

Tabled November 1985

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

RULE 27b (new). TRANSFER OF CASES

Whenever any pending case is so related to another case pending in or dismissed by another court that a transfer of the case to such court would facilitate orderly and efficient disposition of the litigation, the judge of the court in which either case is or was pending may, upon motion and notice (including his own motion) transfer the case to the court in which the earlier case was filed. Such cases may include but are not limited to:

1. Any case arising out of the same transaction or occurrence as did an earlier case, particularly if the earlier case was disimissed for want of prosecution or voluntarily dismissed by plaintiff at any time before final judgment;

2. Any case involving one or more of the same parties in an earlier case and requiring determination of any of the same questions of fact or law as those involved in the earlier case;

3. Any case involving a plea that a judgment in the earlier case is conclusive of any of the issues of the later case by way of res judicata or estoppel by judgment, or any pleading that requires a construction of the earlier judgment or a determination of its effect;

4. Any suit for a declaration concerning the alleged duty of an insurer to provide a defense for a party to another suit; or

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RULE 27b (new). TRANSFER OF CASES

Whenever any pending case is so related to another case pending in or dismissed by another court that a transfer of the case to such court would facilitate orderly and efficient disposition of the litigation, the judge of the court in which either case is or was pending may, upon motion and notice (including his own motion) transfer [illegible] e to the court in which the earli[illegible] es may include but are not limited [illegible]

1. Any c[illegible] ne transaction or occurrence as d[illegible] ly if the earlier case was disim[illegible] on or voluntarily dismissed by pla[illegible] judgment;

2. Any ca[illegible] ne same parties in an earlier case [illegible] f any of the same questions of fact [illegible] he earlier case;

3. Any case involving a plea that a judgment in the earlier case is conclusive of any of the issues of the later case by way of res judicata or estoppel by judgment, or any pleading that requires a construction of the earlier judgment or a determination of its effect;

4. Any suit for a declaration concerning the alleged duty of an insurer to provide a defense for a party to another suit; or

Reject
Increase
in favor of
Local rule
27(a),(b)(c).

00000125

5. Any suit concerning which the duty of an insurer to defend was involved in another suit.

COMMENT: This proposal recommended by Council of Administrative Judges.

Tabled November 1985

RULE 27c (new). TEMPORARY ORDERS

Except in emergencies when the clerk's office is closed, no application for immediate or temporary relief shall be presented to a judge until a case has been filed and assigned to a court according to these rules. If the judge of the court to which a case is assigned is absent, cannot be contacted or is occupied, emergency application may be made to either a judge appointed to hear such matters, or in his absence, any judge of the same jurisdiction, who may sit for the judge of the court in which the case is pending, and who shall make all orders, writs, and process returnable to the court in which the case is pending. Any case not initally filed with the clerk before temporary hearing shall be filed, docketed and assigned to a court under normal filing procedures at the earliest practicable time. All writs and process shall be returnable to that court.

COMMENT: This proposal recommended by Council of Administrative Judges.

Tabled November 1985

Rule 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party [~~all parties~~] or his [~~their~~] attorney[s] of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a

00000128

pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

Comment: The proposed amendment restores the rule to the pre-1984 version. The current version is illogical in that it requires service of a pleading or motion on all parties only if it is not required by law or the rules to be served on the adverse party. If a particular pleading or motion is required by law or the rules to be served on the adverse party, then under the terms of Rule 72 it need not be served on the nonadverse parties. It would seem that nonadverse parties would have at least as much interest -- if not more -- in a pleading or motion expressly required by law or rule to be served on the adverse party, as a pleading or motion that is not required to be served on an adverse party or any party. The current version of the rule is also troublesome in that it first prescribes the circumstance under which a pleading or motion must be served on all parties, but the remainder of the rule addresses specific procedural details of service only as regards adverse parties.

72 Rejects
Unanimous

Jeremy C. Wicker

00000129

RULE 99 Issuance

When a petition is filed ~~with the clerk, he~~ the clerk shall promptly issue such citations ~~for the defendant or defendants~~, as shall be requested by any party ~~or his attorney.~~ The clerk shall promptly deliver such citations ~~shall be delivered to the plaintiff or the plaintiff's attorney, or those persons responsible for service as set forth in these rules, as shall be requested by the plaintiff or the plaintiff's attorney.~~ delivered to any persons designated by the requesting party. ~~or his attorney.~~ In the absence of such designation, the clerk shall deliver such citations according to the clerks ordinary course of proceedings.

99

Approved

Unanimously

00000130

RULE 103. Officer Who May Serve

[All process may be served by the sheriff or any constable of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or of the county in which the party is to be served is found; provided no officer who is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.] Anyone who is of the age of eighteen and over and competent to testify and is not a party to the suit is allowed to serve civil process. A private party or process serving company can be appointed by motion and order to serve civil process within the State of Texas.

COMMENT. This proposed rule change is made by Guillermo Vega, an attorney in Brownsville and other attorneys and process serving companies. It is their suggestion that Rule 103 and Rule 106 read identically or to eliminate one of the rules.

Rejected
8 to 7

RULE 103 Officer or Person Who May Serve

All process may be served by the sheriff or any constable of any county in which the party to be served is found [or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.] Service of citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

107, 103-106
Changes
~~adopted~~
approved &
forwarded
& passage
in Sept

RULE 103. Officer Who May Serve

All process may be served by the sheriff or any constable of any county in which the party to be served is found or, ~~by any person specially appointed~~ by any adult person authorized by court order to serve it, or, if by mail, either by the sheriff or any constable of the county in which the case is pending or by a process server in a particular case, a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication ~~may~~ shall be made by the clerk of the court in which the case is pending.

RULE 106. Service of Citation

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 or by a private party or a process serving company by motion and order to serve citation by. . .

COMMENT. Judge Herb Marsh of El Paso and several process serving companies have requested this change. Rule 106 and Rule 103 were modified in November of 1985.

RULE 103. OFFICER WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [or by mail, either of the county in which the case is pending or of the county in which the party to be served is found]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.] Service by citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

...

(2) [mailing to the defendant by registered or certified mail with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto;]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

The notice and acknowledgment shall conform substantially to the following form.

A. B., Plaintiff)		(IN THE DISTRICT
V.	)NO.	(COURT OF
C. D., DEFENDANT)		(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender within twenty (20) days.

RULE 103. OFFICER WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [or by mail, either of the county in which the case is pending or of the county in which the party to be served is found]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.] Service by citation by publication may be made by the clerk of the court in which the case is pending and service by mail, as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

...

(2) [mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto;]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

The notice and acknowledgment shall conform substantially to the following form.

A. B., Plaintiff)		(IN THE DISTRICT
V.	)NO.	(COURT OF
C. D., DEFENDANT)		(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgement. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, or the party on whose behalf you are being served, may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This notice and acknowledgement of receipt of citation and petition will have been mailed on (insert date).

Signature

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) this day of , 19 .

Notary Public, State of
(
My commission expires:

ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION

I received a copy of the citation and of the petition in the above captioned matter on the day , 19 .

Signature

(Relationship to entity or authority to receive service of process.

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) on this day of , 19 .

Notary Public, State of
(
My commission expires:

00000135

RULE 107. RETURN OF CITATION.

The return of the officer 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. ~~[When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.]~~ When the citation was served by mail as authorized in Rule 106(a)(2), the officer or person who has secured such service shall return to the clerk of the court in which the case is pending, the sworn notice and acknowledgement of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

...

RULE 106 Service of Citation

(a) Unless the citation or order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

(1) delivering to the defendant, in person, by a sheriff or constable referred to in Rule 103, 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgement of service under this subdivision of this Rule is received by the sender

made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath. The notice and acknowledgment shall conform substantially to the following form.

A. B., Plaintiff)	(IN THE DISTRICT
)	(
V.)NO.	(COURT OF
)	(
C. D., Defendant)	(
)	(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your relationship to that entity If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This note and acknowledgement of receipt of citation and petition will have been mailed on (insert date).

_____
(Signature)

Date of Signature.

SWORN TO BEFORE ME by the said (Signing party) this day of , 19 .

_____
Notary Public, State of
( )
My commission expires:

ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION

I received a copy of the citation and of the petition in the above captioned matter on the day of , 19 .

_____
Signature

_____
(Relationshhip to entity or authority to receive service of process.

_____
Date of Signature

00000139

41-2

SWORN TO BEFORE ME by the said (Signing party) on this day of , 19 .

Notary Public, State of

My commission expires:

(b) 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 an officer or by any disinterested adult named in the court's order 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.

RULE 107

....

[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 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: Representative Patricia Hill questioned the reason for the ten day requirement. Deletion of this portion of the rule will enable default judgments to be taken after the period for answer expires, regardless of the number of days the proof of service was on file with the clerk of the court.

Rejects
Amends

107
10 day
right.

00000141

42

RULE 107

RETURN OF CITATION

The return of the officer 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. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature. When the officer has not served the citation the return shall show the diligence used by the officer 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 106, proof of service shall be made in the manner [ordered by the court.] provided above or in any such manner as may be 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 106, shall have been on file with the clerk of the court for ten days, exclusive of the day of filing and the day of judgment.

COMMENT: Attorney Jeffrey Jones recommends this proposal to provide for returns on citations where service is by a disinterested adult pursuant to his recommended rule change in Rule 106.

RULE 107 Return of Citation

The return of the officer executing a citation served under Rule 106(a)(1) 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. [When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.] When the citation was served by mail as authorized in Rule 106(a)(2), the person who has secured such service shall return to the clerk of the court in which the case is pending, the sworn notice and acknowledgment of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

Where citation is executed by an alternative method as authorized by Rule 106(b), proof of service shall be made in the manner ordered by the court.

Revised
103/106/107

)000143

RULE 142. Security for Costs

The clerk may require from the plaintiff security for costs before issuing any process, but shall file the petition and enter the same on the docket. [No attorney or other officer of the court shall be surety in any cause pending in the court, except upon special leave of court.]

COMMENT: Attorney Wendell Loomis of Houston suggests that the last sentence in Rule 142 is "archaic and should be dispensed with". He believes this limitation imposes a substantial burden to the bar and to clients and should be eliminated.

R. 142
Delete 2d sentence
Unanimous approval

Rule 145. In lieu of filing security for costs of an original action ~~or on appeal~~, a party who is unable to afford said costs shall file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a government entitlement based on indigency or any other person who has no ~~present~~ ability to pay costs. Said affidavit, and the party's action or appeal, shall be processed by the clerk in the herein described procedure.

1. **Procedure.** Upon the filing of the affidavit, the clerk shall docket the action ~~or appeal and accord such other typical services as are provided any party.~~ If the court shall find at the first regular hearing in the course of the action or appeal that the party (other than a party receiving a government entitlement) is able to afford costs, the party shall pay the costs of the action or appeal. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action or appeal will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action or appeal. If the court finds that another party to the suit can pay the costs of the action or appeal, the other party shall pay the costs of the action or appeal.

2. **Affidavit.** The affidavit shall contain complete information as to the party's identity , nature and amount of government entitlement income, nature and amount of employment income, other income (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. The Affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The Affidavit shall be ~~acknowledged~~ before a Notary Public.

3. **Attorney's Certification.** If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency, said attorney may file an affidavit to that effect to assist the court in understanding the financial condition of the party.

4.

Unanimous 14-1

R145 Appeals
Delete Appeal
Justice Courts
Remove service
Contest
Delete TX Assist

00000145

of the dismissal or nonsuit

RULE 162 Dismissal or Nonsuit Dismissal

or take a non-suit

At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a ~~case~~ ~~upon the filing of a notice of dismissal~~, which shall be entered in the minutes. ~~A copy of the~~ Notice shall be served in accordance with Rule 21a on any party who has answered or has been served with process. Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect ~~for~~ on any pending motion for sanctions at the time of the dismissal or for either attorneys' fees or other costs, or both, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

162 Unanimous

Adopt

But renumber

164

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4. Cases on File for Two or More Years. Except as provided in this rule, each civil case on file for two or more years which does not meet one of the exceptions herein provided, shall be dismissed for want of prosectuion by the court unless set for hearing on written motion to retain submitted by counsel or set by the court within thirty days of receipt of notice of intent to dismiss which shall be sent by the court to all attorneys in charge and pro se litigants. Dismissal for want of prosectuion shall occur at least once a year on the first Monday of April, and may occur at any time in accordance with section 1. of this rule.

Upon receipt of a motion to retain, the court shall notify the parties of the hearing date. At the hearing, if the parties request trial, the court shall either set the case for final pretrial conference to insure prompt completion of discovery, or, if the court finds the case is ready for trial, shall set the case for trial not less than 30 days from the date of hearing on retention. Cases shall be exempt from dismissal for want of prosecution if at the time of eligibility their status is one or more of the following:

(1) set for trial;

1653 Rejected Changes

(2) one or more of the parties announces ready for trial subsequent to the issuance of the notice of intent to dismiss;

(3) under Bankruptcy Stay order;

(4) having legal or other impediments which the court shall determine as justifiable grounds for retaining the case from dismissal.

Judicial districts previously by local rule having eligibility for dismissal for want of prosecution set at less than two years may retain their dismissal age criteria at less than two years; jurisdictions previously having eligibility for dismissal for want of prosecution set at over two years from the date of filing shall set dismissal for want of prosecuion at three years maximum from the date of filing.

COMMENT: This is recommended by the Council of Administrative Judges.

RULE 165a (2) REINSTATEMENT.

2. Reinstatement. A motion to reinstate shall [set forth the grounds] show good cause therefor and be verified by the movant or his attorney.

. . . . .

COMMENT: Judge Keith Nelson recommends the insertion of "good cause" in Rule 165a (2) and that is the only change in this recommendation.

165a
Union
Rejected

2. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within [30] 120 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motin to the judge, who shall set a hearing on the motions as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within [seventy-five days after the judgment is signed] forty-five days after a timely motion to reinstate is filed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has

Rule 165a. Dismissal for Want of Prosecution

2. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within [30] 120 days after the order of dismissal is signed or within the period provided by Rule 306a. A motion to reinstate shall be served on each attorney and each party not represented by an attorney shown on the docket or in the papers on file. The clerk shall deliver a copy of the motin to the judge, who shall set a hearing on the motions as soon as practicable. The clerk shall notify all parties or their attorneys of record of the date and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within [seventy-five days after the judgment is signed] 45 days after a timely motion to reinstate is filed or such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion for new trial is timely filed by any party, the trial court shall determine whether an appeal has

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49-1

been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are ruled, either by a written or signed order by operation of law, whichever occurs first.

RULE 166b

Nothing in [paragraph 3] either paragraph 2 or 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge of the 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 relied upon the testifying expert.

COMMENT: Professor Edgar desires to make the rule "clear" that all persons having knowledge of relevant facts are proper subjects of discovery in that merely the designation of "consulting expert" cannot be used to hide the identity of persons having such knowledge.

166b

Approved

RULE 166f ORAL HEARINGS; RULINGS ON SUBMISSIONS

The judge of the court in which a case is pending will hear all matters regarding cases either by submission without oral hearing or by oral hearing where such is requested in writing.

1. Form of the Motion. Motions shall be in writing, shall state the grounds therefor, and may include or be accompanied by authority for the motion. Motions shall set a date of submission, and shall be accompanied by a proposed order granting the relief sought. The proposed order shall be a separate instrument.

2. Service. Motions and responses shall be served in accordance with Rule 21 on all attorneys in charge and shall contain a certificate of service.

3. Submission Date. Motions shall bear a submission date at least ten (10) days from the date of filing. The motion will be submitted to the court on the specified day or as soon after as is practical.

4. Response. Responses by opposing parties shall be in writing, shall advise the court whether the motion is opposed or unopposed and may be accompanied by authority for opposition. Failure to file a response shall be a representation of no oppposition.

5. Supporting Material. If the motion or response to motion requires consideration of facts not appearing of record,

RULE 166f ORAL HEARINGS; RULINGS ON SUBMISSIONS

The judge of the court in which a case is pending will hear all matters regarding cases either by submission without oral hearing or by oral hearing where such is requested in writing.

1. Form of the Motion. Motions shall be in writing, shall state the grounds th and may include or be accompanied by authority for set a date of submission, and shall order granting the relief sought be a separate instrument.

2. Service. Motions rved in accordance with Rule 21 o id shall contain a certificate of se

3. Submission Date. sion date at least ten (10) days from the date tion will be submitted to the court on the specified day or as soon after as is practical.

4. Response. Responses by opposing parties shall be in writing, shall advise the court whether the motion is opposed or unopposed and may be accompanied by authority for opposition. Failure to file a response shall be a representation of no oppposition.

5. Supporting Material. If the motion or response to motion requires consideration of facts not appearing of record,

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RULE 188a (New) DEPOSITIONS AND INTERROGATORIES FROM FOREIGN JURISDICTIONS.

Whenever there is presented to a district court a certified copy of any mandate, writ or commission, issuing from any other state, territory, district or foreign jurisdiction, requiring the testimony or response of any person in this state, the judge of such district court shall issue any orders necessary to effectuate the taking of such testimony or the obtaining of such response. The filing of the certified copy of the mandate, writ or commission shall be considered equivalent to the filing of an original petition for the purpose of compelling the appearance and testimony or response of any person within this state.

COMMENT: Attorney Mark Walker made this suggestion so that the rules would embody Texas Revised Civil Statute Annotated Article 3769a. There are no clear procedures in the rules for the presentation of such requests to the appropriate district courts as set out in the statute.

188a
Refer to
Doak Bishop
for guidance
Hugh S. Jr

00000155

RULE 201. Compelling Appearance; Production of Documents and Things; Deposition of Organization

4. Organizations. When the deponent named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the [organization] deponent named to designate the person or persons to testify in the [its] deponent's behalf, and, if ~~[it]~~ deponent so desires, the matters on which each person designated by the deponent will testify and the notice shall further direct that the person or persons designated by the deponent appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

COMMENT. Attorney John Wright of Grand Prairie, Texas suggests this change to clarify the rule.

RULE 204

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Except in the case of objections to the form of questions or the nonresponsiveness of answers, which objections are waived if not made at the taking of an oral deposition unless otherwise agreed between the parties or attorneys by agreement recorded by the officer, the court shall not be confined to objections made at the taking of the testimony.

COMMENT: Attorney Charles Hayworth is recommending this change so that his recommendation on Rule 166b is in keeping with Rule 204.

204

Adopted in substance in other Committee Acts

Next page also,

00000157

RULE 204(4) OBJECTIONS TO TESTIMONY.

The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in the taking of testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. [Except in the case of objections to the form of questions or the non-responsiveness of answers, which objections are waived if not made at the taking of an oral depositions.] The court shall not be confined to objections made at the taking of the testimony.

COMMENT: Attorney J. Harris Morgan desires to completely eliminate the portion of the rule declaring waiver.

204(4)
Rejected by Court Action Committee

00000158

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Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 204--Examination, Cross-examination and Objections

1. Written Cross-Questions on Oral Examination. (No change~~)~~

2. Oath. (No change)

3. Examination. (No change)

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. ~~-Except-in-the case-of--objections--to--the--form--of--questions--or--the--nonresponsiveness-of--answers,--which--objections-are-waived--if--not--made-at-the-taking-of-an-oral-deposition,~~ However, the court shall not be confined to objections made at the taking of the testimony.

COMMENTS: The requirement of objecting to the form of questions or nonresponsiveness of answers serves no useful purpose. It often lengthens the deposition and increases the cost

204(4)
Rejects
by
earlier
Action
of Comm

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RAGLAND, WACO

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Furthermore, this requirement places the burden on the non-deposing attorney to help the deposing attorney get his questions in admissible form by objecting or waiving the objection.

See also (1) Justice Barrow memo dated March 6, 1984; (2) Daniel Hyde letter dated June 20, 1984; (3) Harris Morgan letter dated January 9, 1984.

If the making of objections, of any character, is desirable and fair to all parties to the case, they may enter into such agreements as suits their needs under Rule 11, Agreements To Be in Writing (stipulations).

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

RULE 205

SUBMISSION TO WITNESS; CHANGES, SIGNING

When the testimony is fully transcribed, the deposition officer shall submit the [deposition] transcript and correction sheets to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, unless [such] examination and signature are waived by the witness and the parties.

[Any changes in form or substance] Changes in testimony [which] that the witness desires to make shall [be entered upon the deposition by the officer with the statement of the reasons given by the witness for making such changes.] be entered upon the correction sheet by the witness with a statement of the reason for the change. [The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill and cannot be found or refuses to sign.] The transcript and correction sheet shall then be signed by the witness before any officer authorized to administer oaths unless signature before an authorized officer is waived by the witness and the parties. [If the witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver and examination and signature or

of the illness or absence of the witness or the fact of the refusal together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to supress, made as provided in Rule 207, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.] When the transcript and correction sheets return, the deposition officer shall advise all parties of suggested changes. If the transcript and correction sheet does not return within twenty days, the deposition officer shall certify the failure to return or the refusal to sign and the reason(s), if any, given and shall furnish copies of such certificate to all parties. Thereafter, the deposition officer shall file the original transcript with the clerk of the court in which such cause is pending.

COMMENT: Attorney Charles Matthews and court reporter G. H. Hickman have made this suggestion with the purpose of facilitating the work of court reporters. The Administration of Justice Committee turned down this proposal.

RULE 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the original deposition transcript to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature by the witness before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties. No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the deposition officer with the statement of the reasons given by the witness for making such changes. The deposition shall then be signed by the witness before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign [it] a true copy of the transcript and state on the record the fact of waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless

on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

COMMENT: Attorney Charles Matthews of Houston along with court reporter George Hickman have requested this change in Rule 205. The proposers believe this will simplify the process of obtaining signatures, clear up some of the questions on the procedures and allow for a witness out of state (or out of pocket) to complete the deposition without "inconveniencing" the court reporter.

RULE 205 Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the original deposition transcript to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature by the witness before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties. No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be furnished to the deposition officer by the witness, together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be entered upon the deposition by thh deposition officer. The deposition shall then be signed by the witness before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign [it] a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any,

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RULE 205 Submission to Witness; Changes; Signing

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R205
Changes
Objects

any Changes

transcript

under oath

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71-1

given therefor~~e and~~ the deposition may then be used as fully as though signed, unless on motion to suppress, made as provided in Rule 207, the Court ~~holds~~ determines that the reasons given for the refusal to sign requires rejection of the deposition in whole or in part.

71-2

PACKAGE B -- DEPOSITIONS

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

TEXAS RULES OF CIVIL PROCEDURE.
Rule 207. Use of Depositions in Court Proceedings.

1. Use of Depositions in Same Proceeding.

   a. Availability of Deponent as a Witness does not Preclude Admissibility of Deposition Taken and Used in the Same Proceeding. Depositions shall include the original or any certified copy thereof. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence [~~applied as though the witness were then present and testifying~~], may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying. Unavailability of deponent is not a requirement for admissibility.

   b. Included Within Meaning of "Same Proceeding." Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken, and, when a suit has been brought in a court of the United States or of this or any other state [~~has been dismissed~~] and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken [~~and duly filed~~] in each [~~the former~~] suit may be used in the other suit(s) [~~latter~~] as if originally taken therefor.

   c. If one becomes a party after the deposition is taken and has a similar to that of any party described in (a) or (b) above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose deponent, and has failed to exercise that opportunity.

2. Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Evidence. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying.

3. Motion to Suppress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and

motion to exclude
the testimony
redirect examination

00000167

PACKAGE B -- DEPOSITIONS

TEXAS RULES OF CIVIL PROCEDURE.
Rule 207. Use of Depositions in Court Proceedings.

1. Use of Depositions in Same Proceeding.

a. Availability of Deponent as a Witness does not Preclude Admissibility of Deposition Taken and Used in the Same Proceeding. Depositions shall include the original or any certified copy thereof. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence [~~applied as though the witness were then present and testifying~~], may be used by any person for any purpose against any party who was present or the taking of the deposition or who had eof. Further, the evidence rules ach question and answer as though then present and testifying. ponent is not a requirement for

R207
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Approved
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eaning of "Same Proceeding." ties pursuant to these rules does t to use depositions previously it has been brought in a court of of this or any other state [~~has~~ another suit involving the same ought between the same parties or es or successors in interest, all taken [~~and duly filed~~] in each may be used in the other suit(s) nally taken therefor.

c. If one becomes a party after the deposition is taken and has a ~~interest~~ similar to that of any party described in (a) or (b) above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose deponent, and has failed to exercise that opportunity.

2. Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Evidence. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying.

3. Motion to Suppress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and

motion to exclude
the testimony of direct examination or redirect examination

irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

TEXAS RULES OF EVIDENCE
Rule 801. Definitions.
The following definitions apply under this article:
(a). . .
. . . .
(e) Statements which are not hearsay. A statement is not hearsay if --
(1). . .
(2). . .
(3) Depositions. It is a deposition [~~taken and offered in accordance with the Texas Rules of Civil Procedure~~] taken in the same proceeding, as same proceeding is defined in Rule 207, Texas Rules of Civil Procedure. Unavailability of deponent is not a requirement for admissibility.

Rule 804. HEARSAY EXCEPTIONS. DECLARANT UNAVAILABLE.
(a). . .
(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness --

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of [~~the same or~~] another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment. A deposition in some circumstances may be admissible without regard to unavailability of the deponent. See rule 801(e)(3), Texas Rules of Evidence, and Rule 207, Texas Rules of Civil Procedure.

Discussion of Package B

Package B is based on "Alternative #1" presented and discussed at the November 1-2, 1985 meeting. It melds in the wording suggested at that meeting and seeks to solve the late-on-the-scene party. It maintains the former distinction between depositions offered in the same proceeding and offered in a different proceeding. It makes clear the meaning of same proceeding.

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 209--Disposal of Depositions (New Rule)

1. Depositions filed with the clerk of the court may be disposed of one hundred eighty days after a judgment final as to all parties has been ~~entered in the case.~~ rendered

2. The Court shall, by order entered upon the minutes of the Court, specify the method of disposal of such depositions and the proceeds therefrom, if any, shall be accounted for according to law.

3. The Court may require such advance notice of the disposal of depositions under this rule as it deems appropriate under the circumstances and, for good cause shown, may order certain depositions retained by the clerk or returned to the parties, their attorney, or the witness.

COMMENT: The Rules have required that depositions be filed with the clerk for many years, but there has been no authority for disposal of depositions by the clerk. This has created a storage problem, especially in the larger cities.

Scrap paper is a marketable commodity.

00000169

Paragraph 2 will discourage a clerk, or deputy, from going into the scrap paper business.

Pararaph 3 will allow the trail judge to order special handling of depositions which may be of a sensitive nature, such as divorce cases, depositions dealing with trade secrets, or any deposition subject to a protective order under Rule 166b.4.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

00000170

Tom Rayland, Waco

81

5. Failure to Make Supplementation of Discovery Response in Compliance with Rule 166b. A party who fails to supplement seasonably his response to a request for discovery in accordance with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required for Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the offeror of the evidence and good cause must be shown in the record.

R 215
Wham
to
Adopt

Rule 215

. . .

2. Failure to Comply with Order or with Discovery Request.

. . .

b. Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests, or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) An order compelling a designation, an appearnace, an answer or answers, or inspection or production in accordance with the request;

~~(6)~~ (7) In lieu of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

~~(7)~~ (8) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4), (5), or (6) of this

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Rejected

Lucas

00000172

82-1

subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

~~(8)~~ (9) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

. . .

Rule 239a. Notice of Default Judgment

239a
Rejects
Unanimously

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail by first-class mail ~~[a-copy-cere]~~ notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. 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. ~~[Failure-to-comply-with-the-provisions-of-this-rule-shall-not-affect the-finality-of-the-judgment.]~~

Comment: The proposed amendment conforms the rule to the 1984 amendment to Rule 306a, which requires notice by first-class mail. The last sentence of the rule is deleted to conform to the 1984 amendment to Rule 306a, which provides for up to a ninety-day extension of the date on which the time period for perfecting an appeal begins to run, if the appellant proves he has failed to receive notice of the judgment.

Jeremy C. Wicker

00000174

RULE 306 a (3): NOTICE OF JUDGMENT.

When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by [first class mail] registered or certified mail, return receipt requested, advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4) of this rule and Rule 21 (c).

COMMENT: This proposal is submitted by Charles M. Jordan and I. Nelson Heggen to help alleviate the possibility of counsel not obtaining appropriate notice of an appealable order or a judgment within the time frame allowed and to expressly state that the "forgiveness" of time as set out in Reject Unanimous 306a(3) applies to Rules 306 a (3) and 458.

00000175

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SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 167- Discovery and Production of Documents and Things for Inspection, Copying or Photographing

1. Procedure. (No change)

2. Time. No REQUEST may be served on a party until that party has filed a pleading or time therefor has elapsed. Thereafter, the REQUEST shall be ~~filed with the Clerk and~~ served upon every party to the action. The RESPONSE to any REQUEST made under this rule and objections, if any, shall be served within thirty days after service of the REQUEST. The time for making a RESPONSE may be shortened or lengthened by the court upon a showing of good cause.

4. Order. If objection is made to a REQUEST or to a RESPONSE, either party may ~~request a hearing by filing~~ motion ~~setting forth separately each REQUEST and RESPONSE in controversy.~~ The court may order or deny production within the scope of discovery as provided in Rule 166b in accordance with paragraph 1 of Rule 215. If production is ordered, the order shall specify the time, place, manner and other conditions for making the inspection, measurement or survey, and taking copies and photographs and may ~~prescribe~~ such terms and conditions as are just.

4. Nonparties. (No change)

00000176

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 167- Discovery and Production of Documents and Things for Inspection, Copying or Photographing

1. Procedure. (No change)

2. Time. No REQUEST may be served on a party until that party has filed a pleading or time therefor has elapsed. Thereafter, the REQUEST shall be ~~filed with the Clerk and~~ served upon every party to the action. The RESPONSE to any REQUEST made under this rule and objections, if any, shall be served within thirty days after service of the REQUEST. The time for making a RESPONSE may be shortened or lengthened by the court upon a showing of good cause.

3. Order. If objection is made to a REQUEST or to a RESPONSE, either party may ~~request a hearing by filing~~ motion ~~setting forth separately each REQUEST and RESPONSE in controversy.~~ The court may order or deny production within the scope of discovery as p in accordance with paragraph 1 of Rule 215. red, the order shall specify the time, plac nditions for making the inspection, meas taking copies and photographs and may pres nditions as are just.

4.

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SEE NEXT PAGE FOR
POST-IT NOTE COMMENTS

3. Certificate Filed In Lieu of Documents. A party serving a REQUEST or RESPONSE under this rule shall not file such REQUEST or ~~RESPONSE with the clerk of the court. A party may, however, file with the clerk a certificate, not to exceed one (1) typewritten page, describing such REQUEST or RESPONSE, and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.~~

The court ~~may~~, upon motion and for good cause, permit the ~~filing of such REQUEST or RESPONSE.~~

COMMENT: The phrase "filed with the Clerk and" has been deleted from paragraph 2.

Paragraph 5 has been added.

The purpose of this proposed amendment is to eliminate the requirement that discovery matters must be filed with the clerk. The present filing requirement is a waste of time and effort and takes up valuable file space in the clerk's office and otherwise clutters up the file.

Paragraph 5 allows, but does not require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

3. Custody of Discovered by Parties.

~~5. Certificate Filed In Lieu of Documents.~~ A party serving a REQUEST or RESPONSE under this rule shall not file such REQUEST ~~or RESPONSE with the clerk of the court. A party may, however, file with the clerk a certificate, not to exceed one (1) typewritten page, describing such REQUEST or RESPONSE, and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.~~

The court ~~may~~, upon motion and for good cause, permit the ~~filing of such REQUEST or RESPONSE.~~

COMMENT: The phrase "filed with the Clerk and" has been deleted ~~amendment is to eliminate~~ ~~matters must be filed~~ ~~filing requirement is a~~ ~~takes up valuable file~~ ~~and otherwise clutters up~~

Paragraph 5 allows, but does not require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

Paragraph 5 also allows the court to exercise its discretion, in exceptional cases, and permit the filing of discovery instruments prepared under this rule.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 168- Interrogatories to Parties

1. (No change)

2. (No change)

3. (No change)

4. (No change)

5. Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty (30) answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon the showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule 166b are applicable for the protection of the parties from whom answers to interrogatories are sought under this rule.

The interrogatory shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceeded by the question or interrogatory to which the answer pertains. The answers shall be signed and verified by persons making them and the provisions of Rule 14 shall not apply. True copies of the interrogatories, and objections thereto, and

answers shall be served on all parties or their attorneys at the time that any interrogatories, objections, or answers are served. ~~and a true copy of each shall be promptly filed with the clerks office together with proof of service.~~

6. Objections (No change)

7. Certificate filed in lieu of documents. A party serving interrogatories, answers or objections under this rule shall not file such interrogatories, answers or objections with the clerk of the court. A party may, however, file with the clerk a certificate, not to exceed one (1) typewritten page, describing such interrogatories, answers or objections and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.

The court may, upon motion and for good cause, permit the filing of such interrogatories, answers or objections.

Either party may present to the court any objections to interrogatories by filing a written motion distinctly setting forth the interrogatory in question followed by the objection thereto and request a hearing as to such objection at the earliest possible time.

COMMENT: The purpose of this proposed amendment is to eliminate the requirement that discovery matters must be filed with the clerk. Paragraph 7 allows, but does not

require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

Paragraph 7 also allows the court to exercise its discretion, in exceptional cases, and permit the filing of discovery instruments prepared under this rule.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 169- Admission of Facts and of Genuineness of Documents

1. Request for Admission. At any time after the defendant has made appearance in the cause, or time therefor has elapsed, 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.~~

2. Effect of Admission. (No change)

3. Certificate Filed In Lieu of Documents. A party serving a REQUEST or RESPONSE under this rule shall not file such REQUEST or RESPONSE with the clerk of the court. A party may, however,

file with the clerk a certificate, not to exceed one (1) typewritten page, describing such REQUEST or RESPONSE, and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.

The court may, upon motion and for good cause, permit the filing of such REQUEST or RESPONSE.

Any motion for relief under these rules dealing with the form or substance of any REQUEST or RESPONSE made under this rule shall separately set forth each such REQUEST followed by the RESPONSE thereto and state the nature of the complaint, objection or matter in controversy.

COMMENT: Paragraph 1 is unchanged except for the deletion of the last sentence referring to Rule 21a.

169 Rejected Unanimous

Paragraph 3 has been added.

The purpose of this proposed amendment is to eliminate the requirement that discovery matters must be filed with the clerk. The present filing requirement is a waste of time and effort and takes up valuable file space in the clerk's office and otherwise clutters up the file.

Paragraph 3 allows, but does not require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

Paragraph 3 also allows the court to exercise its discretion, in exceptional cases, and permit the filing of discovery instruments prepared under this rule.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 206- Certification and Filing by Officer; Exhibits; Copies; Notice of Filing

1. Certification and Filing by Officer.

a. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. ~~The officer shall include the amount of his charges for the preparation of the completed deposition in the certification. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.~~

b. The officer shall deliver the deposition to the attorney requesting it and shall file with the clerk a certificate bearing the cause number, style of the case and captioned with the name of the witness and certifying the date and to whom such deposition was delivered. Such certificate shall include the manner of delivery of the deposition and the officer's charges for the preparation of the completed deposition. A copy of such certificate shall be attached to each copy of such deposition.

If delivery of the deposition be by Certified Mail or common carrier, the official's certificate shall include thereon the certified mail receipt number or the waybill number of the common carrier which made the delivery.

c. The deposition shall be retained by the attorney taking delivery thereof, subject to being examined by the witness or any party to the suit, until one hundred eighty days after a judgment final as to all parties has been entered in said cause, after which time the attorney in possession of such deposition may either return it to the witness or destroy such deposition, subject to any protective order which may have been entered in the case.

d. The court may, upon motion and for good cause shown, permit the filing of the original or a true copy of any such deposition with the clerk of the court.

2. Exhibits. (No change.)

3. Copies. (No change)

~~4. Notice of Filing. The person filing the deposition shall give prompt notice of its filing to all parties.~~

~~5. Inspection of Filed Deposition. After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition may be opened by the clerk or justice at the request of the deponent or any party, unless otherwise ordered by the court.~~

COMMENT: The requirement that depositions be "filed" with the clerk appears to be a holdover from the days when it was necessary to have the clerk issue a commission to take a deposition. Present day practice makes the filing of depositions, for the most part, a useless requirement.

Discovery materials are not filed with the clerk in the federal courts except as specifically provided by local rules. See Rule 5.2, United States District Court, Northern District; Rule 10F, United States District Court, Southern District; Rule 300-1, United States District Court, Western District.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

NO. _____

Paul Plaintiff
§
V.
§
David Defendant
§

_____ the District Court of _____ County, Texas

CERTIFICATE OF DELIVERY OF DEPOSITION
OF
(Name of Witness)

To The Clerk of the Court:

Pursuant to Rule 206, Texas Rules of Civil Procedure, I certify as follows:

(1) The (oral deposition) (deposition on written questions) of the above witness was delivered to (attorney's name and address) on (date).

(2) Method of delivery (1) Personal delivery _____

(2) Certified Mail No. _____

(3) Other (Federal Express, United Parcel Service, etc) way bill No. _____

(3) The charges for preparation of this deposition are $_____

SIGNED this _____ day of _____ 19___.

Signature
(Typed Name) CSR No. _____
Expiration Date:
Address
Phone No.

00000188

Tom Ragland, Waco

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 207- Use of Depositions in Court Proceedings

1. Use of Depositions. (No change)

2. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit in a court of the United States or of this or any other state has been dismissed and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken ~~and duly filed~~ in the former suit may be used in the latter as if originally taken therefor.

3. Motion to Suppress. When a deposition shall have been ~~filed in the court~~ delivered in accordance with Rule 206 and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, ~~filed~~, delivered, or otherwise dealt with by the

deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

COMMENT: Changes made to conform with proposed changes in Rules 167, 168, 169, 204 and 206.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Tom Ragland, Waco

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 208--Depositions Upon Written Questions

1. Serving Questions; Notice. (No change)

2. Notice by Publication. (No change)

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Objections. (No change)

4. Deposition Officer; Interpreter. (No change)

5. Officer to take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness in the manner provided in paragraph 2 of Rule 204, to take the testimony of the witness in response to the questions in the manner provided in paragraph 3 of Rule 204 and to prepare, certify, and ~~file or mail~~ deliver the deposition, in the manner provided by Rules 205 and 206, attaching thereto the copy of the notice and questions received by him.

~~The person filing the deposition shall give prompt notice of its filing to all parties.~~

~~After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the witness or deponent or any party and the deposition may be opened by the clerk or justice at the request of the witness or deponent or any party, unless otherwise ordered by the court.~~

COMMENTS:

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Tom Ragland, Waco

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 209--Disposal of Depositions (New Rule)

1. Depositions filed with the clerk of the court may be disposed of one hundred eighty days after a judgment final as to all parties has been entered in the case.

2. The Court shall, by order entered upon the minutes of the Court, specify the method of disposal of such depositions and the proceeds therefrom, if any, shall be accounted for according to law.

3. The Court may require such advance notice of the disposal of depositions under this rule as it deems appropriate under the circumstances and, for good cause shown, may order certain depositions retained by the clerk or returned to the parties, their attorney, or the witness.

COMMENT: The Rules have required that depositions be filed with the clerk for many years, but there has been no authority for disposal of depositions by the clerk. This has created a storage problem, especially in the larger cities.

Scrap paper is a marketable commodity.

Paragraph 2 will discourage a clerk, or deputy, from going into the scrap paper business.

Pararaph 3 will allow the trail judge to order special handling of depositions which may be of a sensitive nature, such as divorce cases, depositions dealing with trade secrets, or any deposition subject to a protective order under Rule 166b.4.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

RULE 18a. Recusal or Disqualification of Judges

(h) Each party is limited to one motion for recusal for each judge.

or at the hearing and on motion of the opposite party

(h) In the event a party files more than one motion to recuse under this rule and it is determined by the presiding judge that the motion to recuse is ~~frivolous~~, brought ~~in bad faith or~~ for the purpose of delay, the presiding judge may impose any sanction as authorized by Rule 215 (2)(b).

COMMENT. Attorney Bruce Pauley of Mesquite, Texas, recommends this change to limit the possibility of delay and abuse under the current rule.

and that there was no sufficient cause for such motion

File Copy
18a

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

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HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

February 18, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rule 18a submitted by Bruce A. Pauley and Rules 103 and 106 submitted by Judge Herb Marsh, Jr. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes for the March 7 and 8 meeting.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 12, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 13 and Rule 18a
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Bruce A. Pauley of Mesquite, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Bruce A. Pauley
Lyon & Lyon
Town East Tower
18601 LBJ Fwy. - Suite 525
Mesquite, Texas 75150

00000197

LYON & LYON
ATTORNEYS AND COUNSELORS AT LAW
TOWN EAST TOWER
18601 LBJ FWY. - SUITE 525
MESQUITE, TEXAS 75150

TED B. LYON, JR.
ROBERT CHARLES LYON
BRUCE A. PAULEY
MICHAEL A. YONKS

214-279-6571

February 10, 1986

Honorable James P. Wallace
Justice
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: Amendments to the Rules of Civil Procedure

Dear Justice Wallace:

It was a pleasure to see you and to have the opportunity to briefly speak with you at the Texas Law Center last Saturday. I appreciate your willingness to pass along to the proper individuals the suggestions which I have for changes in the Rules of Civil Procedure.

The changes I propose result from a case in which the plaintiff filed two Motions to Recuse the trial judge prior to trial and one Motion to Recuse the trial judge after trial but before the Motion for New Trial was heard. Subsequently, the plaintiff filed a fourth Motion to Recuse a judge who was designated to hear the third recusal motion. Although this is a rare circumstance, I believe that certain changes in the rules are in order in order to see that it does not or cannot happen again.

I propose the following changes in Texas Rule of Civil Procudure 18a:

1. Amend Rule 18a to allow for only one recusal motion per litigant per judge.

2. Alternatively, to provide for sanctions for the second and any subsequent recusal motions if they are found by the judge designated to hear the motion to be frivolous, brought in bad faith or for the purpose of delay.

In addition I would propose that Rule 13 be amended to provide for contempt in cases where pleadings are filed for the purposes of securing a delay of the trial or of any hearing of the cause, instead of just the trial of the cause. I would also propose that the Court strongly consider adopting Federal Rule 11 verbatim.

Thank you again for your help with this matter. I hope to see you again in the near future.

With warmest personal regards, I remain

Sincerely,

LYON & LYON

Bruce A Pauley

BRUCE A. PAULEY
Attorney at Law

BAP/mf

27a

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 27a (new). Filing of Cases; Random Assignment

Except as provided in this rule, all cases filed in counties having two or more district courts shall be filed in random order, in a manner prescribed by the judges of those courts. Each garnishment action shall be assigned to the court in which the principal suit is pending, and should transfer occur, both cases shall be transferred. Every suit in the nature of a bill of review or other action seeking to attach, avoid or set aside a judgment or other court order shall be assigned to the court which rendered such decree. Every motion for consolidation or joint hearing under Rule 174(a) shall be heard in the court in which the first case filed is pending. Upon motion granted, the cases being consolidated shall be transferred to the granting court.

CA:RULE9(69th)

27b

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

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00000205

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36th, 156th

Rule 27b (new). Transfer of Cases

Whenever any pending case is so related to another case pending in or dismissed by another court that a transfer of the case to such other court would facilitate orderly and efficient disposition of the litigation, the judge of the court in which either case is or was pending may, upon motion and notice (including his own motion) transfer the case to the court in which the earlier case was filed. Such cases may include but are not limited to:

1. Any case arising out of the same transaction or occurrence as did an earlier case, particularly if the earlier case was dismissed for want of prosecution or voluntarily dismissed by plaintiff at any time before final judgment;

2. Any case involving one or more of the same parties in an earlier case and requiring a determination of any of the same questions of fact or law as those involved in the earlier case;

3. Any case involving a plea that a judgment in the earlier case is conclusive of any of the issues of the later case by way of res judicata or estoppel by judgment, or any pleading that requires a construction of the earlier judgment or a determination of its effect;

4. Any suit for a declaration concerning the alleged duty of an insurer to provide a defense for a party to another suit; or

5. Any suit concerning which the duty of an insurer to defend was involved in another suit.

CA:RULE10(59th)

27c

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

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36th, 156th

Rule 27c (new). Temporary Orders

Except in emergencies when the clerk's office is closed, no application for immediate or temporary relief shall be presented to a judge until a case has been filed and assigned to a court according to these rules. If the judge of the court to which a case is assigned is absent, cannot be contacted or is occupied, emergency application may be made to either a judge appointed to hear such matters, or in his absence, any judge of the same jurisdiction, who may sit for the judge of the court in which the case is pending, and who shall make all orders, writs, and process returnable to the court in which the case is pending. Any case not initially filed with the clerk before temporary hearing shall be filed, docketed and assigned to a court under normal filing procedures at the earliest practicable time. All writs and process shall be returnable to that court.

CA:RULE11(69th)

July 31, 1985

Russell H. McMains
1400 Texas Commerce Plaza
P. O. Drawer 480
Corpus Christi, TX 78403

Steve McConnico
1st City Bank Building
12th Floor
Austin, TX 78701

Gilbert Adams
1855 Calder Avenue
at 3rd Street
Beaumont, TX 77701

John O'Quinn
O'Quinn & Hagans
3200 Texas Commerce Tower
Houston, TX 77002

Clarence Guittard
Chief Justice
Court of Appeals, 2nd Floor
Dallas County Courthouse
Dallas, TX 75202

Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
600 Travis Street
Houston, TX 77702

Bert H. Tunks
Abraham, Watkins, Nichols
Ballard, Onstad & Friend
800 Commerce Street
Houston, TX 77702

Re: Stay of Enforcement of Judgment
Pending Appeal

Gentlemen,

A proposal has been made to add a procedural rule concerning suspending the enforcement of a judgment pending appeal. The proposal passed the Committee on Administration of Justice last year. As you might suspect, the affirmative vote was not unanimous.

I am enclosing a draft of the proposed rule with this letter. From an organizational standpoint, the rule would be included in Section 3 immediately after proposed Rule 37 (Supersedeas Bond or Deposit in Civil Cases) or as an additional rule. It could also be included in proposed Rule 37 if the title to the proposed rule was changed.

This matter will also be included on our agenda for September 7th, 1985.

Thanks,

Bill

William V. Dorsaneo, III

WVD:vm
cc: Luke Soules

00000212

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule _____. Stay of Enforcement of Judgment Pending Appeal

In lieu of a supersedeas bond provided for in Rule 37 the court from which or to which an appeal is taken may order a stay of all or any portion of any proceedings to enforce the judgment or order appealed from pending an appeal upon finding that the appeal is not frivolous, not taken for purposes of delay and that the interest of justice requires a stay of enforcement.

Either court may vacate, limit or modify the stay for good cause during the pendency of the appeal. A motion to vacate, limit, or modify the stay shall be filed and determined in the court that last rendered any order concerning the stay subject to review by any higher court.

Any order granting, limiting, or modifying a stay must provide sufficient conditions for the continuing security of the adverse party to preserve the status quo and the effectiveness of the judgment or order appealed from, and may require a partial or reduced supersedeas bond.

COMMENT: This is a new rule that was recommended by the Committee on Administration of Justice.

81

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

April 14, 1986

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

Dear Judge Thomas:

Enclosed is a letter from Michael D. Schattman regarding consideration of a new rule relative to clients and cases that have been abandoned by their attorneys. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
(817) 877-2715

December 4, 1985

Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248 Capitol Station
Austin, Texas 78711

Re: Rules of Civil Procedure

Dear Justice Wallace:

Enclosed is a copy of a year-old memo. It generated no activity from the bar. However, I think that we need to have some kind of mechanism for dealing with cases that lawyers abandon due to illness or withdrawal from practice.

I hesitate to wait for the Legislature to act and the Disciplinary Rules are not the place for it. That leaves me thinking that the subject could be covered thoroughly and without controversy in the Rules of Civil Procedure. I will broach the subject with the Committee on the Administration of Justice, but it would be nice to get some guidance "from above."

Very truly yours,

Michael D. Schattman

MDS/lw

xc with encl.: Luther H. Soules, III
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Bldg.
San Antonio, Texas 78205

Michael T. Gallagher
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, Texas 77010

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281

January 12, 1984

Honorable Charles Murray
Presiding Judge
8th Administrative District

Dear Judge:

I have some cases in which Marshall Gilmore is attorney of record. I understand he has moved to "Oregon" and given up the practice of law. Apparently, he made no prior arrangements for anyone to succeed him or to take over his practice. David Whaley is attempting to facilitate his withdrawal in some cases and, I assume, will replace him for a particular client. That does not solve the problem of what to do about the clients and cases of an attorney (especially a sole practitioner) who abandons his practice or becomes disabled mentally or physically (as with Larry Parnass of Irving).

This would seem to be an appropriate area for rules to be adopted as part of our local practice until the Supremes can be persuaded to fashion a set themselves. I do not know whether the Tarrant County Board of District Judges should attempt this or whether it should be attempted for the whole Administrative District or, frankly, whether anyone cares. However, I do think it would be useful for us to discuss it and get some local bar participation.

Very truly yours,

Mike

Michael D. Schattman

MDS/lw

xc: Honorable Harold Valderas, Chmn., Board of District Judges
Allan Howeth, Pres., Tarrant County Bar Assoc.
James B. Barlow, Pres.-Elect, Tarrant County Bar Assoc.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 9, 1984

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & CLiffe
1235 Milam Building
San Antonio, Texas 78205

Dear Luke:

In studying the amendments to Rules 28 through 89 in conjunction with the newly amended Article 1995, I find what appears to be a void in our rules. The problem is:

> Plaintiff files suit in Travis County against D-1, D-2, and D-3. D-1 files a motion to transfer to a county of mandatory venue, D-2 and D-3 file no motion to transfer. Must venue as to D-2 and D-3 remain in Travis County, or can the plaintiff request the trial judge to transfer the entire suit.

It appears that we just did not adequately consider the various problems that can arise with multiple defendants when we amended the rules. This, of course, was due to the very short time frame within which we had to get the rules amended and published in order to become effective on September 1, when the new statute became effective.

I feel that we should address this problem and therefore ask that it be put on the agenda for your next meeting.

Sincerely,

James P. Wallace
Justice

00000217

JPW:fw

LAW OFFICES OF
GREEN & KAUFMAN, INC.
800 ALAMO NATIONAL BUILDING
SAN ANTONIO, TEXAS 78205

HUBERT W. GREEN
JACK H. KAUFMAN
MICHAEL L. McREYNOLDS
JOHN T. REYNOLDS
PAUL W. GREEN
ROBERT W. LOREE
BRYAN D. WRIGHT
DAVID W. GREEN

TELEPHONE
AREA CODE 512
225 6545

February 10, 1984

Hendricks Hosp. vs. Howell

Mr. R. Doak Bishop
1000 Mercantile Dallas Bldg.
Dallas, Texas 75201

RE: COMMITTEE ON ADMINISTRATION OF JUSTICE, RULE 87, ETC. (VENUE RULES)

Dear Doak:

Thank you for your letter of January 12 and attachment, suggesting certain modifications to new Rule 87.

In this respect I forward to you and your cohorts letter dated January 9 from Judge James P. Wallace raising problems concerning the new venue rules.

Please give this your additional consideration and any advice or suggestions your subcommittee may have concerning the multiple defendant situation.

Yours very truly,

HUBERT W. GREEN

HWG:hcb

Encl.

cc: Hon. James P. Wallace ✓
Mr. William V. Dorsaneo III
Mr. Michael A. Hatchell
Ms. Evelyn Avent

ROY L. COLE
H. SAM DAVIS, JR.
WAYNE PEARSON
JAMES H. HOLMES III
GREGORY E. JENSEN
ROBERT F. BEGERT
MICHAEL S. HOLLOWAY
JEB LOVELESS
STEPHEN N. WAKEFIELD
LARRY HALLMAN
DAVID M. WEAVER
JAMES M. STEWART
JOANN N. WILKINS
J. TRUSCOTT JONES

BURFORD & RYBURN
ATTORNEYS AND COUNSELORS AT LAW
1511 FIDELITY UNION LIFE BUILDING
DALLAS, TEXAS 75201
214/720-3911

FRANK M. RYBURN, JR.
SAM P. BURFORD
OF COUNSEL

September 19, 1985

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Re: Rule 87 - June 1984 Meeting of
Administration of Justice Committee

Dear Luke:

After our recent committee meeting on Saturday in Austin, we discussed the status of the amendment to Rule 87 which was passed by the Administration of Justice Committee at its June 1984 meeting. What I left with you was my copy of the minutes from that meeting which set forth the recommended changes of the committee and which I understood was forwarded on to your committee for review.

If the changes which were recommended are adopted, the problems raised in the case styled Hendrick Medical Center v. Howell, 690 S.W.2d 42, would be allieviated. I am enclosing a copy of that opinion for your review.

I trust that you can determine the status of the recommended changes. If they have been lost somewhere in the "shuffle", I will be happy to write a letter to Mike Gallagher asking that consideration be again given to changes of Rule 87 to meet the problems in the Hendrick case.

Many thanks for your consideration, and I look forward to working with you in the future. Kindest personal regards.

Very truly yours,

BURFORD & RYBURN

James H. Holmes, III

JHH:ko
Enclosure

immunity from liability for death, personal injury, or property damages resulting from the use of a publicly owned automobile. It also waives immunity from liability for death or personal injuries growing out of premise defects, and injuries arising out of some condition or use of property. *Duhart*, 610 S.W.2d at 742. Appellant's cause of action is not covered by the Texas Tort Claims Act. Point of error one is overruled.

Appellant's second point of error brings to our attention the ambiguous summary judgment order in which the State of Texas, and Hunnicutt in his official capacity, are dismissed. That order provides:

> It is, THEREFORE, ORDERED that the State of Texas be dismissed from this cause of action, and that Plaintiff amend his petition to delete all references to the State of Texas or to an official of the State of Texas as a party of Defendant herein within twenty days of this order.

On the same day the State's summary judgment was granted, the court denied Hunnicutt's motion for summary judgment. Taking the two orders together, it appears the trial judge meant for Hunnicutt in his individual capacity to remain in the suit. As already discussed, we find that the trial court did not err in dismissing the State from the lawsuit.

[5] Since the summary judgment order dismissing the State of Texas does not make it clear that Hunnicutt remains in the suit in an individual capacity, we find it necessary to modify the second paragraph of the order to read:

> It is, THEREFORE, ORDERED that the State of Texas be dismissed from this cause of action, and that Plaintiff amend his petition to delete all references to the State of Texas and to J.R. Hunnicutt in his capacity as an official of the State of Texas, as party defendants within twenty days of this order.

Accordingly, the judgment of the trial court is affirmed as modified.

HENDRICK MEDICAL CENTER and Howard Tobin, M.D., Relators,

v.

The Honorable Charles Ben HOWELL, Respondent.

No. 05-84-01349-CV.

Court of Appeals of Texas, Dallas.

March 11, 1985.

Rehearing Denied April 9, 1985.

Defendants in personal injury action brought original proceeding seeking to direct a judge to transfer a cause to court in another county alleging that venue had been conclusively established as a result of prior order of transfer, despite subsequent nonsuit taken by plaintiffs. The Court of Appeals, Akin, J., held that: (1) determination of venue, prior to nonsuit and refiling of action in another county, was conclusive as to venue, but (2) mandamus did not lie since adequate legal remedy was available and contrary result would be, in effect, an interlocutory appeal venue determination.

Writ will not issue.

1. Courts ⇐99(3)

Statute contemplates only one venue determination in a cause of action, once venue has been determined, that determination is conclusive in subsequent refiling after nonsuit of the same cause of action against the same parties. Vernon's Ann. Texas Rules Civ.Proc., Rule 87; Vernon's Ann.Texas Civ.St. art. 1995.

2. Courts ⇐99(3)

Where venue of action had been determined after hearing, plaintiffs could not avoid this result by voluntarily nonsuiting the action and refiling it in another county, since contrary result would be to circumvent legislator's intent that there be only

one venue determination. Vernon's Ann. Texas Rules Civ.Proc., Rule 87; Vernon's Ann.Texas Civ.St. art. 1995.

3. Mandamus ⇐4(1)

Mandamus did not lie to compel transfer of cause to county which had been determined to be the proper venue, prior to voluntary nonsuit and refiling the cause in another county, since the remedy of challenge to venue on appeal was not inadequate and a contrary result would circumvent legislative intent that there be no interlocutory appeal from a venue determination; declining to follow *Ramcon Corp. v. American Steel Building Co.*, 668 S.W.2d 459, Vernon's Ann.Texas Civ.St. art. 1995, § 4(d)(1, 2).

James H. Holmes, III, Joann N. Wilkins, Burford & Ryburn, Dallas, J.M. Lee, Fort Worth, for relators.

C.L. Mike Schmidt, Stradley, Schmidt, Stephens & Wright, Paul W. Pearson, Dallas, Pete Baker, Abilene, Fred E. Davis, Austin, Sidney H. Davis, Jr., Dallas, Stephen H. Suttle, Abilene, Jim Cowles, Cowles, Sorrells, Patterson & Thompson, Dallas, for respondent.

Before AKIN, GUILLOT, and DEVANY, JJ.

AKIN, Justice.

In this original proceeding relators, Hendrick Medical Center and Howard Tobin, M.D., seek a writ of mandamus directing respondent, Hon. Charles Ben Howell, Judge of the 191st Judicial District Court, to transfer a cause pending in respondent's court to a district court in Jones County. Relators contend that venue in the cause at issue has been conclusively established in Jones County as a result of a prior order of transfer and subsequent nonsuit taken by Priscilla G. Ratliff and David Ratliff, real parties in interest in this original proceeding. We agree with relators that venue was conclusively established in Jones County because there can be but one venue hearing. We decline, however, to issue the writ of mandamus because an adequate remedy at law is available to relators by raising the venue question on an appeal after a trial on the merits.

The Ratliffs brought a personal injury action against relators and others in the 136th District Court of Jefferson County. Relators filed their respective motions to transfer, alleging that venue was improper in Jefferson County and requesting transfer to one of several counties of allegedly proper venue. These motions were challenged by the Ratliffs. After a venue hearing, the judge of the Jefferson County district court ordered the cause transferred to a district court in Jones County. Subsequent to docketing of the cause in Jones County, the Ratliffs filed a motion to dismiss. The motion was granted and the cause dismissed without prejudice.

The Ratliffs thereafter filed a suit in Dallas County alleging the same causes of action pleaded in the first suit. The named defendants, who did not include relators, filed motions to transfer. Respondent overruled these motions, holding venue to be proper in Dallas County. The Ratliffs, subsequent to respondent's determination of venue, amended their original petition and named relators as defendants. Relators filed motions to transfer, which were overruled by respondent on the ground that the similar motions of relator's co-defendants had already been heard and ruled upon and that TEX.R.CIV.P. 87(5) prohibited a second venue hearing. Relators then instituted this original proceeding seeking a writ of mandamus compelling respondent to transfer the cause to Jones County.

[1, 2] Relators contend that, as a result of the Jefferson County judge's venue determination in the first suit, venue in the second suit has been conclusively established in Jones County. We begin our consideration of this contention at its logical starting point, the pertinent provisions of the amended venue statute, TEX.REV.CIV.STAT.ANN. art. 1995, § 4 (Vernon Supp. 1985):

(d) Hearings. (1) In all venue hearings, no factual proof concerning the merits of

the case shall be required to establish venue; the court shall determine venue questions from the pleadings and affidavits. *No interlocutory appeal shall lie from such determination.*

(2) On appeal from the trial on the merits, if venue was improper it shall in no event be harmless error and shall be reversible error. In determining whether venue was or was not proper the appellate court shall consider the entire record, including the trial on the merits. [Emphasis added].

Additionally, we find instructive TEX.R. CIV.P. 87, promulgated by the supreme court to conform to amended article 1995, entitled "Determination of Motion to Transfer:"

5. No Rehearing. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then *no further motions to transfer shall be considered regardless of whether the movant was a party to the proper proceedings or was added as a party subsequent to the venue proceedings,* unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

6. *There shall be no interlocutory appeals from such determination.* [Emphasis added].

It is apparent, in light of rule 87, that article 1995 contemplates only one venue determination in a cause of action, and we so hold. Permitting a plaintiff to avoid being bound by a venue determination simply by nonsuiting and subsequently refiling the same cause of action against the same parties in a county other than that in which venue was determined to be proper would, in effect, circumvent the legislature's intent that there be only one venue determination in a cause of action. Accordingly, we hold that once a venue determination has been made in a cause, that determination is conclusive in a subsequent refiling after nonsuit of the same cause of action against the same parties. Consequently, venue in the second suit filed by the Ratliffs has been conclusively determined to lie in Jones County as a result of the Jefferson County judge's venue determination in the first suit.

To hold to the contrary would not only contravene legislative intent but would permit a plaintiff to nonsuit-and-refile his way through Texas' 254 counties until he obtained a venue determination to his liking. This would result in an enormous waste of judicial resources and would force defendants to bear the onerous burden of responding in a different county each time plaintiff refiled his action. Such a situation was not intended by the legislature and was prevented from occurring under the old plea of privilege practice pursuant to pre-amendment article 1995 by judicial imposition of a "*res judicata*" rule.[1] According to this rule, when a plea of privilege was sustained and a cause transferred pursuant thereto, a nonsuit filed by the plaintiff became *res judicata* as to venue if he asserted the same cause of action against the defendant in a subsequent suit. *Wichita Falls & S.R. Co. v. McDonald,* 141 Tex. 555, 174 S.W.2d 951, 952 (1943); *H.H. Watson Co. v. Cobb Grain Co.,* 292 S.W. 174, 177 (Tex.Comm'n App.1927); *Poynor v. Bowie Independent School District,* 627 S.W.2d 517, 519 (Tex.App.—Fort Worth

1. [I]t is well to be mindful in plea of privilege cases that it is not strictly accurate to speak in terms of *res judicata* in instances where plaintiff takes a nonsuit before judgment, for the doctrine normally applies only when there has been a final judgment upon the merits of the matter concluded. Courts do so speak of it as a matter of convenience though the application of pertinent rules are really grounded upon a principle of policy.... *Southwestern Investment Co. v. Gibson,* 372 S.W.2d 754, 757 (Tex.Civ.App.—Fort Worth 1963, no writ).

1982, writ dism'd). Although we need not decide whether this rule is still viable under the current version of article 1995,[2] we find persuasive the rationale underlying the rule. The *res judicata* rule was adopted to prevent defendants from being subjected to the harassment and expense of presenting their venue claims in a number of successive forums as a consequence of a plaintiff's nonsuiting and subsequent refiling of the same cause of action in different counties. *See First National Bank in Dallas v. Hannay*, 123 Tex. 203, 67 S.W.2d 215 (1933); *Joiner v. Stephens*, 457 S.W.2d 351, 352 (Tex.Civ.App.—El Paso 1970, no writ); *Southwestern Investment Co. v. Gibson*, 372 S.W.2d 754, 757 (Tex.Civ.App.—Fort Worth 1963, no writ). The legislative decision that there shall be but one venue determination in a cause of action protects defendants from a plaintiff's abuse of the nonsuit privilege, as did the *res judicata* rule.

Of course, our holding leaves a plaintiff's right to take a nonsuit undisturbed. Should a plaintiff choose, however, to exercise this right after a venue determination has been made, he does so at his own peril if the defendant brings the matter to the attention of the trial judge in the second suit by a motion to dismiss. If after nonsuit a plaintiff refiles the same cause of action against the same parties in a county other than that designated in the first suit as one of proper venue, the defendant may move to dismiss the second suit and, if that motion is overruled, may complain on appeal from trial on the merits in the second suit that venue in the second suit was improper because venue of the cause had already been conclusively determined in the first suit. Such a complaint requires automatic reversal of the judgment if the appellate court concludes that the district court in the first suit correctly decided the venue question. TEX.REV.CIV.STAT.ANN. art. 1995, § 4(d)(2) (Vernon Supp.1985). Similarly, a plaintiff who believes that a venue determination has been incorrectly made may challenge that determination on appeal from trial on the merits, but not after voluntary dismissal of the first suit. For example, if the Ratliffs had tried this cause in Jones County, they could have tested the Jefferson County District Judge's venue ruling in an appeal from a judgment on the merits.

[3] Having held that a venue determination in the first suit is conclusive in a subsequent refiling after nonsuit of the same cause of action against the same parties, we turn to the question of whether mandamus lies to compel respondent to transfer the cause filed by the Ratliffs in Dallas County to Jones County. We hold that mandamus will not lie.[3]

Ordinarily mandamus does not lie if another remedy is available and adequate. *State v. Archer*, 163 Tex. 234, 353 S.W.2d 841 (1962); *Brazos River Conservation District v. Belcher*, 139 Tex. 368, 163 S.W.2d 183 (1942). In the situation at hand, such a remedy is available. Section 4(d)(2) of amended article 1995 expressly provides that a litigant who establishes on appeal that an improper venue determination was made in the court below is entitled to reversal of the judgment. Neither the delay in obtaining relief nor the added costs of a trial and of the appellate process makes this remedy inadequate. *See Ilcy v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 652 (1958).

Additionally, we note that section 4(d)(1) of amended article 1995 expressly provides that "[n]o interlocutory appeal shall lie" from a venue determination. To accede to relator's request for issuance of the writ of mandamus would be to allow what, in effect, amounts to an interlocutory appeal of the Jefferson County court's venue deter-

2. We need not address this question because we base our holding upon the pertinent provisions of amended article 1995 rather than upon the *res judicata* rule itself.

3. We note that our holding conflicts with dicta in an opinion of the El Paso Court of Appeals indicating that mandamus would lie in such a situation. *See Ramcon Corp. v. American Steel Building Co.*, 668 S.W.2d 459, 461 (Tex.App.—El Paso 1984, no writ).

mination, albeit in the guise of an original proceeding, despite a clear statutory directive to the contrary. This we decline to do.

Accordingly, the writ will not issue.

Clarence LaGUARDIA, et al., Appellants,

v.

Raymond F. SNODDY, Appellee.

No. 05-84-00067-CV.

Court of Appeals of Texas, Dallas.

March 20, 1985.

Rehearing Denied April 15, 1985.

Individual who claimed to have acted as a real estate broker in sale of apartment buildings brought action against vendors for commission allegedly due him. Vendors counterclaimed seeking penalties which statute allows to be recovered from one who has performed brokerage services without first obtaining a real estate license. The 160th District Court, Dallas County, Lenoard Hoffman, J., entered judgment denying counterclaim and rendered judgment non obstante veredicto for broker on his action for commission, and vendors appealed. The Court of Appeals, Akin, J., held that: (1) record supported finding that broker was entitled to commission, and (2) record was not sufficient to allow award of penalties against either broker or the corporation of which he was president.

Affirmed.

1. The Honorable Quentin Keith, Justice, Ninth Supreme Judicial District, retired, sitting by assignment.

1. Brokers ⇐42

Strict compliance with statute requiring persons who perform real estate brokerage services to be licensed is required of anyone using the courts to recover compensation for performing such services. Vernon's Ann.Texas Civ.St. art. 6573, § 20(a).

2. Brokers ⇐86(1)

In action to recover real estate commission for services rendered in sale of apartment building, testimony of individual that he was licensed at the requisite time and performed services upon which action for commissions was based was sufficient to allow recovery. Vernon's Ann.Texas Civ.St. art. 6573, § 20(a).

3. Brokers ⇐3

In order to recover penalties from individual performing real estate brokerage services without license, claimant is required to establish: that party from whom penalties are sought has received money or equivalent thereof as commission or compensation, that money or its equivalent was received as consequence of violation of the act, and that claimant is an aggrieved party under the act. Vernon's Ann.Texas Civ.St. art. 6573, § 19(a, b).

4. Brokers ⇐3

Where record was inconclusive as to who actually received monies paid as real estate commission, vendors of apartment building could not obtain statutory penalties recoverable from those who engage in real estate transactions without license. Vernon's Ann.Texas Civ.St. art. 6573, § 19(a, b).

Peter J. Harry, Daniel P. Donovan, Dallas, for appellants.

Bill Kuhn, Dallas, for appellee.

Before AKIN, DEVANY, and KEITH, JJ.[1]

February 16, 1984

Hubert W. Green, Esquire
Green & Kaufman, Inc.
800 Alamo National Building
San Antonio, Texas 78205

Re: Rule 87

Dear Hubert,

I have reviewed Judge Wallace's letter of January 9, 1984. He is right that neither the amended venue statute nor the amended rules address this question with any clarity. Rule 89's third sentence touches upon the issue but doesn't do so very clearly.

We did consider the matter when the drafts of the amended rules were being circulated. But as in the case of several other matters (effect of plaintiff's nonsuit; fraudulent joinder to confer venue), we did not draft a provision to deal with the issue.

I agree with Judge Wallace that this issue should be addressed by a provision in the rules because the current state of the law is unsatisfactory. Prior to the amendment of the venue statute, the cases on the subject basically provided the following answer to Judge Wallace's question.

> "The rule seems to be that, where one of several defendants files a plea of privilege to be sued in the county of his residence, and the plea is sustained, if the cause of action is a joint action growing out of joint liability of all of the defendants, the suit must be transferred in its entirety to the county of the residence of the defendant whose plea is sustained. On the other hand, if the cause of action against several defendants is severable, or joint and several, the court should retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained, and should transfer the suit in so far as it concerns the defendant whose plea is sustained."

The above quotation is set forth in the Texas Supreme Court's opinion in International Harvester Co. v. Stedman, 59 Tex. 593, 324

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S.W.2d 543 (1959) quoting Johnson v. First National Bank, 42 S.W.2d 870 (Tex. Civ. App. - Waco 1931, no writ). Since a literal application of the test ordinarily would require a division of the case (i.e., there are very few instances where defendants are only jointly liable rather than jointly and severally liable), the courts have on occasion mouthed the test but have actually applied a more practical principle. See e.g. Geophysical Data Processing Center, Inc. v. Cruz, 576 S.W.2d 666 (Tex. Civ. App. - Beaumont 1978, no writ) - applying test that when relief sought is "so interwoven" that case should not be split up, entire case should be transferred.

My own view is that judicial economy would be better served by not transferring part of the case, assuming the requirements of Rule 40 have been satisfied in the first place, i.e. assuming that the claims against multiple defendants have arisen from the same transaction or occurrence or series of transactions or occurrences.

Once this matter is voted upon by the Committee, it will not be a difficult matter to draft a provision for inclusion in either Rule 87 or perhaps Rule 89.

Best regards,

William V. Dorsaneo, III

WVD,III:cr

cc: Hon. James P. Wallace
Mr. Doak R. Bishop
Mr. Michael A. Hatchell
Ms. Evelyn Avent

is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within thirty (30) days after written notice by the clerk. Exhibits not so removed will be disposed of by the clerk in any convenient manner and any expense incurred taxed against the offering party without notice.

Exhibits which are determined by the Judge to be of a special nature, so as to make it improper for them to be withdrawn, shall be retained in the custody of the clerk pending disposition on order of the court.

→ NOTE: Kreager offered another amendment - get this from the tape.

c. Proposed Rule. Parties Responsible for Accounting of own Costs

This proposal by Mr. Jones was deferred until the next meeting of the committee.

d. Proposed Rule. Documents not to be Filed

This proposal by Mr. Jones was also deferred until the next meeting of the committee.

e. Rule 264

The following proposal by Mr. Clarkson was approved:

Rule 264. Videotape Trial.

By agreement of the parties, the trial court may allow that any testimony agreed by the parties and such other evidence as may be appropriate be presented at trial by videotape. The expenses of such videotape recordings shall be taxed as costs. If any party withdraws agreement to a videotape trial, the videotape costs that have accrued will be taxed against the party withdrawing from the agreement.

R87→ f. Rule 87

Following report by William Dorsaneo and discussion the committee approved Rule 87 as follows:

Rule 87. Determiniation of Motion to Transfer

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits 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. ~~but~~ When the claimant's venue venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading ~~that the cause of action or a part thereof, accrued in the county of suit~~ by prima facie proof, as provided in paragraph 3 of this rule, that the cause of action, ~~or a part thereof, arose or accrued in the county of suit~~. 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 defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

5. ~~No Rehearing~~. Additional Motions. If a motion to transfer is overruled and the suit retained in the county of suit or if a motion to transfer is sustained and the suit is transferred to another county, no additional motion to transfer may be made by a party whose motion was overruled or sustained except on grounds that an impartial trial cannot be had under Rules 257-259.

A subsequently-joined party may not file a motion to transfer based on venue grounds previously raised by another party, but such subsequently-joined party may complain on appeal of improper venue based upon grounds previously raised in the motion to transfer of another party.

No motion for rehearing of a venue ruling shall be required, but nothing in this rule shall prevent the trial court from considering the motion of a subsequently-joined party or reconsidering an order overruling a motion to transfer.

(Present Section 5 deleted in entirety.)

g. Rule 680

Judge Thurmond stated that the subcommittee felt this was a problem in the family law area and that the Family Law Section should handle this matter through legislation. Mr. Green suggested that the matter be carried over to the new Bar year.

h. Rule 272

Mr. Kreager said the subcommittee felt this Rule needed study. A MOTION was made, seconded and ADOPTED to carry the item over to the new Bar year.

There being no further business the meeting was adjourned.

Rule 87. Determination of Motion to Transfer Sara Bishop

. . . . .

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits 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. ~~but~~ When the claimant's venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading that the cause of action, or a part thereof, arose or accrued in the county of suit by prima facie proof as provided in paragraph 3 of this rule. 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 defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

. . . . .

5. ~~No Rehearing~~. No Additional Motions. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no further additional motions to transfer by a movant who was a party to the prior proceedings shall be considered, ~~regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings~~;

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unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was previously not available to the movant or to the other movant or movants. In addition, if venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then a motion to transfer by a party added subsequent to the venue proceedings may be filed but not considered, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not made by the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

Rule 87. Determination of Motion to Transfer

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits 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. ~~but~~ When the claimant's venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading ~~that the cause of action or a part thereof, accrued in the county of suit~~ by prima facie proof, as provided in paragraph 3 of this rule, that the cause of action, or a part thereof, arose or accrued in the county of suit. 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 defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

5. ~~No Rehearing~~. No Additional Motions. If a motion to transfer is overruled and the suit retained in the county of suit or if a motion to transfer is sustained and the suit is transferred to another county, no additional motion to transfer may be made by a party whose motion was overruled or sustained except on grounds that an impartial trial cannot be had under Rules 257-259.

No motion to transfer may be granted a party who is joined subsequent to the ruling on a motion or motions to transfer, unless based on the ground that an impartial trial cannot be had under Rules 257-259 or upon a mandatory venue exception, and a subsequently-joined party may file a motion to transfer based upon such grounds. A subsequently-joined party may not file a motion to transfer based upon venue grounds previously raised by another party, but such subsequently-joined party may complain on appeal of improper venue based upon grounds previously raised in the motion to transfer of another party.

Nothing in this rule shall prevent the trial court from reconsidering an order overruling a motion to transfer.

~~5.--No-Rehearing.--If-venue-has-been-sustained-as-against-a motion-to-transfer,-or-if-an-action-has-been-transferred-to-a proper-county-in-response-to-a-motion-to-transfer,-then-no-further motions-to-transfer-shall-be-considered-regardless-of-whether-the movant-was-a-party-to-the-prior-proceedings-or-was-added-as-a party-subsequent-to-the-venue-proceedings,-unless-the-motion-to transfer-is-based-on-the-grounds-that-an-impartial-trial-cannot-be had-under-Rules-257-259-or-on-the-ground-of-mandatory-venue, provided-that-such-claim-was-not-available-to-the-other-movant or-movants.~~

~~Parties-who-are-added-subsequently-to-an-action-and-are precluded-by-this-rule-from-having-a-motion-to-transfer considered-may-raise-the-propriety-of-venue-on-appeal,-provided that-the-party-has-timely-filed-a-motion-to-transfer.~~

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February 9, 1984

Mike Hatchell
Ramey, Flock, Hutchins, Jeffus,
McClendon & Crawford
P. O. Box 629
Tyler, Texas 75710

Professor William Dorsaneo
SMU School of Law
Dallas, Texas 75275

Gentlemen:

Enclosed is a new draft of proposed revisions to Rule 67. These changes were prompted by Mike's recent letter regarding the first draft. I believe that this new draft will satisfy our mandate, subject to one question: Should the whole concept of paragraph 5 be revised? The modifications embodied in this draft are primarily technical clarifications with only minor substantive changes.

Please give me your comments as soon as possible.

Respectfully,

R. Doak Bishop

RDB/bsl

Enclosure

cc: Ms. Evelyn Avent
Hubert Green, Esq.

Rule 87. Determination of Motion to Transfer

. . . . .

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits 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. ~~but~~ When the claimant's venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading ~~that-the-cause-of action, or a part thereof, accrued in-the-county-of-suit~~ by prima facie proof, as provided in paragraph 3 of this rule, that the cause of action, or a part thereof, arose or accrued in the county of suit. 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 defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

. . . . .

5. ~~No Rehearing~~. No Additional Motions. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no ~~further~~ additional motions to transfer by a movant who was a party when the prior motion to transfer was ruled upon shall be considered ~~regardless of whether the movant was a party to the~~

prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was previously not available to the movant or to the other movant or movants. In addition, if venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then a motion to transfer by a party added subsequent to the ruling on another party's motion to transfer may be filed as a prerequisite to an appeal, but it shall be considered as overruled by operation of law upon filing, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not made by the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

99

LAW OFFICES

SOULES & REED

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TELEPHONE
(512) 224-9144

April 14,1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 99, 106, 107, 145, and 215. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Tina — transmit ltr to Stdg SCAC subC.
J

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 11, 1986

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Re: Rules 99, 103, 106 and 107.

Dear Mike and Luke:

I am enclosing suggested revisions to the above rules from Mr. Charles R. Griggs of Sweetwater.

May I suggest that these matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Charles R. Griggs
Nunn, Griggs, Wetsel & Jones
Doscher Building
Sweetwater, Texas 79556-0488

00000237

NUNN, GRIGGS, WETSEL & JONES

LAWYERS

CHAS. L. NUNN
CHAS. R. GRIGGS
ROD E. WETSEL
C. E. JONES

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March 10, 1986

The Honorable John Cornyn
37th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Mr. Phillip Johnson
Attorney at Law
10th Floor, First National Bank Building
Lubbock, Texas 79408

Gentlemen:

At the last meeting of the Committee on Administration of Justice, the full Committee apparently approved the suggested revision of the rule permitting service by mail. The Committee further indicated that the matter should be voted on at the next regular meeting, which will be early in April.

To each of you, I enclose a suggested revision of Rules 99, 103, 106 and 107. I have called to Bar Headquarters to secure the necessary form for submitting these changes to Committee action but with Evelyn gone, no one seemed to know what I was talking about. In any case, I submit the proposed rule changes to you for your comments and suggestions. I will try to have the proposed changes in proper form at an early date so, if you think there should be any changes, please let me hear from you as soon as possible.

Sincerely,

Charles R. Griggs

CRG:bl
Enclosure
cc: The Honorable James Wallace
Associate Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

00000238

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

A
B RULE 99. ISSUANCE
C
D When a petition is filed with the clerk, he shall promptly
E issue such citations, for the defendant or defendants, as shall
F be requested by any party or his attorney.
G
H
I
J
K
L
M
N
O
P
Q
R END OF EXISTING RULE 99

II. Proposed Rule: (Mark through deletions to existing rule with dasnes or put in parentnesis; underline proposed new wording; see example attached).

1
2
3
4 RULE 99. ISSUANCE
5
6 When a petition is filed with the clerk, he shall promptly
7 be requested by any party or his attorney. Such citations shall
8 be delivered to the plaintiff or the plaintiff's attorney, or
9 those persons responsible for service as set forth in these
10 Rules, as shall be requested by the plaintiff or the plaintiff's
11 attorney.
12
13
14
15
16
17
18
19
20
21
etc. END OF PROPOSED RULE 99

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted, 00000239

Date _____ 197__

_____ Name

_____

_____ Address

RULE 99. ISSUANCE

When a petition is filed with the clerk, he shall promptly issue such citations, for the defendant or defendants, as shall be requested by any party or his attorney. Such citations shall be delivered to the plaintiff or the plaintiff's attorney, or those persons responsible for service as set forth in these Rules, as shall be requested by the plaintiff or the plaintiff's attorney.

~~RULE 103, OFFICER WHO MAY SERVE.~~

RULE 103, OFFICER OR PERSON WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [~~or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found~~]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [~~Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.~~] Service of citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

(1) delivering to the defendant, in person, by a sheriff or constable referred to in Rule 103, 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.~~]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

September 18, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
70th Fl., Allied Bank Plaza
Houston, TX 77002

Re: Rule 101

Dear Luke and Mike:

I am enclosing a letter in regard to the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

00000241

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON
ATTORNEYS AT LAW
12 NORTH ABE
P. O. DRAWER 911
SAN ANGELO, TEXAS 76902-0911

RALPH LOGAN (1913-1983)
TOM LEAR
GREG GOSSETT
GEORGE W. HARRISON
MORRIS M. REESE, JR.
CLYDE WILSON
JONATHAN R. DAVIS

TELEPHONE (915) 655-3291

September 12, 1985

Honorable John Hill, Chief Justice
Texas Supreme Court
Supreme Court Building
Austin, Texas 78711

Re: Proposal of Amendment to the Texas Rules of Court

Dear Chief Justice Hill:

I would like to propose a change in the requisites for citation as set out in Rule 101 of the Texas Rules of Civil Procedure. Presently our citation has required the defendant "to appear by filing a written answer to plaintiff's petition at or before ten o'clock A.M. of the Monday next after the expiration of 20 days after the date of service thereof."

My objection to this anachronism is two-fold. First, the computation of the answer day can sometimes be confusing, particularly if the twentieth day falls on Monday or the Monday is a holiday. Secondly, often intelligent clients assume that they must appear in court at ten o'clock on the answer day and are confused by this terminology. Why not provide that an answer must be filed within a definite time, such as 20 days as required in federal court?

In this age of fair notice and consumer protection I would also suggest that citation might contain some simple statement to the recipient, such as: You have been sued. You have a right to retain an attorney. If you do not file a written answer with the appropriate court within the appropriate time, a default judgment may be taken against you.

Your consideration to the above will be greatly appreciated.

With warmest regards, I remain

Very truly yours,

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON

Greg Gossett

GG:lt

00000242

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(409) 245-1122

January 14, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 103 and 106, submitted by Mr. Guillermo Vega, Jr. and Honorable Menton Murray, Jr. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 9, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 103 and Rule 106

Dear Luke and Mike:

I am enclosing a letter from Guillermo Vega of Brownsville, in regard to the above rules.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Guillermo Vega, Jr.
Attorney at Law
P. O. Box 1911

00000244

Guillermo Vega, Jr.
Attorney at Law

546-5573

P.O. Box 1911
Brownsville, Texas 78520

December 13, 1985

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

RE: Rule 103 and Rule 106

Gentlemen:

I would like to petition the Supreme Court to change Rule 103 and Rule 106 to read as follows:

Anyone who is of the age of 18 and over and competent to testify and is not a party to the suit is allowed to serve civil process.

A private party or process serving company can be appointed by a Motion and Order to serve Civil Process within the state of Texas.

Thank You.

Respectfully,

Guillermo Vega, Jr.
Attorney at Law

GV/lt

00000245

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 9, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Civil Process Servers

Dear Luke and Mike:

I am enclosing a letter from Judge Menton Murray, Jr., of Brownsville, regarding civil process servers.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Menton Murray, Jr.
District Judge
357th District Court
974 E. Harrison
Brownsville, Tx 78520

00000246

THREE HUNDRED FIFTY SEVENTH DISTRICT COURT

STATE OF TEXAS

MENTON MURRAY, JR.
DISTRICT JUDGE
CAMERON COUNTY COURTHOUSE
974 E. HARRISON
BROWNSVILLE, TEXAS 78520
512-544-0837

December 3, 1985

Rules Committee
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

RE: CIVIL PROCESS SERVERS

Dear Sirs:

I am sure that you have received substantial comment regarding the fall out from recent Court of Appeals decisions relating to the validity of service by Civil Process Servers. I am not here to quarrel with these rulings as they appear to be in compliance with the existing rules. I am suggesting that it is time to change those rules.

For several years we in Cameron County have gotten along nicely with process being served by private civil process servers. The attorneys, to a great extent, have used the private service rather than the Sheriff's Office or the Constables for obvious market place reasoning that they have gotten better service privately than through the various elected officials. I recognize that service of civil process is a potential money maker for the county which could more than offset the cost of providing the manpower to properly give such service. Notwithstanding, public process serving has lagged substantially behind private process serving in this county for several years. I have my suspicions as to the reasons for this but they are somewhat conjectural on my part. Suffice it to say that we are not really set up in this county to adequately provide for all of the necessary service of process on a basis nearly so prompt as that provided by civil process servers in the private sector. I do not see any reason why the various factors that have contributed to this situation are going to change in the forseeable future.

While I am not particularly tied to any specific rule change, I would generally endorse any reasonable change which would allow private civil process serving either with or without prior court approval. I do not object to having to approve private service of process and I certainly do not suggest that the public sector should be excluded from the service of process. I merely suggest that the option be available to the court and the litigants to use either of the two.

I recognize that there must be some significant opposition to officially recognizing by rule a practice that has occurred throughout the state prior to the recent appellate decisions. I suspect that some type of compromise could be reached that would accommodate all parties. I know that the present state of the law which requires failure on the part of the public process server prior to the use of a private process server is totally unacceptable since failure on the part of the public process server takes too much time and seriously delays the prompt trial of cases, particularly those involving short notice periods such as temporary restraining orders, temporary injunctions and show-cause orders.

I hope that you will give prompt attention to this serious matter.

Yours very truly,

Menton Murray, Jr.
Judge

cc:
Eddie Gonzalez

103

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TELEPHONE
(512) 224-9144

February 10, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 103 and 106 submitted by Mr. Edward S. Hubbard; proposed change to Rule 106 submitted by Mr. Charles Griggs; proposed change to Rule 142 submitted by Wendell Loomis; proposed changes to Rules 205, 206-1 and 207 submitted by Charles Matthews. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

KENNEDY, BURLESON & HACKNEY
ATTORNEYS AT LAW
1600 FOUR ALLEN CENTER
HOUSTON, TEXAS 77002
(713) 951-0730

TELECOPIER (713) 951-9864

TELEX 353953

February 2, 1986

Honorable James P. Wallace
Supreme Court of Texas
P.O. Box 12248
Capital Station
Austin, Texas 78711

RE: Texas Association of Civil Process Server's Petition for Amending Rules 103 and 106 of the Texas Rules of Civil Procedure Pursuant to the Supreme Court's Rule-Making Authority Under §22.004 of the Texas Government Code

Dear Justice Wallace:

Enclosed please find for your review The Texas Association of Civil Process Server's Petition for Amending Rules 103 and 106 of the Texas Rules of Civil Procedure Pursuant to the Supreme Court's Rule-Making Authority Under §22.004 of the Texas Government Code.

We have also forwarded a copy of this petition to the Administrative Justice Committee and the Supreme Court Advisory Committee for its review.

After you have had the opportunity to review the petition, if you should have any questions and/or comments, please feel free to give me a call.

Very truly yours,

Edward S. Hubbard
For the Firm

ESH:kah
Enclosure
File No. 5072.00

cc: Mr. Edward Pankau
Texas Association of Civil
Process Servers

cc: Mr. Michael T. Gallagher
Chairman, Administrative Justice
Committee

cc: Mr. Luther H. Soules, III
Chairman, Supreme Court Advisory
Committee

#5072.00:CPH:kah:1/17/86:#k-15

TO:

The Texas Supreme Court

The Administrative Justice Committee
AND
The Supreme Court Advisory Committee

Petition for Amending Rules 103 and 106 of the Texas Rules of Civil Procedure Pursuant to the Supreme Court's Rule-Making Authority Under §22.004 of the Texas Government Code

KENNEDY, BURLESON & HACKNEY

BY: EDWARD S. HUBBARD
TBA#10131700
1600 Four Allen Center
Houston, Texas 77002
(713) 951-0730

Attorneys for The Texas Association of Civil Process Servers

5072.00:CPH:kah:1/17/86:#k-15

PETITION FOR AMENDING RULES 103 AND 106 OF THE TEXAS RULES OF CIVIL PROCEDURE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

NOW COMES THE TEXAS ASSOCIATION OF CIVIL PROCESS SERVERS, whose members are engaged in the business of private process service within the State of Texas, and petition this Court to amend Rules 103 and 106 of the Texas Rules of Civil Procedure, so as to allow for the alternative of private service of process in civil cases without first requiring such service to be attempted through Sheriffs, Constables or court clerks. In support of such petition, THE TEXAS ASSOCIATION OF CIVIL PROCESS SERVERS, provide the following arguments:

I.

JUDICIAL AND SOCIAL POLICY: THE NEED FOR CHANGE

There comes a time in the evolution and development of the laws of every jurisdiction when changes should be made in even the most enduring and traditional laws or policies. There are rules and customs logically and rationally founded that eventually become outdated or outweighed by practical considerations. Our State's judicial system has arrived at such a time for change in Rules 103 and 106 of the Texas Rules of Civil Procedure, which regulate service of process in civil cases.

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Limited budgets and increased needs for law enforcement are inherent in urban, and rapidly growing counties. The population of Texas continues to grow at a rapid pace, and the state now contains more than sixteen million inhabitants. [U.S. Dept. of Commerce Bureau of Census Estimates of the Resident Population of States, July 1, 1984 and 1985]. Constant growth has strained the ability of limited county budgets to provide for essential public services, while increasing the demands upon peace officers to provide adequate law enforcement to protect the public. More significantly, the urbanization of Texas will be a lasting cause of strained budgets and increased law enforcement requirements.

It is the mandatory duty of Sheriffs and Constables of Texas to serve all writs and processes directed or delivered to them by legal authority. TEX. REV. CIV. STAT. ANN. art. 6883 and 6885 (Vernon 1960). Sheriffs and Constables are required to attempt service of process before others may be allowed to attempt such service. TEX. REV. CIV. PROC. Rule 103, Rule 106. The limited county budgets and increased public safety responsibilites cause understaffed Sheriffs' and Constables' Departments. It has been proven that Sheriffs' and Constables' Departments can become so understaffed that they cannot meet all the needs of the public for which they have responsibility. As a result, service of process is not effected. See Garcia v. Gutierrez, 697 S.W.2d 758 (Tex. app. - Corpus Christi 1985, no writ); Lawyers Civil Process v. State Ex. Rel. Vines, 690 S.W.2d 939 (Tex. App. - Dallas 1985, no writ). The courts in those cases give strong indications that

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private process servers should be allowed to serve all process; however, the courts hands were tied since the rule-making authority on that matter rests with the Texas Supreme Court. Garcia v. Gutierrez, 697 S.W.2d at 759.

Texas has placed a heavy burden on its taxpayers to try and provide sufficient staff and equipment to accommodate the mounting documents which must be served. Yet the majority of taxpayers never need or use the judicial system, while there are others who need and desire access to the Courts to prosecute claims and requests. Some of that heavy burden can be and should be shifted from the large taxpayer pool to the relatively small number of persons and entities which seek access to the system. Free enterprise service of process shifts some of that burden. Although it can be said that many or most Sheriffs' and Constables' Departments operate with zeal and determination, they will not be able to equal the efficiencies inherent in a free enterprise endeavor due to the burdensome budgeting processes and taxpayer limits. See Garcia v. Gutierrez, 697 S.W.2d at 759.

The Federal Rules of Civil Procedure have for sometime allowed private persons to serve process. (Fed. R. Civ. Proc. Rule 4) There are no substantive complaints regarding the Federal system which allows such process. Due process is met, access to the Courts is more efficient, and judicial economy has been served. In the Garcia and Lawyers Civil Process cases the Courts stated that the arguments of judicial economy and efficiency are

persuasive, and virtually declared that it would be in the best interest of our judicial system to allow private process service similar to that allowed under the Federal rules.

Moreover, an adoption of the practical efficiencies of the private process service alternative need not jeopardize the fairness and legitimacy sought to be maintained through the present system. First, the alternative of public process service through Sheriffs, Constables and court clerks (by certified mail) should remain available for those litigants who could not afford the services of private process servers, but who need access to the system. See Boddie v. Conneticut, 401 U.S. 371, 97 S.Ct. 780 (1971). Second, in recent hearings before the Texas legislature, representatives of the Texas Private Investigators Board acknowledged that the Board could use its present facilities to provide for licensing and regulation of the private process service industry. (Hearing held on HB#613 before the House Committee on Law Enforcement, May 1, 1985). By maintaining public alternatives and state supervision, the state will benefit from the efficient private alternative without abandoning its responsibility to protect the public welfare.

We petition the Court for relief, because the common law is not an avenue available for change in the rules of civil process in this particular instance. The rules are statutory in nature. It is felt by many that on some issues change in the common law is the most effective or appropriate means in meeting the changing

needs of the judicial system and desires of the people. That method of change is left to our judicial branch. Because it is statutory, the Texas Rules of Civil Procedure would seem to need legislative enactment for the change. In Texas, however, this is not true. The Texas legislature has seen fit to allow the well respected Texas Supreme Court to establish the Rules of Civil Procedure and make changes where needed. TEX. GOV. CODE §22,004. Thus, the Rules of Civil Procedure are developed and overseen jointly by the legislative and judicial branches.

The legislature in several recent sessions reviewed the need for a change in the rules of process serving. In 1983, the 68th Session of the Texas Legislature passed changes allowing private process servers to serve civil process issued by the Courts of this state in the manner provided by law for service by Sheriffs and Constables with few exceptions. That passage exhibited the desire of the people of Texas through their elected representatives to change the rules regarding service of process in this state. The change petitioned for herein would have been effective that year, but for a Governor's veto. Now two of the three branches of the Texas government have had a hand in the movement of the state to change the rule. The legislature has approved it. A Governor has not. Years ago the legislature understood and continues to understand that the highest Court in the Texas judicial system should have the best knowledge and understanding of the Texas Rules of Civil Procedure, and it is the Texas Supreme

Court that should make the change whose time has come.

II.

Legal Arguments and Authorities In Support of Amending Rules

The inadequacies arising from the strict construction of Rules 103 and 106 have become acute, and are affecting litigants' ability to obtain effective access to this state's judicial system for redress of grievances. Without a change in the method of service of process the state may soon be faced with a system of service of process which violates its own constitution, as well as the guarantee of due process under the Fourteenth Amendment to the United States Constitution.

Under Article 1, Section 13 of the Texas Constitution "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." In interpreting the requirements of Section 13, the Texas Supreme Court has stated that "a statute or ordinance that unreasonably abridges a justifiable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under Article 1, Section 13 and is therefore, void." Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983). In applying this standard the Court stated that the litigants' right to redress would be balanced against the legislative basis for the regulation, considering both the general purpose of the

rule and the extent to which the litigants' right to redress is affected. Sax v. Votteler, 648 S.W.2d at 665-666. Moreover, since 1885, the U.S. Supreme Court has recognized that the Due Process provisions of the Fifth and Fourteenth Amendments to the United States Constitution guarantee a right of access for litigants to the judicial process. Doe v. Schneider, 443 F.Supp. 780 (D. Kansas, 1978). The right of access is triggered when "the judicial proceeding becomes the only effective means of resolving the dispute at hand..." Boddie v. Conneticut, 401 U.S. 371, 377, 91 S. Ct. 780, 785 (1971). The right of access requires that persons who are forced to settle their claims through the judicial system shall be given a meaningful opportunity to be heard. Boddie v. Conneticut, 91 S. Ct. at 785; See Dorsey v. City of New York, 321 N.Y.S.2d 129, 130 (1971).

The "right to access" is a right to effective access to judicial recourse, as opposed to a right to a certain remedy. When the availabilty or functioning of the judicial process is impaired by acts of the State, so as to interfere with, or impede a litigants' access to the judicial system for redress of his rights, the State has deprived the Plaintiff of liberty or property without due process of law. Doe v. Schneider, 443 F.Supp. at 787; Boddie v. Conneticut, 91 S. Ct. at 791 (Brennan concurring); See Pope and McConnico, Practicing Law with a 1981 Texas Rules, 32 Baylor L. Rev. 457, 484 (1980). A cause of action whether grounded in the common law or granted by statute, is a property

right protected by the guarantee of Due Process. Sax v. Votteler, 648 S.W.2d at 665. Courts, when applying the Due Process guarantee to the right of access, have found that a refusal to allow an individual to be served with judicial process violates due process of law. Application of Brux, 216 F.Supp. 956 (D. Haw. 1963); Doe v. Schneider 443 F.Supp. at 787.

In April, 1985, the Court of Appeals for the Fifth Supreme Judicial District of Texas ruled that the mandatory language of Rules 103 and 106 was binding, and that private civil process servers could not serve citations without service having been attempted by Sheriffs or Constables first. Lawyers Civil Process v. State Ex. Rel Vines, 690 S.W.2d 939 (Tex. App.- Dallas 1985, no writ.) Testimony received by the trial court in the Lawyers Civil Process case, showed that there were as many as 25,000 unserved papers over the past three years in Dallas County alone.[1] Both the appellate court in the Lawyers Civil Process case and the Corpus Christi Court of Appeals in Garcia v. Gutierrez, 697 S.W.2d 758 (Tex. App. - Corpus Christi 1985, no writ) found the practical arguments of counsels representing the appellants, which cited the limited county budgets, understaffed Sheriffs' Departments and inefficiencies inherent in the governmental system in support of the more efficient private civil process alternative, to be

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1 Appellant's brief in the Lawyers's Civil Process case cited the following facts in support of its arguments against the mandatory application of Rules 103 and 106:

persuasive. Though noting the strength of the argument, the court was forced to find that "unfortunately, however, no amount of practical consideration or desire for judicial economy and efficiency can transfer to this court the decision on matters which have already been decided by statutory enactments of the legislature and the rule-making authority of the Supreme Court."

---

footnote cont.-

> "In a trial before the court, Plaintiff Keene, Constable of Precinct 1, Dallas County, Texas, testified that he had a backlog of civil papers for the last three or four years. (S.F. 129). Defendant's Exhibit No. 5 is Keene's activity report. The report for January, 1983 showed that there were 6,280 unserved papers. (S.F. 131). A paper which is paid for but not served, is returned as served in Keene's report. (S.F. 130). Keene's record showed that he served 4,729 papers in January 1983, but that figure included the papers that Keene returned to the Clerk's office that were not served. (S.F. 131, 132). Keene did not have a statistical record with him that would show how many unserved papers he had in his office at the time he testified. (S.F. 132).
>
> "Plaintiff Jack Richardson, Constable of Precinct 2, Dallas County, Texas, testified that the total number of papers including criminal warrants that he had on hand September 30, 1983 was 8,397. Richardson also reported as served papers for which he had been paid but which he had been unable to serve. His report that 3,472 papers were served in the month of September, 1983 included such paid-for papers which were not actually served. (S.F. 137, 137).
>
> "Judge Dan Gibbs, Judge of the 303rd District Court testified that he frequently signed orders appointing private process servers to serve citations out of his court. He had been doing this for two or three years. Before he signs the order he receives a sworn motion and a motion to appoint the process server. These sworn motions set out as reasons for the order: the backlog of unserved civil process and the delays in serving the process. (S.F. 141-142)

Where the Courts lack the discretion to provide for quick and efficient access to the judicial system, (regardless of the situation or the needs of litigants, the rules will inevitably lead to impractical adn inequitable results, and will "endanger our entire system of justice." Pope and McConnico, Practicing Law With the 1981 Texas Rules, 32 Baylor Law Review 457, 484 (1980).

The Court in the Garcia case correctly isolated the only effective means for changing the current inequitable circumstances

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footnote cont.-

> "Judge Gibbs testified that when a temporary restraining order is involved in a petition filed in a family court, the temporary restraining order lasts only ten days. In order for the temporary restraining order to become a temporary injunction it must be heard within ten days and notice must be given to the responding parties in sufficient time to give adequate notices to get prepared. Unless the papers are served within time to give proper notice, the temporary restraining order is either dissolved or has to be continued. This will produce a backlog in cases involving temporary restraining orders.
>
> "The same situation exists with regard to contempt motions.
>
> "On Motions to Modify that have to be set at least thirty days with sufficient time to answer and respond, if service is not achieved within that length of time, those motions have to be reset and therefore, build up the backlog of cases down the line. (S.F. 143, 144).
>
> "Judge Gibbs's experience is that in most cases the docket of his court is assisted by private process servers because it is faster and the service is better. In response to the question, "Would the lack of private servers cause delays of your docket?" he responded, "We are getting more definite answers, and those people are notified at a proper time by using them.

caused by the present rules. The problem will not be solved by trying to coerce the Commissioner's Court to budget more funds for service of process. Instead, noting the practical circumstances that face Sheriffs and Constables in this state, the proper remedy is for this Court, through its rule-making authority, to change the rules to allow for the alternative of private service of process. As cited above, the political and practical considerations facing the legislature, Governor and Commissioner's Courts in

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footnote cont.-

> "Judge Linda Thomas, Judge of the 256th District Court, testified that when she signed orders appointing private process servers for citations, notices, and temporary restraining orders she examines the motion requesting appointment, the affidavit supporting the request for the appointment for its sufficiency as a basis for signing the order before she signs the order. (S.F. 161, 162).
>
> "Her experience found a necessity for appointing private process servers because in the 265th District Court, which is a family court, the Court is frequently trying to prevent something from occurring, such as children being taken outside the jurisdiction, or trying to keep money in bank accounts, and private process servers give an additional option for getting service and getting people under orders until there is a Court hearing. (S.F. 162, 163.).
>
> "In many of her cases she is dealing with the threat of money, and children and there is a need for immediate service. With the use of private process servers the courts have not had to reset their dockets nearly as much as they did in the past. (S.F. 162)
>
> "Sergeant Stanley Bolin testified as a representative of Sheriff Don Byrd in response to a subpoena issued on Don Byrd. Bolin produced a memorandum dated October 5, 1983, introduced as Defendant's Exhibit #30, summarizing the numbers of papers received, executed, and returned executed for the years 1979 through 1983. (S.F. 148, 149).

appropriating funds makes it impractical for Sheriffs or Constables to meet the growing demand for access to the courts of this state. Therefore, it is for the Court through its rule-making authority to devise rules which will guarantee to all litigants an equal right of access to the judicial process while

---

footnote cont.-

> "Defendant's Exhibit #30 shows that for the years tabulated, the sheriff's office received 74,217 papers, executing 55,898 papers, and returned unexecuted 18,305 papers. The total papers on hand as of 10/1/83 was 1,005.
>
> "Bolin testified that the nubmer of papers coming into the Sheriff's Department dropped off after 1981. (S.F. 150). Basically, the sheriff's office does not serve civil process, writs of garnishment, habeas corpus, injunctions, criminal subpoenas, duces tecum, summons, citations, notices, citations by public indication or posting, or probate papers. (S.F. 156).
>
> "When citations are sent to the sheriff's office they are routed to Constable Forrest Keene's office. (S.F. 156, 157). If there is a criminal case witness outside of Precinct 1, the subpoena is sent to the proper constable even if the request to the sheriff is to get the witness for the criminal trial the next day. (S.F. 157, 158).
>
> "Bolin testified that the Sheriff's office does not serve civil papers because there is an order not to serve civil process except for certain types which have addresses in Precinct Number 1. The reason for this is there is not enough staff in the Sheriff's Department to do it because the sheriff's budget does not allow him to hire sufficient staff. (S.F.170)

footnote end.

protecting the state's interest in avoiding frivolous claims and lawsuits. As the U.S. Supreme Court noted in Boddie v. Conneticut:

> "American society... bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized orderly process of dispute settlement... Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monolopy over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things." 401 U.S. at 375-376.

CONCLUSION

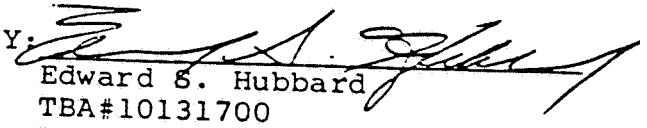
Today there exists a barrier to the effective access of litigants to the judicial system, due to the failure, of Sheriffs and Constables to serve process. Ultimately, it is for the courts to uphold the rights guaranteed to citizens through their constitutions. This responsibility can be carried out through the court's case or controversy jurisdiction, or when applicable, through its rule-making authority. The problems inherent with the strict construction of Rules 103 and 106 threaten the legitimacy of the judicial system. Therefore, we ask that this court review the present rules of civil procedure applicable to service of process and amend them in order to guarantee effectively an equal right of access to all litigants to the judicial process.

PRAYER

WHEREFORE, Petitioner, THE TEXAS ASSOCIATION OF CIVIL PROCESS SERVERS, request that this Court, through its rule-making authority, amend Rules 103 and 106 of the Texas Rules of Civil Procedure to provide for the alternative of private service of process of all citations, writs and other forms of process in civil cases at the initiation of legal proceedings, and for such other and further relief to which the petitioner may show itself justly entitled.

Respectfully submitted,

KENNEDY, BURLESON & HACKNEY

BY: 

Edward S. Hubbard
TBA#10131700
1600 Four Allen Center
Houston, Texas 77002
(713) 951-0730

ATTORNEY FOR PETITIONER
TEXAS ASSOCIATION OF CIVIL
PROCESS SERVERS

File Copy
103

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SOULES & REED

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ROBERT E. ETLINGER
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SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

February 18, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rule 18a submitted by Bruce A. Pauley and Rules 103 and 106 submitted by Judge Herb Marsh, Jr. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes for the March 7 and 8 meeting.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 12, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 13 and Rule 18a
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Bruce A. Pauley of Mesquite, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Bruce A. Pauley
Lyon & Lyon
Town East Tower
18601 LBJ Fwy. - Suite 525
Mesquite, Texas 75150

LYON & LYON
ATTORNEYS AND COUNSELORS AT LAW
TOWN EAST TOWER
18601 LBJ FWY. - SUITE 525
MESQUITE, TEXAS 75150

TED B LYON, JR.
ROBERT CHARLES LYON
BRUCE A. PAULEY
MICHAEL A. YONKS

214-279-6571

February 10, 1986

Honorable James P. Wallace
Justice
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: Amendments to the Rules of Civil Procedure

Dear Justice Wallace:

It was a pleasure to see you and to have the opportunity to briefly speak with you at the Texas Law Center last Saturday. I appreciate your willingness to pass along to the proper individuals the suggestions which I have for changes in the Rules of Civil Procedure.

The changes I propose result from a case in which the plaintiff filed two Motions to Recuse the trial judge prior to trial and one Motion to Recuse the trial judge after trial but before the Motion for New Trial was heard. Subsequently, the plaintiff filed a fourth Motion to Recuse a judge who was designated to hear the third recusal motion. Although this is a rare circumstance, I believe that certain changes in the rules are in order in order to see that it does not or cannot happen again.

I propose the following changes in Texas Rule of Civil Procudure 18a:

1. Amend Rule 18a to allow for only one recusal motion per litigant per judge.

2. Alternatively, to provide for sanctions for the second and any subsequent recusal motions if they are found by the judge designated to hear the motion to be frivolous, brought in bad faith or for the purpose of delay.

In addition I would propose that Rule 13 be amended to provide for contempt in cases where pleadings are filed for the purposes of securing a delay of the trial or of any hearing of the cause, instead of just the trial of the cause. I would also propose that the Court strongly consider adopting Federal Rule 11 verbatim.

Thank you again for your help with this matter. I hope to see you again in the near future.

With warmest personal regards, I remain

Sincerely,

LYON & LYON

Bruce A Pauley

BRUCE A. PAULEY
Attorney at Law

BAP/mf

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 10, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 103 and Rule 106
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Judge Herb Marsh, Jr., of El Paso, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Herb Marsh, Jr.
Judge, 243rd District Court
City-County Building
El Paso, Texas 79901

00000270

HERBERT E. MARSH, JR.
DISTRICT JUDGE
243RD DISTRICT COURT
CITY-COUNTY BUILDING
EL PASO, TEXAS 79901
(915) 546-2168
(915) 546-2178

February 5, 1986

Committee on Revision of Rules
of Civil Procedure
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Gentlemen:

Please find enclosed a copy of proposed revision of Rules 103 and 106 T.R.C.P.

Thank you for your consideration.

Yours very truly,

Herb Marsh, Jr.
Judge

HM: sc
encl.

00000271

SOUTHWEST PROCESS SERVICE, INC.
1023 E. YANDELL
EL PASO, TEXAS 79902
(915) 533-0139

December 30, 1985

Hon. Herb Marsh
243th District Court
City County Building
El Paso, Texas 79901

Dear Judge Marsh:

Enclosed, please find a proposed rule change that we respectfully request that you consider, in accordance to Rule 3a of the Texas Rules of Civil Procedure. Said Rule change parallels the Federal Rules of Civil Procedure that offers saving to the petitioners and accelerates the judicial process.

Being cognizant of the fact that the El Paso County Judges are progressive leaders in the judiciary, we are requesting that the enclosed rule change be adopted and forwarded to the Supreme Court, in accordance with Rule 3a, for approval.

The approval of said rule will benefit the community in several ways.

First and foremost, it will enable the Sheriffs department to save money by the assignment of more personnel to the solving of serious crimes instead of being pre-occupied as process servers. Additionally, the considerable operating cost will be absorbed by the private sector instead of the public sector. Furthermore, the time lapse between filing and return of service will be shortened and El Paso County will join the rest of the states in the union in allowing service of citation through private enterprise. Therefore, the bold vision of the El Paso judges will benefit the community.

In closing, we thank you in advance for your prompt and favorable consideration to this request.

Respectfully yours,

RAY SARABIA

00000272

SOUTHWEST PROCESS SERVICE, INC.
1023 E. YANDELL
EL PASO, TEXAS 79902
(915) 533-0139

PROPOSED RULE CHANGE

RULE 103. OFFICER WHO MAY SERVE:

All process may be served by the sheriff or any constable of any county in which the party to be served is found or, TO A PERSON SPECIALLY APPOINTED TO SERVE IT or, if by mail, either of the county in which the case is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.

RULE 106 SERVICE OF CITATION:

(a) Unless the citation or an order of the court otherwise directs the citation shall be served by any officer authorized by RULE 103 OR BY A PRIVATE PARTY OR A PROCESS SERVING COMPANY BY MOTION AND ORDER TO SERVE CITATION 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) 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 an officer or by any disinterested adult named in the court's order 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.

. bcc: Evelyn Avent

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 10, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 103 and Rule 106
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Judge Herb Marsh, Jr., of El Paso, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Herb Marsh, Jr.
Judge, 243rd District Court
City-County Building
El Paso, Texas 79901

00000274

bcc: Evelyn Avent

HERBERT E. MARSH, JR.
DISTRICT JUDGE
243RD DISTRICT COURT
CITY-COUNTY BUILDING
EL PASO, TEXAS 79901
(915) 546-2168
(915) 546-2178

February 5, 1986

Committee on Revision of Rules
of Civil Procedure
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Gentlemen:

Please find enclosed a copy of proposed revision of Rules 103 and 106 T.R.C.P.

Thank you for your consideration.

Yours very truly,

Herb Marsh, Jr.
Judge

HM: sc
encl.

00000275

SOUTHWEST PROCESS SERVICE, INC.
1023 E. YANDELL
EL PASO, TEXAS 79902
(915) 533-0139

PROPOSED RULE CHANGE

RULE 103. OFFICER WHO MAY SERVE:

All process may be served by the sheriff or any constable of any county in which the party to be served is found or, TO A PERSON SPECIALLY APPOINTED TO SERVE IT or, if by mail, either of the county in which the case is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.

RULE 106 SERVICE OF CITATION:

(a) Unless the citation or an order of the court otherwise directs the citation shall be served by any officer authorized by RULE 103 OR BY A PRIVATE PARTY OR A PROCESS SERVING COMPANY BY MOTION AND ORDER TO SERVE CITATION 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) 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 an officer or by any disinterested adult named in the court's order 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.

SOUTHWEST PROCESS SERVICE, INC.
1023 E. YANDELL
EL PASO, TEXAS 79902
(915) 533-0139

December 30, 1985

Hon. Herb Marsh
243th District Court
City County Building
El Paso, Texas 79901

Dear Judge Marsh:

Enclosed, please find a proposed rule change that we respectfully request that you consider, in accordance to Rule 3a of the Texas Rules of Civil Procedure. Said Rule change parallels the Federal Rules of Civil Procedure that offers saving to the petitioners and accelerates the judicial process.

Being cognizant of the fact that the El Paso County Judges are progressive leaders in the judiciary, we are requesting that the enclosed rule change be adopted and forwarded to the Supreme Court, in accordance with Rule 3a, for approval.

The approval of said rule will benefit the community in several ways.

First and foremost, it will enable the Sheriffs department to save money by the assignment of more personnel to the solving of serious crimes instead of being pre-occupied as process servers. Additionally, the considerable operating cost will be absorbed by the private sector instead of the public sector. Furthermore, the time lapse between filing and return of service will be shortened and El Paso County will join the rest of the states in the union in allowing service of citation through private enterprise. Therefore, the bold vision of the El Paso judges will benefit the community.

In closing, we thank you in advance for your prompt and favorable consideration to this request.

Respectfully yours,

RAI SARABIA

00000277

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) 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

EXISTING RULE 106 CONTINUED ON NEXT PAGE

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline proposed new wording; see example attached).

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

(1) delivering to the defendant, in person, by a sheriff or constable referred to in Rule 103, 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.~~]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted, 00000278

Date _____ 197__

_____ Name

_____

_____ Address

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

(1) by an officer or any disinterested adult named in the court's order 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.

END OF EXISTING RULE 106

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; uncerline proposed new worcing; see example attached).

payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

The notice and acknowledgment shall conform substantially to the following form:

A. B., Plaintiff) (IN THE DISTRICT

V.) NO.) (COURT OF

C. D., Defendant) (COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your

etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted,

00000279

Date _____ 197__

_____ Name

_____

_____ Address

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

A
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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline proposed new wording; see example attached).

relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This notice and acknowledgment of receipt of citation and petition will have been mailed on (insert date).

_____
(Signature)

_____
Date of Signature

etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted, 00000280

Date _____ 197__

_____ Name

_____

_____ Address

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline proposed new wording; see example attached).

1
2 SWORN TO BEFORE ME by the said (Signing party) this
3 day of , 19 .
4
5 Notary Public, State of
6 ( )
7 My commission expires:
8
9 ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION
10
11 I received a copy of the citation and of the petition in
12 the above capationed matter on the day of , 19 .
13
14 Signature
15
16 (Relationship to entity or
17 authority to receive service of
18 process.
19
20 Date of Signature
21
etc.

PROPOSED RULE 106 CONTINUED ON NEXT PAGE

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted,

00000281

Date _____ 197__

_____ Name

_____

_____ Address

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

A
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E
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I
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K
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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline proposed new wording; see example attached).

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etc.

SWORN TO BEFORE ME by the said (Signing party) on the day of , 19 .

Notary Public, State of
( )
My commission expires:

(b) 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 an officer or by any disinterested adult named in the court's order 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 suit.

END OF PROPOSED RULE 106

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted, 00000282

Date _____ 197__

_____ Name

_____

_____

LAW OFFICES

SOULES, CLIFFE & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

STEPHANIE A. BELBER
JAMES R. CLIFFE
ROBERT E. ETLINGER
ROBERT D. REED
SUSAN D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III

[illegible] BUILDING, SIXTH FLOOR
1001 TEXAS AT MAIN
HOUSTON, TEXAS 77002
(713) 224-6122

1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

WILLIAM A. BRANT, P. C.
1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

January 14, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 103 and 106, submitted by Mr. Guillermo Vega, Jr. and Honorable Menton Murray, Jr. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 9, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 103 and Rule 106

Dear Luke and Mike:

I am enclosing a letter from Guillermo Vega of Brownsville, in regard to the above rules.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Guillermo Vega, Jr.
Attorney at Law
P. O. Box 1911

00000284

Guillermo Vega, Jr.
Attorney at Law

546-5573

P.O. Box 1911
Brownsville, Texas 78520

December 13, 1985

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

RE: Rule 103 and Rule 106

Gentlemen:

I would like to petition the Supreme Court to change Rule 103 and Rule 106 to read as follows:

Anyone who is of the age of 18 and over and competent to testify and is not a party to the suit is allowed to serve civil process.

A private party or process serving company can be appointed by a Motion and Order to serve Civil Process within the state of Texas.

Thank You.

Respectfully,

Guillermo Vega, Jr.
Attorney at Law

GV/lt

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THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 9, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Civil Process Servers

Dear Luke and Mike:

I am enclosing a letter from Judge Menton Murray, Jr., of Brownsville, regarding civil process servers.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Menton Murray, Jr.
District Judge
357th District Court
974 E. Harrison
Brownsville, Tx 78520

00000286

THREE HUNDRED FIFTY SEVENTH DISTRICT COURT
STATE OF TEXAS

MENTON MURRAY, JR.
DISTRICT JUDGE
CAMERON COUNTY COURTHOUSE
974 E. HARRISON
BROWNSVILLE, TEXAS 78520
512-544-0837

December 3, 1985

Rules Committee
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

RE: CIVIL PROCESS SERVERS

Dear Sirs:

I am sure that you have received substantial comment regarding the fall out from recent Court of Appeals decisions relating to the validity of service by Civil Process Servers. I am not here to quarrel with these rulings as they appear to be in compliance with the existing rules. I am suggesting that it is time to change those rules.

For several years we in Cameron County have gotten along nicely with process being served by private civil process servers. The attorneys, to a great extent, have used the private service rather than the Sheriff's Office or the Constables for obvious market place reasoning that they have gotten better service privately than through the various elected officials. I recognize that service of civil process is a potential money maker for the county which could more than offset the cost of providing the manpower to properly give such service. Notwithstanding, public process serving has lagged substantially behind private process serving in this county for several years. I have my suspicions as to the reasons for this but they are somewhat conjectural on my part. Suffice it to say that we are not really set up in this county to adequately provide for all of the necessary service of process on a basis nearly so prompt as that provided by civil process servers in the private sector. I do not see any reason why the various factors that have contributed to this situation are going to change in the forseeable future.

While I am not particularly tied to any specific rule change, I would generally endorse any reasonable change which would allow private civil process serving either with or without prior court approval. I do not object to having to approve private service of process and I certainly do not suggest that the public sector should be excluded from the service of process. I merely suggest that the option be available to the court and the litigants to use either of the two.

I recognize that there must be some significant opposition to officially recognizing by rule a practice that has occurred throughout the state prior to the recent appellate decisions. I suspect that some type of compromise could be reached that would accommodate all parties. I know that the present state of the law which requires failure on the part of the public process server prior to the use of a private process server is totally unacceptable since failure on the part of the public process server takes too much time and seriously delays the prompt trial of cases, particularly those involving short notice periods such as temporary restraining orders, temporary injunctions and show-cause orders.

I hope that you will give prompt attention to this serious matter.

Yours very truly,

Menton Murray, Jr.
Judge

cc:
Eddie Gonzalez

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HUGH L. SCOTT, JR.
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February 10, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 103 and 106 submitted by Mr. Edward S. Hubbard; proposed change to Rule 106 submitted by Mr. Charles Griggs; proposed change to Rule 142 submitted by Wendell Loomis; proposed changes to Rules 205, 206-1 and 207 submitted by Charles Matthews. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

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TELEX 353953

February 2, 1986

Honorable James P. Wallace
Supreme Court of Texas
P.O. Box 12248
Capital Station
Austin, Texas 78711

RE: Texas Association of Civil Process Server's Petition for Amending Rules 103 and 106 of the Texas Rules of Civil Procedure Pursuant to the Supreme Court's Rule-Making Authority Under §22.004 of the Texas Government Code

Dear Justice Wallace:

Enclosed please find for your review The Texas Association of Civil Process Server's Petition for Amending Rules 103 and 106 of the Texas Rules of Civil Procedure Pursuant to the Supreme Court's Rule-Making Authority Under §22.004 of the Texas Government Code.

We have also forwarded a copy of this petition to the Administrative Justice Committee and the Supreme Court Advisory Committee for its review.

After you have had the opportunity to review the petition, if you should have any questions and/or comments, please feel free to give me a call.

Very truly yours,

Edward S. Hubbard
For the Firm

ESH:kah
Enclosure
File No. 5072.00

cc: Mr. Edward Pankau
Texas Association of Civil
Process Servers

cc: Mr. Michael T. Gallagher
Chairman, Administrative Justice
Committee

cc: Mr. Luther H. Soules, III
Chairman, Supreme Court Advisory
Committee

00000290

#5072.00:CPH:kah:1/17/86:#k-15

TO:

The Texas Supreme Court

The Administrative Justice Committee
AND
The Supreme Court Advisory Committee

Petition for Amending Rules 103 and 106
of the Texas Rules of Civil Procedure Pursuant
to the Supreme Court's Rule-Making Authority
Under §22.004 of the Texas Government Code

KENNEDY, BURLESON & HACKNEY

BY: EDWARD S. HUBBARD
TBA#10131700
1600 Four Allen Center
Houston, Texas 77002
(713) 951-0730

Attorneys for The Texas
Association of Civil
Process Servers

#5072.00:CPH:kah:1/17/86:#k-15

PETITION FOR AMENDING RULES 103
AND 106 OF THE TEXAS RULES OF CIVIL PROCEDURE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

NOW COMES THE TEXAS ASSOCIATION OF CIVIL PROCESS SERVERS, whose members are engaged in the business of private process service within the State of Texas, and petition this Court to amend Rules 103 and 106 of the Texas Rules of Civil Procedure, so as to allow for the alternative of private service of process in civil cases without first requiring such service to be attempted through Sheriffs, Constables or court clerks. In support of such petition, THE TEXAS ASSOCIATION OF CIVIL PROCESS SERVERS, provide the following arguments:

I.

JUDICIAL AND SOCIAL
POLICY: THE NEED FOR CHANGE

There comes a time in the evolution and development of the laws of every jurisdiction when changes should be made in even the most enduring and traditional laws or policies. There are rules and customs logically and rationally founded that eventually become outdated or outweighed by practical considerations. Our State's judicial system has arrived at such a time for change in Rules 103 and 106 of the Texas Rules of Civil Procedure, which regulate service of process in civil cases.

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Limited budgets and increased needs for law enforcement are inherent in urban, and rapidly growing counties. The population of Texas continues to grow at a rapid pace, and the state now contains more than sixteen million inhabitants. [U.S. Dept. of Commerce Bureau of Census Estimates of the Resident Population of States, July 1, 1984 and 1985]. Constant growth has strained the ability of limited county budgets to provide for essential public services, while increasing the demands upon peace officers to provide adequate law enforcement to protect the public. More significantly, the urbanization of Texas will be a lasting cause of strained budgets and increased law enforcement requirements.

It is the mandatory duty of Sheriffs and Constables of Texas to serve all writs and processes directed or delivered to them by legal authority. TEX. REV. CIV. STAT. ANN. art. 6883 and 6885 (Vernon 1960). Sheriffs and Constables are required to attempt service of process before others may be allowed to attempt such service. TEX. REV. CIV. PROC. Rule 103, Rule 106. The limited county budgets and increased public safety responsibilites cause understaffed Sheriffs' and Constables' Departments. It has been proven that Sheriffs' and Constables' Departments can become so understaffed that they cannot meet all the needs of the public for which they have responsibility. As a result, service of process is not effected. See Garcia v. Gutierrez, 697 S.W.2d 758 (Tex. app. - Corpus Christi 1985, no writ); Lawyers Civil Process v. State Ex. Rel. Vines, 690 S.W.2d 939 (Tex. App. - Dallas 1985, no writ). The courts in those cases give strong indications that

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private process servers should be allowed to serve all process; however, the courts hands were tied since the rule-making authority on that matter rests with the Texas Supreme Court. Garcia v. Gutierrez, 697 S.W.2d at 759.

Texas has placed a heavy burden on its taxpayers to try and provide sufficient staff and equipment to accommodate the mounting documents which must be served. Yet the majority of taxpayers never need or use the judicial system, while there are others who need and desire access to the Courts to prosecute claims and requests. Some of that heavy burden can be and should be shifted from the large taxpayer pool to the relatively small number of persons and entities which seek access to the system. Free enterprise service of process shifts some of that burden. Although it can be said that many or most Sheriffs' and Constables' Departments operate with zeal and determination, they will not be able to equal the efficiencies inherent in a free enterprise endeavor due to the burdensome budgeting processes and taxpayer limits. See Garcia v. Gutierrez, 697 S.W.2d at 759.

The Federal Rules of Civil Procedure have for sometime allowed private persons to serve process. (Fed. R. Civ. Proc. Rule 4) There are no substantive complaints regarding the Federal system which allows such process. Due process is met, access to the Courts is more efficient, and judicial economy has been served. In the Garcia and Lawyers Civil Process cases the Courts stated that the arguments of judicial economy and efficiency are

persuasive, and virtually declared that it would be in the best interest of our judicial system to allow private process service similar to that allowed under the Federal rules.

Moreover, an adoption of the practical efficiencies of the private process service alternative need not jeopardize the fairness and legitimacy sought to be maintained through the present system. First, the alternative of public process service through Sheriffs, Constables and court clerks (by certified mail) should remain available for those litigants who could not afford the services of private process servers, but who need access to the system. See Boddie v. Conneticut, 401 U.S. 371, 97 S.Ct. 780 (1971). Second, in recent hearings before the Texas legislature, representatives of the Texas Private Investigators Board acknowledged that the Board could use its present facilities to provide for licensing and regulation of the private process service industry. (Hearing held on HB#613 before the House Committee on Law Enforcement, May 1, 1985). By maintaining public alternatives and state supervision, the state will benefit from the efficient private alternative without abandoning its responsibility to protect the public welfare.

We petition the Court for relief, because the common law is not an avenue available for change in the rules of civil process in this particular instance. The rules are statutory in nature. It is felt by many that on some issues change in the common law is the most effective or appropriate means in meeting the changing

needs of the judicial system and desires of the people. That method of change is left to our judicial branch. Because it is statutory, the Texas Rules of Civil Procedure would seem to need legislative enactment for the change. In Texas, however, this is not true. The Texas legislature has seen fit to allow the well respected Texas Supreme Court to establish the Rules of Civil Procedure and make changes where needed. TEX. GOV. CODE §22,004. Thus, the Rules of Civil Procedure are developed and overseen jointly by the legislative and judicial branches.

The legislature in several recent sessions reviewed the need for a change in the rules of process serving. In 1983, the 68th Session of the Texas Legislature passed changes allowing private process servers to serve civil process issued by the Courts of this state in the manner provided by law for service by Sheriffs and Constables with few exceptions. That passage exhibited the desire of the people of Texas through their elected representatives to change the rules regarding service of process in this state. The change petitioned for herein would have been effective that year, but for a Governor's veto. Now two of the three branches of the Texas government have had a hand in the movement of the state to change the rule. The legislature has approved it. A Governor has not. Years ago the legislature understood and continues to understand that the highest Court in the Texas judicial system should have the best knowledge and understanding of the Texas Rules of Civil Procedure, and it is the Texas Supreme

Court that should make the change whose time has come.

II.

Legal Arguments and Authorities In Support of Amending Rules

The inadequacies arising from the strict construction of Rules 103 and 106 have become acute, and are affecting litigants' ability to obtain effective access to this state's judicial system for redress of grievances. Without a change in the method of service of process the state may soon be faced with a system of service of process which violates its own constitution, as well as the guarantee of due process under the Fourteenth Amendment to the United States Constitution.

Under Article 1, Section 13 of the Texas Constitution "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." In interpreting the requirements of Section 13, the Texas Supreme Court has stated that "a statute or ordinance that unreasonably abridges a justifiable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under Article 1, Section 13 and is therefore, void." Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983). In applying this standard the Court stated that the litigants' right to redress would be balanced against the legislative basis for the regulation, considering both the general purpose of the

rule and the extent to which the litigants' right to redress is affected. Sax v. Votteler, 648 S.W.2d at 665-666. Moreover, since 1885, the U.S. Supreme Court has recognized that the Due Process provisions of the Fifth and Fourteenth Amendments to the United States Constitution guarantee a right of access for litigants to the judicial process. Doe v. Schneider, 443 F.Supp. 780 (D. Kansas, 1978). The right of access is triggered when "the judicial proceeding becomes the only effective means of resolving the dispute at hand..." Boddie v. Conneticut, 401 U.S. 371, 377, 91 S. Ct. 780, 785 (1971). The right of access requires that persons who are forced to settle their claims through the judicial system shall be given a meaningful opportunity to be heard. Boddie v. Conneticut, 91 S. Ct. at 785; See Dorsey v. City of New York, 321 N.Y.S.2d 129, 130 (1971).

The "right to access" is a right to effective access to judicial recourse, as opposed to a right to a certain remedy. When the availabilty or functioning of the judicial process is impaired by acts of the State, so as to interfere with, or impede a litigants' access to the judicial system for redress of his rights, the State has deprived the Plaintiff of liberty or property without due process of law. Doe v. Schneider, 443 F.Supp. at 787; Boddie v. Conneticut, 91 S. Ct. at 791 (Brennan concurring); See Pope and McConnico, Practicing Law with a 1981 Texas Rules, 32 Baylor L. Rev. 457, 484 (1980). A cause of action whether grounded in the common law or granted by statute, is a property

right protected by the guarantee of Due Process. Sax v. Votteler, 648 S.W.2d at 665. Courts, when applying the Due Process guarantee to the right of access, have found that a refusal to allow an individual to be served with judicial process violates due process of law. Application of Brux, 216 F.Supp. 956 (D. Haw. 1963); Doe v. Schneider 443 F.Supp. at 787.

In April, 1985, the Court of Appeals for the Fifth Supreme Judicial District of Texas ruled that the mandatory language of Rules 103 and 106 was binding, and that private civil process servers could not serve citations without service having been attempted by Sheriffs or Constables first. Lawyers Civil Process v. State Ex. Rel Vines, 690 S.W.2d 939 (Tex. App.- Dallas 1985, no writ.) Testimony received by the trial court in the Lawyers Civil Process case, showed that there were as many as 25,000 unserved papers over the past three years in Dallas County alone.[1] Both the appellate court in the Lawyers Civil Process case and the Corpus Christi Court of Appeals in Garcia v. Gutierrez, 697 S.W.2d 758 (Tex. App. - Corpus Christi 1985, no writ) found the practical arguments of counsels representing the appellants, which cited the limited county budgets, understaffed Sheriffs' Departments and inefficiencies inherent in the governmental system in support of the more efficient private civil process alternative, to be

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1 Appellant's brief in the Lawyers's Civil Process case cited the following facts in support of its arguments against the mandatory application of Rules 103 and 106:

persuasive. Though noting the strength of the argument, the court was forced to find that "unfortunately, however, no amount of practical consideration or desire for judicial economy and efficiency can transfer to this court the decision on matters which have already been decided by statutory enactments of the legislature and the rule-making authority of the Supreme Court."

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footnote cont.-

"In a trial before the court, Plaintiff Keene, Constable of Precinct 1, Dallas County, Texas, testified that he had a backlog of civil papers for the last three or four years. (S.F. 129). Defendant's Exhibit No. 5 is Keene's activity report. The report for January, 1983 showed that there were 6,280 unserved papers. (S.F. 131). A paper which is paid for but not served, is returned as served in Keene's report. (S.F. 130). Keene's record showed that he served 4,729 papers in January 1983, but that figure included the papers that Keene returned to the Clerk's office that were not served. (S.F. 131, 132). Keene did not have a statistical record with him that would show how many unserved papers he had in his office at the time he testified. (S.F. 132).

"Plaintiff Jack Richardson, Constable of Precinct 2, Dallas County, Texas, testified that the total number of papers including criminal warrants that he had on hand September 30, 1983 was 8,397. Richardson also reported as served papers for which he had been paid but which he had been unable to serve. His report that 3,472 papers were served in the month of September, 1983 included such paid-for papers which were not actually served. (S.F. 137, 137).

"Judge Dan Gibbs, Judge of the 303rd District Court testified that he frequently signed orders appointing private process servers to serve citations out of his court. He had been doing this for two or three years. Before he signs the order he receives a sworn motion and a motion to appoint the process server. These sworn motions set out as reasons for the order: the backlog of unserved civil process and the delays in serving the process. (S.F. 141-142)

Where the Courts lack the discretion to provide for quick and efficient access to the judicial system, (regardless of the situation or the needs of litigants, the rules will inevitably lead to impractical adn inequitable results, and will "endanger our entire system of justice." Pope and McConnico, Practicing Law With the 1981 Texas Rules, 32 Baylor Law Review 457, 484 (1980).

The Court in the Garcia case correctly isolated the only effective means for changing the current inequitable circumstances

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footnote cont.-

> "Judge Gibbs testified that when a temporary restraining order is involved in a petition filed in a family court, the temporary restraining order lasts only ten days. In order for the temporary restraining order to become a temporary injunction it must be heard within ten days and notice must be given to the responding parties in sufficient time to give adequate notices to get prepared. Unless the papers are served within time to give proper notice, the temporary restraining order is either dissolved or has to be continued. This will produce a backlog in cases involving temporary restraining orders.
>
> "The same situation exists with regard to contempt motions.
>
> "On Motions to Modify that have to be set at least thirty days with sufficient time to answer and respond, if service is not achieved within that length of time, those motions have to be reset and therefore, build up the backlog of cases down the line. (S.F. 143, 144).
>
> "Judge Gibbs's experience is that in most cases the docket of his court is assisted by private process servers because it is faster and the service is better. In response to the question, "Would the lack of private servers cause delays of your docket?" he responded, "We are getting more definite answers, and those people are notified at a proper time by using them.

caused by the present rules. The problem will not be solved by trying to coerce the Commissioner's Court to budget more funds for service of process. Instead, noting the practical circumstances that face Sheriffs and Constables in this state, the proper remedy is for this Court, through its rule-making authority, to change the rules to allow for the alternative of private service of process. As cited above, the political and practical considerations facing the legislature, Governor and Commissioner's Courts in

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footnote cont.-

> "Judge Linda Thomas, Judge of the 256th District Court, testified that when she signed orders appointing private process servers for citations, notices, and temporary restraining orders she examines the motion requesting appointment, the affidavit supporting the request for the appointment for its sufficiency as a basis for signing the order before she signs the order. (S.F. 161, 162).
>
> "Her experience found a necessity for appointing private process servers because in the 265th District Court, which is a family court, the Court is frequently trying to prevent something from occurring, such as children being taken outside the jurisdiction, or trying to keep money in bank accounts, and private process servers give an additional option for getting service and getting people under orders until there is a Court hearing. (S.F. 162, 163.).
>
> "In many of her cases she is dealing with the threat of money, and children and there is a need for immediate service. With the use of private process servers the courts have not had to reset their dockets nearly as much as they did in the past. (S.F. 162)
>
> "Sergeant Stanley Bolin testified as a representative of Sheriff Don Byrd in response to a subpoena issued on Don Byrd. Bolin produced a memorandum dated October 5, 1983, introduced as Defendant's Exhibit #30, summarizing the numbers of papers received, executed, and returned executed for the years 1979 through 1983. (S.F. 148, 149).

appropriating funds makes it impractical for Sheriffs or Constables to meet the growing demand for access to the courts of this state. Therefore, it is for the Court through its rule-making authority to devise rules which will guarantee to all litigants an equal right of access to the judicial process while

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footnote cont.-

> "Defendant's Exhibit #30 shows that for the years tabulated, the sheriff's office received 74,217 papers, executing 55,898 papers, and returned unexecuted 18,305 papers. The total papers on hand as of 10/1/83 was 1,005.
>
> "Bolin testified that the nubmer of papers coming into the Sheriff's Department dropped off after 1981. (S.F. 150). Basically, the sheriff's office does not serve civil process, writs of garnishment, habeas corpus, injunctions, criminal subpoenas, duces tecum, summons, citations, notices, citations by public indication or posting, or probate papers. (S.F. 156).
>
> "When citations are sent to the sheriff's office they are routed to Constable Forrest Keene's office. (S.F. 156, 157). If there is a criminal case witness outside of Precinct 1, the subpoena is sent to the proper constable even if the request to the sheriff is to get the witness for the criminal trial the next day. (S.F. 157, 158).
>
> "Bolin testified that the Sheriff's office does not serve civil papers because there is an order not to serve civil process except for certain types which have addresses in Precinct Number 1. The reason for this is there is not enough staff in the Sheriff's Department to do it because the sheriff's budget does not allow him to hire sufficient staff. (S.F.170)

footnote end.

protecting the state's interest in avoiding frivolous claims and lawsuits. As the U.S. Supreme Court noted in Boddie v. Conneticut:

> "American society... bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized orderly process of dispute settlement... Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monolopy over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things." 401 U.S. at 375-376.

CONCLUSION

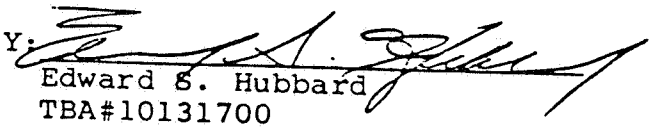
Today there exists a barrier to the effective access of litigants to the judicial system, due to the failure, of Sheriffs and Constables to serve process. Ultimately, it is for the courts to uphold the rights guaranteed to citizens through their constitutions. This responsibility can be carried out through the court's case or controversy jurisdiction, or when applicable, through its rule-making authority. The problems inherent with the strict construction of Rules 103 and 106 threaten the legitimacy of the judicial system. Therefore, we ask that this court review the present rules of civil procedure applicable to service of process and amend them in order to guarantee effectively an equal right of access to all litigants to the judicial process.

PRAYER

WHEREFORE, Petitioner, THE TEXAS ASSOCIATION OF CIVIL PROCESS SERVERS, request that this Court, through its rule-making authority, amend Rules 103 and 106 of the Texas Rules of Civil Procedure to provide for the alternative of private service of process of all citations, writs and other forms of process in civil cases at the initiation of legal proceedings, and for such other and further relief to which the petitioner may show itself justly entitled.

Respectfully submitted,

KENNEDY, BURLESON & HACKNEY

BY: 

Edward S. Hubbard
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ATTORNEY FOR PETITIONER
TEXAS ASSOCIATION OF CIVIL
PROCESS SERVERS

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SAN ANTONIO, TEXAS 78205

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February 10, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
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P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 103 and 106 submitted by Mr. Edward S. Hubbard; proposed change to Rule 106 submitted by Mr. Charles Griggs; proposed change to Rule 142 submitted by Wendell Loomis; proposed changes to Rules 205, 206-1 and 207 submitted by Charles Matthews. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

Rule 106 Recommended by CoA J 2-8-86

NUNN, GRIGGS, WETSEL & JONES

LAWYERS

CHAS. L. NUNN
CHAS. R. GRIGGS
ROD E. WETSEL
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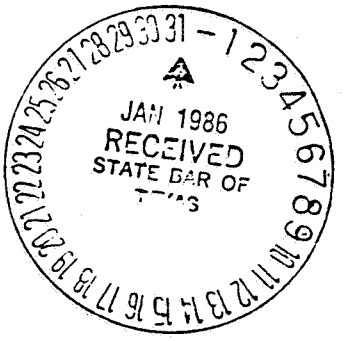
January 29, 1986



Mr. Mike Gallagher
Attorney at Law
7th Floor, Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002

Dear Mike:

At the last meeting of the Administration of Justice Committee, you designated Judge Cornyn, Phillip Johnson, and me to a sub-committee for the purpose of considering service of citation by mail. You will recall that the wording of the present Rule 106 permits service by certified mail, return receipt requested, addressee only. The postal service no longer accepts "addressee only" mail but provides a service known as "restricted delivery." Under the restricted delivery method, the certified mail may be delivered to the addressee or to some person designated by the addressee.

A majority of the subcommittee feels that the restricted delivery now available may not satisfy the requirements of proper notice under due process. At the same time, it is the feeling of the subcommittee that service by mail is a useful tool and ought to be retained if it is possible to do so.

There is submitted with this letter a proposed revision of Rules 103, 106 and 107, which would provide a service very similar to that provided by Rule 4 of the Federal Rules of Civil Procedure. Consideration of this change is recommended.

Because of the short period of time between the last meeting and the next meeting on February 8th, it is doubtful that a proper agenda setting can be obtained. However, I am sending a copy of this letter and the proposed changes to Evelyn Avent (or her successor) with the hope that it can at least be included in the packet for February 8.

In addition to addressing the due process problem, this method of securing service by mail may meet one of the problems addressed by Mr. Donald O. Baker of Huntsville in his original letter to

Justice Wallace when he suggested that clerks were sometimes reluctant to utilize the service by certified mail that was formerly available. It is the feeling of this subcommittee that the suggested amendment may simplify the entire process.

Sincerely,

Charles R. Griggs

CRG:bl

cc: The Honorable James Wallace
Associate Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Ms. Evelyn Avent
State Bar of Texas
P. O. Box 12487
Austin, Texas 78711

The Honorable John Cornyn
37th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Mr. Phillip Johnson
Attorney at Law
10th Floor, First National Bank Building
Lubbock, Texas 79408

Mr. Donald O. Baker
Attorney at Law
1024 Tenth Street
Huntsville, Texas 77340

RULE 103, OFFICER WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [or by mail, either of the county in which the case is pending or of the county in which the party to be served is found]; provided that no officer who is a party to or interested in the outcome of a suit shall ~~serve any process therein.~~ [Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending;] Service by citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

...

(2) [mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto;]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

The notice and acknowledgment shall conform substantially to the following form.

A. B., Plaintiff)		(IN THE DISTRICT
V.	)NO.	(COURT OF
C. D., DEFENDANT)		(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This notice and acknowledgment of receipt of citation and petition will have been mailed on (insert date).

Signature

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) this day of , 19 .

Notary Public, State of
(
My commission expires:

ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION

I received a copy of the citation and of the petition in the above captioned matter on the day , 19 .

Signature

(Relationship to entity or authority to receive service of process.

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) on this day of , 19 .

Notary Public, State of
(
My commission expires:

00000310

RULE 107. RETURN OF CITATION.

The return of the officer 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. ~~[When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.]~~ When the citation was served by mail as authorized in Rule 106(a)(2), the officer or person who has secured such service shall return to the clerk of the court in which the case is pending, the sworn notice and acknowledgment of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

...

File Copy

LAW OFFICES

SOULES & REED

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SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

February 18, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rule 18a submitted by Bruce A. Pauley and Rules 103 and 106 submitted by Judge Herb Marsh, Jr. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes for the March 7 and 8 meeting.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 12, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 13 and Rule 18a
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Bruce A. Pauley of Mesquite, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Bruce A. Pauley
Lyon & Lyon
Town East Tower
18601 LBJ Fwy. - Suite 525
Mesquite, Texas 75150

00000313

LYON & LYON
ATTORNEYS AND COUNSELORS AT LAW
TOWN EAST TOWER
18601 LBJ FWY. - SUITE 525
MESQUITE, TEXAS 75150

TED B. LYON, JR.
ROBERT CHARLES LYON
BRUCE A. PAULEY
MICHAEL A. YONKS

214-279-6571

February 10, 1986

Honorable James P. Wallace
Justice
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711

RE: Amendments to the Rules of Civil Procedure

Dear Justice Wallace:

It was a pleasure to see you and to have the opportunity to briefly speak with you at the Texas Law Center last Saturday. I appreciate your willingness to pass along to the proper individuals the suggestions which I have for changes in the Rules of Civil Procedure.

The changes I propose result from a case in which the plaintiff filed two Motions to Recuse the trial judge prior to trial and one Motion to Recuse the trial judge after trial but before the Motion for New Trial was heard. Subsequently, the plaintiff filed a fourth Motion to Recuse a judge who was designated to hear the third recusal motion. Although this is a rare circumstance, I believe that certain changes in the rules are in order in order to see that it does not or cannot happen again.

I propose the following changes in Texas Rule of Civil Procudure 18a:

1. Amend Rule 18a to allow for only one recusal motion per litigant per judge.

2. Alternatively, to provide for sanctions for the second and any subsequent recusal motions if they are found by the judge designated to hear the motion to be frivolous, brought in bad faith or for the purpose of delay.

In addition I would propose that Rule 13 be amended to provide for contempt in cases where pleadings are filed for the purposes of securing a delay of the trial or of any hearing of the cause, instead of just the trial of the cause. I would also propose that the Court strongly consider adopting Federal Rule 11 verbatim.

Thank you again for your help with this matter. I hope to see you again in the near future.

With warmest personal regards, I remain

Sincerely,

LYON & LYON

Bruce A Pauley

BRUCE A. PAULEY
Attorney at Law

BAP/mf

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 10, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 103 and Rule 106
Texas Rules of Civil Procedure

Dear Luke and Mike:

I am enclosing a letter from Judge Herb Marsh, Jr., of El Paso, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Herb Marsh, Jr.
Judge, 243rd District Court
City-County Building
El Paso, Texas 79901

00000316

HERBERT E. MARSH, JR.
DISTRICT JUDGE
243RD DISTRICT COURT
CITY-COUNTY BUILDING
EL PASO, TEXAS 79901
(915) 546-2168
(915) 546-2178

February 5, 1986

Committee on Revision of Rules
of Civil Procedure
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Gentlemen:

Please find enclosed a copy of proposed revision of Rules 103 and 106 T.R.C.P.

Thank you for your consideration.

Yours very truly,

Herb Marsh, Jr.
Judge

HM: sc
encl.

SOUTHWEST PROCESS SERVICE, INC.
1023 E. YANDELL
EL PASO, TEXAS 79902
(915) 533-0139

December 30, 1985

Hon. Herb Marsh
243th District Court
City County Building
El Paso, Texas 79901

Dear Judge Marsh:

Enclosed, please find a proposed rule change that we respectfully request that you consider, in accordance to Rule 3a of the Texas Rules of Civil Procedure. Said Rule change parallels the Federal Rules of Civil Procedure that offers saving to the petitioners and accelerates the judicial process.

Being cognizant of the fact that the El Paso County Judges are progressive leaders in the judiciary, we are requesting that the enclosed rule change be adopted and forwarded to the Supreme Court, in accordance with Rule 3a, for approval.

The approval of said rule will benefit the community in several ways.

First and foremost, it will enable the Sheriffs department to save money by the assignment of more personnel to the solving of serious crimes instead of being pre-occupied as process servers. Additionally, the considerable operating cost will be absorbed by the private sector instead of the public sector. Furthermore, the time lapse between filing and return of service will be shortened and El Paso County will join the rest of the states in the union in allowing service of citation through private enterprise. Therefore, the bold vision of the El Paso judges will benefit the community.

In closing, we thank you in advance for your prompt and favorable consideration to this request.

Respectfully yours,

RAI SARABIA

00000318

SOUTHWEST PROCESS SERVICE, INC.
1023 E. YANDELL
EL PASO, TEXAS 79902
(915) 533-0139

PROPOSED RULE CHANGE

RULE 103. OFFICER WHO MAY SERVE:

All process may be served by the sheriff or any constable of any county in which the party to be served is found or, TO A PERSON SPECIALLY APPOINTED TO SERVE IT or, if by mail, either of the county in which the case is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.

RULE 106 SERVICE OF CITATION:

(a) Unless the citation or an order of the court otherwise directs the citation shall be served by any officer authorized by RULE 103 OR BY A PRIVATE PARTY OR A PROCESS SERVING COMPANY BY MOTION AND ORDER TO SERVE CITATION 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) 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 an officer or by any disinterested adult named in the court's order 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.

RULE 107 RETURN OF CITATION

The return of the officer 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. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature. When the officer has not served the citation the return shall show the diligence used by the officer 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 106, proof of service shall be made in the manner [ordered by the court.] provided above or in any such manner as may be 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 106, shall have been on file with the clerk of the court for ten days, exclusive of the day of filing and the day of judgment.

COMMENT: Attorney Jeffrey Jones recommends this proposal to provide for returns on citations where service is by a disinterested adult pursuant to his recommended rule change in Rule 106.

RULE 107

[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 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: Representative Patricia Hill questioned the reason for the ten day requirement. Deletion of this portion of the rule will enable default judgments to be taken after the period for answer expires, regardless of the number of days the proof of service was on file with the clerk of the court.

107

LAW OFFICES

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RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

April 14,1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 99, 106, 107, 145, and 215. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Tina — transmitted ltr to Stdg SCAC subC.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 11, 1986

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Re: Rules 99, 103, 106 and 107.

Dear Mike and Luke:

I am enclosing suggested revisions to the above rules from Mr. Charles R. Griggs of Sweetwater.

May I suggest that these matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Charles R. Griggs
Nunn, Griggs, Wetsel & Jones
Doscher Building
Sweetwater, Texas 79556-0488

00000323

NUNN, GRIGGS, WETSEL & JONES

LAWYERS

CHAS. L. NUNN
CHAS. R. GRIGGS
ROD E. WETSEL
C. E. JONES

DOSCHER BUILDING
SWEETWATER, TEXAS 79556-0488

TELEPHONE
AREA CODE 915
236/6648
P.O. BOX 488

March 10, 1986

The Honorable John Cornyn
37th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Mr. Phillip Johnson
Attorney at Law
10th Floor, First National Bank Building
Lubbock, Texas 79408

Gentlemen:

At the last meeting of the Committee on Administration of Justice, the full Committee apparently approved the suggested revision of the rule permitting service by mail. The Committee further indicated that the matter should be voted on at the next regular meeting, which will be early in April.

To each of you, I enclose a suggested revision of Rules 99, 103, 106 and 107. I have called to Bar Headquarters to secure the necessary form for submitting these changes to Committee action but with Evelyn gone, no one seemed to know what I was talking about. In any case, I submit the proposed rule changes to you for your comments and suggestions. I will try to have the proposed changes in proper form at an early date so, if you think there should be any changes, please let me hear from you as soon as possible.

Sincerely,

Charles R. Griggs

CRG:bl
Enclosure
cc: The Honorable James Wallace
Associate Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION

I received a copy of the citation and of the petition in the above captioned matter on the day of , 19 .

Signature

(Relationship to entity or authority to receive service of process.

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) on this day of , 19 .

Notary Public, State of
( )
My commission expires:

(b) 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 an officer or by any disinterested adult named in the court's order 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.

RULE 107. RETURN OF CITATION.

The return of the officer executing a citation served under Rule 106(a)(1) 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. [When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.] When the citation was served by mail as authorized in Rule 106(a)(2), the person who has secured such service shall return to the clerk of the court in which the case is pending, the sworn notice and acknowledgment of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

Where citation is executed by an alternative method as authorized by Rule 106(b), 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 ordered by the court in the event citation is executed under Rule 106(b), shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY PROPOSED NEW RULES:

The proposed Rule changes arise from the fact that the provisions of Rule 106(a)(2) are no longer available for use. That Rule provides that service of citation may be accomplished by:

> "(2) Mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto." (Emphasis added)

At the time that portion of Rule 106 was adopted, the United States Postal Service provided an "Addressee Only" service but that particular service is no longer available through the postal service. The closest approximation of such a service is now known as "Restricted Delivery" and assures delivery only to the addressee or to some agent of the addressee who has been authorized in writing to receive the mail of the addressee. It is the feeling of the Subcommittee that this Restricted Delivery may not fulfill the requirements of due process insofar as notice is concerned.

The Subcommittee feels that service by mail is a useful device and ought to be preserved if it is possible to do so. The proposed Rule changes conform closely to a method of service available under Rule 4 of the Federal Rules of Civil Procedure. The particular parts of Rule 4 that areadapted to the proposed changes to the Texas Rules of Civil Procedure are:

RULE 4. Process.

...

(c) SERVICE.
(C) A summons and complaint may be served upon a defendant of any class referred to in Paragraph (1) or (3) of Subdivision (d) of this Rule -

...

(ii) By mailing a copy of the summons and of the complaint (by First Class Mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be maid under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so, the Court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

While the proposed service by mail will not be used in a majority of situations, it is felt that it will be useful under a number of circumstances and that the return of the acknowledgment of receipt of service will constitute a compliance with the due process requirement of notice.

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

RULE 107. RETURN OF CITATION

The return of the officer 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 must be signed by the officer officially. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature. When the officer has not served the citation, the return shall show the diligence used by the officer 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 106, 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 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.

END OF EXISTING RULE 107

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; uncerline propose new wording; see example attacned).

RULE 107. RETURN OF CITATION

The return of the officer executing a citation served under Rule 106(a)(1) 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. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. [When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.] When the citation was served by mail as authorized in Rule 106(a)(2), the person who has secured such service shall return to the clerk of the court in which the cause is pending, the sworn notice and acknowledgment of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

Where citation is executed by an alternative method as authorized by Rule 106(b), proof of service shall be made in the manner ordered by the court.

etc.

PROPOSED RULE 107 CONTINUED ON NEXT PAGE

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted, 00000328

Date _____ 197__

_____ Name

_____

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

A
B
C
D
E
F
G
H
I
J
K
L
M
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Q
R

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; uncerline proposed new wording; see example attacned).

1 No default judgment shall be granted in any cause until the
2 citation with proof of service as provided by this rule, or
3 ordered by the court in the event citation is executed under Rule
4 106(b), shall have been on file with the clerk of the court ten
5 days, exclusive of the day of filing and the day of judgment.
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20
21 END OF PROPOSED RULE 107
etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

SEE FOLLOWING PAGE

Respectfully submitted, 00000329

Date _____ 197_

Name

Address

BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES
AND
ADVANTAGES TO BE SERVED BY PROPOSED NEW RULES:

The proposed Rule changes arise from the fact that the provisions of Rule 106(a)(2) are no longer available for use. That Rule provides that service of citation may be accomplished by:

> "(2) Mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto." (Emphasis added)

At the time that portion of Rule 106 was adopted, the United States Postal Service provided an "Addressee Only" service but that particular service is no longer available through the postal service. The closest approximation of such a service is now known as "Restricted Delivery" and assures delivery only to the addressee or to some agent of the addressee who has been authorized in writing to receive the mail of the addressee. It is the feeling of the Subcommittee that this Restricted Delivery may not fulfill the requirements of due process insofar as notice is concerned.

The Subcommittee feels that service by mail is a useful device and ought to be preserved if it is possible to do so. The proposed Rule changes conform closely to a method of service available under Rule 4 of the Federal Rules of Civil Procedure. The particular parts of Rule 4 that areadapted to the proposed changes to the Texas Rules of Civil Procedure are:

RULE 4. Process.

...

(c) SERVICE.
(C) A summons and complaint may be served upon a defendant of any class referred to in Paragraph (1) or (3) of Subdivision (d) of this Rule -

...

(ii) By mailing a copy of the summons and of the complaint (by First Class Mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be maid under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so, the Court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgement of receipt of summons and complaint shall be executed under oath or affirmation.

While the proposed service by mail will not be used in a majority of situations, it is felt that it will be useful under a number of circumstances and that the return of the acknowledgment of receipt of service will constitute a compliance with the due process requirement of notice.

Respectfully submitted,

CHARLES R. GRIGGS
P. O. Box 488
Sweetwater, Texas 79556

Date: March 13, 1986

00000331

JOHNSON & DAVIS

February 27, 1985

Ms. Evelyn A. Avent
Executive Assistant
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, Texas 78711

Re: Proposed amendments to Rules 106 and 107, T.R.C.P.

Dear Evelyn:

Enclosed herewith are proposed amendments to Rules 106 and 107 of the Rules of Civil Procedure.

Also enclosed, as background material, is a copy of Senate Bill No. 253 which relates to the same matter. This Bill was passed by both houses of the last legislature, but was vetoed by the Governor.

I think that it would be helpful to the committee members to have a copy of the Bill in addition to the proposed amendments to Rules 106 and 107.

Thank you very much for your help in this matter.

Very truly yours,

Jeffrey W. Jones

JWJ:rrm
Encls.

cc: Mr. Michael T. Gallagher
Fisher, Gallagher, Perrin & Lewis
[illegible]

00000332

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL PROCEDUR

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

Rule 106. Service of Citation

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 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, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other pl 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, good cause therefor, the court may authorize service

(1) by any disinterested adult as the manner provided in section (a)(1) of this Rule, or

(2) where service has been attempted under either (a)(1) or (a)(2) but has not been successful, by an officer or by any disinterested adult named in the court's order 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,

(3) in any manner that the affidavit or other evidence before court shows will be reasonably effective to give the defendant notice the suit.

Brief statement of reasons for requested changes and suggestions to be served proposed new Rule:

To allow service of citation by any disinterested adult by order of the court, upon showing of good cause.

Respectfully submitted,

Jeffrey [illegible]
[illegible]
402 East [illegible]
Harlingen, Texas 78551
(512) 423-[illegible]

Date: February 27, 1985

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL PROCE

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

Rule 107. Return of Citation

The return of the officer executing the citation shall be endorsed or attached to the same; it shall state when the citation was served a the manner of service and be signed by the officer officially. When t citation was served by registered or certified mail as authorized by R 106, the return by the officer must also contain the return receipt wi the addressee's signature. When the officer has not served the citat the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant i to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court. provided above or in any such other manner as may be 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 106, shall have been on file with the clerk of the court for ten days, exclusive of the day filing and the day of judgment.

etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

To provide for returns on citations where service is by a disinterested adult pursuant to revised Rule 106.

Respectfully submitted,

DATE February 27, 1981

00000334

PATRICIA HILL
STATE REPRESENTATIVE
DISTRICT 102

AUSTIN OFFICE
P.O. BOX 2910
AUSTIN, TEXAS 78769-2910
512-475-5693

DISTRICT OFFICE
1000 PACIFIC PLACE
1910 PACIFIC AVENUE
DALLAS, TEXAS 75201-4598
214-748-9020

August 12, 1985

Mr. Luther H. Soules, III
Attorney at Law
800 Milam Building
San Antonio, Texas 78205

Mr. Michael T. Gallagher
Attorney at Law
70th Floor
Allied Bank Plaza
Houston, Texas 77002

RE: Proposed changes in Texas Rules of Civil Procedure

Gentlemen:

I ran into Justice Mack Wallace at the State Bar of Texas Convention. Knowing he was the justice responsible for recommending rule changes to the Texas Supreme Court, I ventured to suggest a few changes to our state rules. Justice Wallace suggested I contact the two of you. I would like to make several suggestions for possible consideration:

1. Provide for motions to dismiss. As you well know, there is no procedure possible in state court comparable to a Rule 12(b)(6) motion in federal court. It is ponderous at best to dispose of a frivolous claim in state court. I am seeing lawyers in state court filing motions to dismiss on occasion, though unauthorized by the rules. I think a rule enabling the filing of a motion for failure to state a claim upon which relief can be granted would be a boon to lawyers, litigants and judges.

2. Permitting attorneys to prepare certain pleadings. In federal court, attorneys are required to prepare their own citations, executions, and abstracts of judgment, in addition to taxing their own costs. I carried legislation enabling attorneys to do this last session which passed the House but got bogged down in the Senate during the last weeks, due mostly to the fact that county clerks feared that enabling attorneys to prepare these simple documents would cut down on their revenues. My legislation was permissive, and a copy of it is enclosed for your perusal. On consideration, it seems

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just as logical for a change like this to be adopted in the rules as through the legislature. Justice Wallace said this change had been suggested on several occassions. I do not think I need to belabor the reasons for suggesting this change to the two of you but will be happy to provide testimony in favor of the change if you think this is advisable.

3. Adoption of federal rules. I know this suggestion may be considered heresy by some, but I would timidly submit that the 822 rules which govern our state practice act as tar babies to which even the most competent lawyers occasionally become affixed. Because the rules are so many and so complicated, the courts do not consistently enforce them. I know many lawyers would oppose the adoption of federal rules, but I am being surprised by how many state court lawyers appear to be frustrated by the number of state court rules. (When I suggested this to Justice Wallace, he said no one had suggested it to him. It has now been suggested by someone.) I will attempt to do some formal or informal polling among lawyers in Dallas to see what the concensus might be on this issue and would appreciate your input.

A

3. Service of process by private process servers. As you know, the rules require that service be attempted by a sheriff or constable before service by a private process server may be had. These rules are to some extent ignored since the service problems in some metropolitan areas are becoming extreme. Legislation was introduced during the last two sessions to permit private process servers the same rights to serve basic court documents as law enforcement officials. In 1983 the bill passed but was vetoed by the Governor due to opposition on the part of the constables' association.

4. Ten-day period citation must be on file. As you know, Rule 107 provides in part that no default judgment shall be granted until the citation has been on file with the clerk ten days, exclusive of the day of filing and the day of judgment. I have often been perplexed about the reason for this rule, especially since the answer date in justice courts is the Monday following ten days; in many cases the citation is received from the constable less than ten days prior to the answer date.

5. Filing frivolous suits/motions. Rule 11 of the federal rules provides for sanctions to be imposed for the filing of a pleading for any improper purpose, and the signature of an attorney on a pleading certifies that the pleading is "well grounded in fact and is warranted by existing law...". I believe that this is an excellent

rule and would like to see a comparative state rule. At the present time, to my knowledge, only the Deceptive Trade Practices Act provides for attorney fees for defending a claim brought under the Act which is found to be false. Each of us has experienced representing a client defending a suit brought in bad faith and with no grounds. If sanctions could be imposed, I believe this may deter some litigious plaintiffs from filing groundless suits in the hope of settling out of court.

I would enjoy hearing from you and would be glad to give you any help I can on these changes.

Very truly yours,

Patricia Hill

Patricia Hill

PH:lh

HOUSE ENGROSSMENT

By P. Hill of Dallas H.B. No. 17

A BILL TO BE ENTITLED

AN ACT

relating to the preparation and delivery of certain court documents and to costs in civil suits.

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

SECTION 1. Title 42, Revised Statutes, is amended by adding Article 2021a to read as follows:

Art. 2021a. CITATION

Sec. 1. The plaintiff or his attorney may prepare the appropriate citation for the defendant and file a sufficient number of copies of the citation with the clerk of the court at the time the plaintiff or his attorney files the petition.

Sec. 2. The citation must be in the form prescribed by the Texas Rules of Civil Procedure.

Sec. 3. The clerk may not charge a fee for the preparation of a citation under this article.

Sec. 4. The citation shall be served in the manner prescribed by law.

Sec. 5. The plaintiff or his attorney and the clerk of the court shall comply with the applicable Texas Rules of Civil Procedure governing preparation and issuance of citation.

SECTION 2. Title 56, Revised Statutes, is amended by adding Article 3783a to read as follows:

Art. 3783a. EXECUTION OF JUDGMENT

Sec. 1. The prevailing party in a civil suit or the party's

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attorney may prepare a writ of execution and deliver it to the clerk of the court or justice of the peace. The clerk or the justice of the peace may not charge a fee for the preparation of a writ of execution under this article. If the prevailing party or his attorney requests that the writ of execution be returned for delivery to a sheriff or constable, the clerk of the court or the justice of the peace shall deliver the writ of execution to the prevailing party or his attorney. If the prevailing party or his attorney does not request that the writ be returned, the clerk of the court or the justice of the peace shall send the writ to the appropriate sheriff or constable.

Sec. 2. The prevailing party or his attorney may send the writ of execution to the appropriate sheriff or constable.

Sec. 3. The prevailing party or his attorney, the clerk of the court or the justice of the peace, and the sheriff or constable who executes the writ shall comply with the applicable Texas Rules of Civil Procedure governing writs of execution.

SECTION 3. Section 52.002, Property Code, is amended to read as follows:

Sec. 52.002. ISSUANCE OF ABSTRACT. (a) On application of a person in whose favor a judgment is rendered or on application of that person's agent, attorney, or assignee, the justice of the peace who rendered the judgment or the clerk of the court that rendered the judgment shall prepare and deliver to the applicant an abstract of the judgment.

(b) The person in whose favor a judgment was rendered, his agent, attorney, or assignee, may prepare the abstract of judgment

and deliver it to the clerk of the court or the justice of the peace. The clerk or the justice of the peace may not charge a fee for the preparation of an abstract of judgment under this subsection. [~~The justice or clerk shall certify the abstract.~~]

(c) If the clerk prepares the abstract, the [~~The~~] applicant for the abstract must pay the fee allowed by law.

SECTION 4. (a) Each party to a civil action shall file with the court an itemized bill of costs incurred by that party during the action.

(b) The bill of costs must have attached an affidavit by the party or the party's attorney stating that:

(1) the bill of costs is correct;

(2) each item was necessarily incurred in the case; and

(3) the services for which fees have been charged were actually and necessarily performed.

(c) If the court allows the bill of costs, the bill of costs shall be included in the judgment.

SECTION 5. This Act takes effect September 1, 1985, and applies only to actions filed on or after that date.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

LEGISLATIVE BUDGET BOARD

Austin, Texas

FISCAL NOTE

March 20, 1985

Honorable Frank Tejeda, Chair
Committee on Judicial Affairs
House of Representatives
Austin, Texas

In Re: House Bill No. 17
By: P. Hill

Sir:

In response to your request for a Fiscal Note on House Bill No. 17 (relating to preparation and delivery of certain court documents) this office has determined the following:

No fiscal implication to the State or units of local government is anticipated.

Jim Oliver
Director

Source: LBB Staff: JO, JH, HF, PA

00000341

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 4, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 142, Security for Costs

Dear Luke and Mike:

I am enclosing a letter from Wendell S. Loomis of Houston, regarding the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Wendell S. Loomis
Loomis & McKenney, P.C.
Attorneys at Law
Cornerstone Towers #450
3707 FM 1960 West
Houston, Tx 77068

00000342

Wendell S. Loomis, B.B.A., J.D.
Hugh L. McKenney, B.S., J.D.

Thomas A. Hunter, B.A., J.D.

Office 580-6767
Area Code 713

LOOMIS & McKENNEY, P.C.
Attorneys at Law
CORNERSTONE TOWERS #450
3707 FM 1960 WEST
HOUSTON, TEXAS 77068

January 22, 1986

Supreme Court
Supreme Court Building
Post Office Box 12248
Austin, Texas 78711

Re: Rules of Civil Procedure, Rule 142
Security for Costs

Gentlemen:

I respectfully wish to suggest that the last sentence of Rule 142 is archaic and should be dispensed with. That last sentence reads as follows:

> "No attorney or other officer of the court shall be surety in any cause pending in the court, except under special leave of court."

It is suggested that the rule is a substantial burden to the bar and the appellate process, because it requires the application to a corporate surety (most of the time) and a premium for the bond to be paid. Usually, all of the costs have been paid either by the attorney or the client as incurred in the trial court, and for the statement of facts and the transcript. In the instances where the appellant's attorney has not paid or arranged for the payment of these costs, he knows what they are when they are incurred by the appellee.

Rule 354 provides the amount of $1,000.00 without court approval, and anything in excess of $1,000.00 has to be requested by the appellee on proper motion to the court. If there were any such increase, then the attorney could reassess his surety position and, at that time, obtain any approval necessary from the trial court or the Court of Appeals.

As a practical matter, few cost bonds are ever objected to by appellees, either in amount or as to sureties.

Until the recent case of the Court of Appeals calling my attention to Rule 142, I was not even aware that the last sentence existed and that approval of the court was necessary for an attorney to be surety for his client.

It is respectfully suggested that Rule 142 should be amended and the second sentence omitted.

Very truly yours,

LOOMIS & MCKENNEY, P.C.

Wendell S. Loomis

WSL:ag

145

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

April 14,1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 99, 106, 107, 145, and 215. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Tina
transmit ltr to
Std Sub C of SCAP.
J

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 10, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 145.

Dear Luke and Mike:

I am enclosing a letter from Mr. Robert L. Byrd of the Gulf Coast Legal Foundation regarding the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Robert L. Byrd, Executive Director
Gulf Coast Legal Foundation
5009 Caroline
Houston, Texas 77004

(713) 522-5383

GULF COAST LEGAL FOUNDATION

5009 CAROLINE • HOUSTON, TEXAS 77004

March 6, 1986

Justice Jim Wallace
Supreme Court of Texas
Austin, Texas

Dear Justice Wallace:

The Gulf Coast Legal Foundation is a non-profit corporation composed of lawyers who assist indigent clients in a variety of civil matters. Presently, the Foundation is faced with a situation adversely affecting its clients which can be remedied through your assistance. Without the Court's remedial action, many clients will be frustrated in exercising their right to access to the courts.

Rule 145, Texas Rules of Civil Procedure, allows an individual to file an affidavit to proceed *in forma pauperis*. The Rule further provides that any party to the suit, the judge, or the clerk may contest said affidavit. The Government Code, 51.317, provides that the clerk shall collect all fees and costs as detailed therein.

The District and County Clerk's offices in Houston have determined they must challenge each and every affidavit that is filed. The clerks contest the affidavits for the stated reason that they fear liability by reason of the Government Code provision.

The Foundation's Attorney Managers in the 16 counties contiguous to Harris report a variety of *in forma pauperis* procedures without uniformity. The same can be said of reports from members of the "Legal Services To the Poor Committee - - Civil Matters," State Bar of Texas,

chaired by Dean Frank Newton, Texas Tech Law School. It appears District and County Clerks state-wide lack procedural direction.

Given this context the sound opinions of the Texas Supreme Court [Allred v. Lowry, 597 S. W. 2d 353 (Tex. 1980); Goffney v. Lowry, 554 S. W. 2d 157 (Tex. 1977); King v. Payne, 292 S. W. 2d 331 (Tex. 1956); Pinchback v. Hockless, 164 S. W. 2d 19 (Tex. 1942)] are subjected to a haphazard process.

Time consuming delays are experienced by the indigent persons and their attorneys, county attorneys, who represent the clerks on their contests, and the courts.

We propose the Court remedy this situation to the benefit of indigent Texans. Such a remedy may also assist the clerks around the state in limiting their liabilities.

We propose a new Rule 145 (attached). We base our proposal on a Pennsylvania rule which is enclosed for your review. Our proposed rule reorders the process of filing *in forma pauperis*, this assures said affidavits will be accepted for filing without delay. For the benefit of legal services programs (such as the Foundation's) and *pro bono* panels (such as the Houston Bar Association's Houston Volunteer Lawyers) it provides for acceptance of the affidavit upon certification by an attorney that no fees are being charged for the rendition of legal representation.

Further, the Legislature should be asked to modify Government Code Section 51.317. Language should be added to 51.317 which simply says: "...except as provided in Rule 145, Texas Rules of Civil Procedure."

I have taken the liberty of copying other parties. Among them are persons who have been kind enough to share their perspectives on this important subject. This does appear to be a situation where everyone wants to help the indigent. And, this is a situation where all parties need the same remedy. The remedy needed is reform of the *in forma pauperis* process.

I appreciate the opportunity of addressing you on this issue. I invite your questions. I am told by Dean Newton that his State Bar

Committee stands ready to serve as well. Please accept my gratitude in advance for engaging us in the dialogue necessary to solve this problem.

Very truly yours,

Robert L. Byrd
Executive Director

xc: Chief Justice John Hill
Justice Bill Kilgarlin
Justice Raul Gonzalez
Bill Willis
Dean Frank Newton, Texas Tech School of Law
Judge Frank Evans
Judge Thomas J. Stovall
Judge Michael O'Brien
Judge Dean Huckabee
District Clerk Ray Hardy
County Attorney Mike Driscoll
John Eikenburg, President Houston Bar Association
Reginald Hirsch, President GCLF Board
Prof. Joseph Hensley, GCLF Board

Rule 145. In lieu of filing security for costs of an original action or an appeal, a party who is unable to afford said costs shall file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a government entitlement based on indigency or any other person who has no present ability to pay costs. Said affidavit, and the party's action or appeal, shall be processed by the clerk in the herein described procedure.

1. **Procedure.** Upon the filing of the affidavit, the clerk shall docket the action or appeal and accord such other typical services as are provided any party. If the court shall find at the first regular hearing in the course of the action or appeal that the party (other than a party receiving a government entitlement) is able to afford costs, the party shall pay the costs of the action or appeal. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action or appeal will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action or appeal. If the court finds that another party to the suit can pay the costs of the action or appeal, the other party shall pay the costs of the action or appeal.

2. **Affidavit.** The affidavit shall contain complete information as to the party's identity , nature and amount of government entitlement income, nature and amount of employment income, other income (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. The Affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The Affidavit shall be acknowledged before a Notary Public.

3. **Attorney's Certification.** If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency, said attorney may file an affidavit to that effect to assist the court in understanding the financial condition of the party.

Upon request and payment of reasonable costs of reproduction and mailing, the prothonotary or clerk shall furnish to any person a copy of any local rule.

Note: It is contemplated under subdivision (c)(5) that a separate consolidated set of local rules shall be maintained in the prothonotary's or clerk's office. To simplify the use of local rules it is also recommended that whenever possible local rules should be given numbers that are keyed to the numbers of the general rules to which the local rules correspond.

(6) A local rule promulgated before the effective date of this rule shall be filed on or before that effective date with the prothonotary or clerk of court and shall be kept by the prothonotary or clerk for inspection, copying, and furnishing as provided in subdivision (c)(5).

(d) A local rule shall become effective not less than thirty days after the date of publication of the rule in the Pennsylvania Bulletin.

Note: Although under subdivision (d) a local rule shall not be effective until at least thirty days after the date of publication in the Pennsylvania Bulletin, when a situation arises that requires immediate action, the local court may act by specific orders governing particular cases in the interim before an applicable local rule becomes effective.

(e) The Civil Procedural Rules Committee may at any time recommend that the Supreme Court suspend, vacate, or require amendment of a local rule and may suspend that local rule pending action by the Court on that recommendation.

(f) No civil action or proceeding shall be dismissed for failure to comply with a local rule other than one promulgated under Rule of Judicial Administration 1901.

Note: Rule of Judicial Administration 1901 directs each court of common pleas to provide by local rule for the termination of matters which have been inactive for an unreasonable period of time.

Adopted Jan. 28, 1983, effective July 1, 1983.

Rule 240. In Forma Pauperis

(a) This rule shall apply to all civil actions and proceedings except actions of divorce or for annulment of marriage and actions pursuant to the Protection from Abuse Act.

Note: For special provisions governing proceedings in forma pauperis, see Divorce Rule 1920.62 and section 4(b) of the Protection from Abuse Act, 35 P.S. § 10184(b).

(b) A party who is without financial resources to pay the costs of litigation is entitled to proceed in forma pauperis.

(c) Except as provided by subdivision (d), the party shall file a petition and an affidavit in the form prescribed by subdivision (h). The petition may not be filed prior to the commencement of an action or the taking of an appeal.

(1) If the petition is filed simultaneously with the commencement of the action or with the taking of the appeal, the prothonotary shall docket the action and petition or shall accept the appeal and petition without the payment of any filing fee. If the court shall thereafter deny the petition, the petitioner shall pay the filing fee for commencing the action or taking the appeal. A party required to pay such fee may not without leave of court take any further steps in the action or appeal so long as such fee remains unpaid.

(2) If the action is commenced or the appeal is taken without the simultaneous filing of a petition, the appropriate filing fee must be paid and shall not be refunded if a petition is thereafter filed and granted.

(3) Except as prescribed by subdivision (d), the court shall act promptly upon the petition and shall enter its order within twenty days from the date of the filing of the petition. If the petition is denied, in whole or in part, the court shall briefly state its reasons.

(d)(1) If the party is represented by an attorney, the prothonotary shall allow the party to proceed in forma pauperis upon the filing of a praecipe which

(i) contains a certification by the attorney that he is providing free legal service to the party and that he believes the party is unable to pay the costs, and

(ii) is accompanied by the affidavit required by subdivision (c).

(2) The praecipe shall be substantially in the form prescribed by subdivision (i).

(e) A party permitted to proceed in forma pauperis has a continuing obligation to inform the court of improvement in his financial circumstances which will enable him to pay costs.

(f) A party permitted to proceed in forma pauperis shall not be required to

(1) pay any cost or fee imposed or authorized by Act of Assembly or general rule which is payable to any court or prothonotary or any public officer or employee, or

(2) post bond or other security for costs as a condition for commencing an action or taking an appeal.

(g) If there is a monetary recovery by judgment or settlement in favor of the party permitted to proceed in forma pauperis, the exonerated fees and costs shall be taxed as costs and paid to the prothonotary by the party paying the monetary recov-

ery. In no event shall the exonerated fees and costs be paid to the indigent party.

(h) The affidavit in support of a petition for leave to proceed in forma pauperis shall be substantially in the following form:

(Caption)

1. I am the (plaintiff) (defendant) in the above matter and because of my financial condition am unable to pay the fees and costs of prosecuting or defending the action or proceeding.

2. I am unable to obtain funds from anyone, including my family and associates, to pay the costs of litigation.

3. I represent that the information below relating to my ability to pay the fees and costs is true and correct:

(a) Name: _____

Address: _____

_____

Social Security Number: _____

(b) Employment

If you are presently employed, state

Employer: _____

Address: _____

_____

Salary or wages per month: _____

Type of work: _____

If you are presently unemployed, state

Date of last employment: _____

Salary or wages per month: _____

Type of work: _____

(c) Other income within the past twelve months

Business or profession: _____

Other self-employment: _____

Interest: _____

Dividends: _____

Pension and annuities: _____

Social security benefits: _____

Support payments: _____

Disability payments: _____

Unemployment compensation and supplemental benefits: _____

Workman's compensation: _____

Public assistance: _____

Other: _____

_____

(d) Other contributions to household support

(Wife) (Husband) Name: _____

If your (wife) (husband) is employed, state

Employer: _____

Salary or wages per month: _____

Type of work: _____

Contributions from children: _____

Contributions from parents: _____

Other contributions: _____

(e) Property owned

Cash: _____

Checking account: _____

Savings account: _____

Certificates of deposit: _____

Real estate (including home): _____

Motor vehicle: Make _____, Year _____,

Cost _____, Amount Owed $_____

Stocks; bonds: _____

Other: _____

_____

(f) Debts and obligations

Mortgage: _____

Rent: _____

Loans: _____

Other: _____

_____

(g) Persons dependent upon you for support

(Wife) (Husband) Name: _____

Children, if any:

Name: _____ Age: ___

_____ ___

_____ ___

Other persons:

Name: _____

Relationship: _____

4. I understand that I have a continuing obligation to inform the court of improvement in my financial circumstances which would permit me to pay the costs incurred herein.

5. I verify that the statements made in this affidavit are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: _____

Petitioner

(i) The praecipe required by subdivision (d) shall be substantially in the following form:

(Caption)

PRAECIPE TO PROCEED IN FORMA PAUPERIS

To the Prothonotary:

Kindly allow _____, (Plaintiff) (Defendant), to proceed in forma pauperis.

I, _____, attorney for the party proceeding in forma pauperis, certify that I believe the party is unable to pay the costs and that I am providing free legal service to the party. The party's affidavit showing inability to pay the costs of litigation is attached hereto.

Attorney for

Adopted March 10, 1983, effective April 1, 1983.

Rule 247. Rescinded May 24, 1979, effective Dec. 30, 1978

Note: Former Rule 247 is no longer necessary. Jurisdiction in the courts of common pleas of appeals from arbitration awards in public employment disputes between local government units and their employes is now provided by Section 933(b) of the Judicial Code, 42 Pa.C.S. § 933(b), effective June 27, 1978.

Rule 247.1. Rescinded March 16, 1981, effective in 60 days

Rule 248. Modification of Time

The time prescribed by any rule of civil procedure for the doing of any act may be extended or shortened by written agreement of the parties or by order of court.

Adopted Jan. 4, 1952, effective July 1, 1952.

Rule 249. Authority of Individual Judge

(a) Except where the court is required to act en banc, a law judge may perform any function of the court, including the entry of interlocutory or ex parte orders, decrees and other matters in the nature thereof.

(b) When a law judge may perform a function of the court, other than trying an action, he may act at any time and at any place within the judicial district.

(c) Each court may regulate the assignment of business among its judges.

Adopted Jan. 4, 1952, effective July 1, 1952.

Rule 250. Scope of Chapter

The rules of this chapter shall apply to all civil actions and proceedings at law and in equity.

Adopted Sept. 30, 1949, effective April 1, 1950.

SERVICE OF ORIGINAL PROCESS AND OTHER LEGAL PAPERS

PART I. SERVICE OF ORIGINAL PROCESS

SUBPART A. SERVICE GENERALLY

EXPLANATORY COMMENT—1985

The recent amendments to the rules of civil procedure promulgated by the Supreme Court of Pennsylvania consolidate into a single chapter all of the rules governing service of original process and other legal papers, which are presently scattered throughout various chapters in the rules. These amendments result in a net reduction of nine entire rules of civil procedure and many other subdivisions of rules governing service.

When these amendments were published as Recommendation No. 69, the recommendation proposed to extend the right of service by competent adult and by mail to all actions whether within or outside the Commonwealth. These proposals, however, have not been adopted and are not a part of the present amendments, and the right of service by competent adult and by mail is restricted to those situations where it was previously permitted.

For the convenience of the bench and bar, there are attached to this comment a table showing the disposition of the present service rules and another table showing the derivation of the new rules.

The new chapter governing service is divided into two major parts, Part I relating to service of original process and Part II relating to service of other legal papers.

Part I governing service of original process is further divided into four subparts. Subpart A (Rules 400–405), which is entitled "Service Generally", provides the basic practice for serving original process upon any type of party in any type of action and for making the return of service, except for the special situations provided for in Subparts B and C. Subpart A relates to service both within and outside the Commonwealth. Rules 400, 401 and 402 relate to service within the Commonwealth and prescribe the persons who may make service (Rule 400), the time within which service must be made and the requirement of reissuance or reinstatement of original process when service is not made timely (Rule 401), and the manner of service (Rule 402). Rule 404 relates to service outside the Commonwealth and

145

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LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

March 27, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a proposed change to Rule 145, submitted by Kenneth L. Schorr. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 17, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 145

Dear Luke and Mike:

I am enclosing a letter from Mr. Kenneth L. Schorr, Executive Director of the North Central Texas Legal Services Foundation, Inc., of Dallas, regarding the above rule.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Kenneth L. Schorr, Executive Director
North Central Texas Legal Services Foundation, Inc.
3108 Live Oak Street
Dallas, Tx 75204

00000355

NORTH
CENTRAL
TEXAS
LEGAL
SERVICES FOUNDATION, INC.

MAIN OFFICE
3108 Live Oak Street
Dallas, Texas 75204
(214) 824-6690

SOUTH OFFICE
Lancaster-Kiest Shopping Center
Suite 405
Dallas, Texas 75216
(214) 374-7681

NORTH OFFICE
110 North Tennessee Street
McKinney, Texas 75069
(214) 542-9405/McKinney
(214) 868-1800 Sherman/Denison

Reply to: MAIN OFFICE

March 12, 1986

Justice Jim Wallace
Supreme Court of Texas
Austin, Texas

RE: Filing Fee Waivers

Dear Justice Wallace:

I am writing as Executive Director of a publicly funded agency which providing free civil legal services to indigent Texans, to encourage your support of a revision in Rule 145. A proposal has been forwarded to you by the Director of the Gulf Coast Legal Foundation, a sister agency, which we wholeheartedly support.

It is our practice to screen all applicants for free representation for financial eligibility, according to criteria based on federal proverty guidelines. Virtually all of our clients are unable to pay filing fees, and affidavits of inability to pay filing fees are filed in almost all of our cases.

There are a variety of different practices in the various clerk's offices in the six counties in which we provide services. In some counties, the District or County Clerk's offices accept our representation as facial eligibility of our client for a fee waiver, and seldom contest the affidavits of our clients. In other offices, the clerks contest every affidavit as a matter of course, requiring our attorneys to attend an additional hearing in virtually every case.

Most of our work involves emergencies such as loss of shelter or income or domestic violence, requiring immediate filing and trial or temporary orders. Because the procedure for contesting the affidavit may introduce delay into the initial stages, the existing procedure interferes with the proper representation of clients.

00000356

The existing procedure also provides so much discretion to trial judges that eligibility for waiver is unpredictable. In one recent Dallas case, the Court of Appeals upheld the exercise of discretion in denying waiver of fees to an indigent quadriplegic receiving Supplemental Security Income disability benefits because he might pay fees with borrowed funds to be repaid from possible future employment, Wallgren v. Martin, 700 S.W.2d 28 (Tex.Civ.App.--Dallas, 1985).

The existing procedure is a burden on the time of our professional staff, who number approximately one for every 12,000 eligible indigent individuals in our service area. We simply cannot afford to pay the fees from institutional funding, and spend an enormous amount of time litigating contested affidavits. Reform of the fee waiver procedure is of critical importance to us.

Your attention to this matter is appreciated.

Sincerely yours,

Kenneth L Schorr
EXECUTIVE DIRECTOR

KLS:amm

cc: Chief Justice John Hill
Justice Bill Kilgarlin
Justice Raul Gonzalez
Dean Frank Newton
Judge Merrill Hartman
Attorney Charles Cotropia
Attorney Jarilyn Dupont

Rule 161

Evaluate - J. P.

January 25, 1984

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Rule 161, Texas Rules of Civil Procedure

Dear Judge Pope:

Please forgive my delay in bringing this up, but it seems to me there is a further amendment to Rule 161 which might well improve administration of justice. Frequently, when some parties are served and others are not served, the most appropriate remedy is to sever the case so that the case may proceed to judgment against those parties who are properly before the court and not be held up awaiting service on parties as to whom a dismissal is not desired.

Therefore, I suggest the rule be amended to read as follows:

> "When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by Article 2088 of the Texas Revised Civil Statutes. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liablity, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered."

Sincerely yours,

Don

DON L. BAKER

DLB:lg

Change already adopted in April 24, 1984

00000358

Law Offices of Baker & Price A PROFESSIONAL CORPORATION SUITE 500 314 WEST 11TH ST. AUSTIN, TEXAS 78701-2186 512-476-600

1K - send to R 204-4 SubC SCAC COA recommends adoption 9-14-85

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule: 166c

None as to Rule ~~216~~.

Rule 11. Agreements To Be in Writing

~~Unless otherwise provided in these rules,~~

No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Rule 204-4

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Except in the case of objections to the form of questions or the nonresponsiveness of answers, which objections are waived if not made at the taking of an oral deposition, the court shall not be confined to objections made at the taking of the testimony.

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

New Rule ~~216~~. 166c

Rule ~~240~~. 166c Stipulations Regarding Discovery Procedure.

Unless the Court orders otherwise, the parties may by written agreement (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery. An agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the transcript of deposition.

Rule 11. Agreements To Be in Writing.

Unless otherwise provided in these rules,

No agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record. ~~This rule is subject to the provisions of Rule 240.~~

Rule 204-4

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Except in the case of objections to the form of questions or the nonresponsiveness of answers, which objections are waived if not made at the taking of an oral deposition unless otherwise agreed between the parties or attorneys by agreement recorded by the officer, the court shall not be confined to objections made at the taking of the testimony.

etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

(See Attached Comment)

00000359

Date August 28 1985

Respectfully submitted,

Charles L. Dewoody Name

4400 Thanksgiving Tower

Dallas Tx. 75201

COMMENT

The proposed Rule 216 is taken almost verbatim from Federal Rule 29, which provides in full that:

> Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

It should initially be noted that the underlined portion of Federal Rule 29 is not recommended for adoption in Texas.

The proposed new rule is submitted in response to an expressed desire for more flexibility in the rules to acommodate proposed agreements among parties to litigation during discovery, expecially regarding taking depositions upon oral examination. Texas practitioners have historically entered into agreements regarding many aspects of discovery without question of their authority to do so. Recently, concerns have been expressed that because the Texas Rules of Civil Procedure do not contain express authorization to vary the terms of the rules, the rules thus may not be varied by agreement. In particular, concerns have been expressed that objections to the form of questions or nonresponsiveness of answers required by Texas Rule 204-4 may not be reserved until time of trial. The proposed new rule will clearly allow reserving objections.

It could perhaps be argued that Texas Civil Rule 11 would apply to agreements under Rule 216. Caution would dictate, therefore, that an additional sentence be added to the proposed Rule 216 to the effect that "an agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the transcript of deposition."

The provision of Federal Rule 29 regarding court approval for stipulations extending the time limits regarding Interrogatories to Parties (Rule 33), Production of Documents (Rule 34), and Requests for Admission (Rule 36) is not recommended for adoption. Under the proposed Rule 216 the Court may always override the parties' agreement. See C. Wright and A. Miller, Federal Practice and Procedure § 2092, at 359 (1970). The order required by Federal Rule 29 is a nuisance to the court and

almost always approved. Thus, some judge-time could be saved by eliminating the requirement contained in the exception.

The addition of the language to Texas Rule 204-4 is to assure further that the waiver provided for by that rule is subject to a contrary agreement between the parties.

205

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TELEPHONE
(512) 224-9144

March 21, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed is a proposed change to Rule 205 submitted by Charles Matthews. Please draft, in proper form for Committee consideration, an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

CHARLES W MATTHEWS
ASSOCIATE GENERAL ATTORNEY

March 12, 1986

Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
7000 Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002

Dear Mike:

At the February 8, 1986 meeting of the Administration of Justice Committee, the changes to Rule 205, as originally suggested by George Hickman of Bastrop and as discussed at the September 14, 1985 meeting of the Committee, were submitted to the Committee for discussion and approval. We were advised that you were in New Orleans in deposition, and we surmised that the coincidence of Mardi Gras weekend with our meeting date and your absence suggested that you were perhaps deposing Rex without benefit of our insight into Rule 205. Nevertheless, the discussion at the February 8 meeting produced several comments which have been generally incorporated into the draft of a new Rule 205, which is attached for the consideration of the Committee members.

It is requested that Rule 205 and the proposed changes be placed on the agenda for the April 5 meeting for final discussion and approval, if appropriate.

Very truly yours,

Charles Matthew

CWM:ch
Attachment

c - w/attachment:
Administration of Justice
Committee Members

00000363

RULE 205

SUBMISSION TO WITNESS; CHANGES, SIGNING

When the testimony is fully transcribed, the deposition officer shall submit the [deposition] transcript and correction sheets to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, unless [such] examination and signature are waived by the witness and the parties.

[Any changes in form or substance] Changes in testimony [which] that the witness desires to make shall [be entered upon the deposition by the officer with the statement of the reasons given by the witness for making such changes.] be entered upon the correction sheet by the witness with a statement of the reason for the change. [The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill and cannot be found or refuses to sign.] The transcript and correction sheet shall then be signed by the witness before any officer authorized to administer oaths unless signature before an authorized officer is waived by the witness and the parties. [If the witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver and examination and signature or

of the illness or absence of the witness or the fact of the refusal together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to supress, made as provided in Rule 207, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.] When the transcript and correction sheets return, the deposition officer shall advise all parties of suggested changes. If the transcript and correction sheet does not return within twenty days, the deposition officer shall certify the failure to return or the refusal to sign and the reason(s), if any, given and shall furnish copies of such certificate to all parties. Thereafter, the deposition officer shall file the original transcript with the clerk of the court in which such cause is pending.

COMMENT: Attorney Charles Matthews and court reporter G. H. Hickman have made this suggestion with the purpose of facilitating the work of court reporters. The Administration of Justice Committee turned down this proposal.

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE -
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the deposition to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, unless such examination and signature are waived by the witness and by the parties.

Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with the statement of the reasons given by the witness for making such changes. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

II. Proposed Rule:

Amendment to Rule 205

Rule 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the <u>original</u> deposition <u>transcript</u> to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature <u>by the witness before any officer authorized to administer an oath</u>, unless such examination and signature are waived by the witness and by the parties.

No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be furnished to the deposition officer by the witness, together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be entered upon the deposition by the deposition officer. The deposition shall then be signed by the witness before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign ~~it~~ a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

(See Attached Comment)

Respectfully submitted,

Date March 12, 1986

Charles Matthews
Name

P. O. Box 2180
Houston, Texas 77001
Address

COMMENT

The proposed amendments to the existing Rule 205 are as follows:

1. Original deposition transcript - This change specifies that the original transcript is to be submitted to the witness. If he fails to return it, the deposition officer may sign a true copy. The existing rule does not clearly provide for a copy to be signed if the original is not returned.

2. No erasures or obliterations - Some concern has been expressed concerning the right of a witness to mark out testimony while inserting changes. This suggested addition would clearly prohibit alterations in the original transcript.

3. Changes furnished to officer and entered upon deposition by officer - This change would clarify the procedure with regard to making changes in the original transcript. If the witness desires to make a change in the form or substance of the transcript, the changes must be submitted by the witness to the deposition officer, either orally or in writing, with a statement setting forth the reasons for the change. The deposition officer will then enter the changes upon the transcript, together with the statement of the reasons for the changes. The particular manner in which the changes are made is not mandated, but left to the discretion of the deposition officer. This seems to be consistent with the current practice and maintains the flexibility desirable for the handling of both minor and major

changes. However, the prohibition against erasures or obliterations to the original testimony applies to the deposition officer as well as the witness and attorneys.

4. Signature before any officer - It can be implied from the existing rule that the signing of the deposition by the witness must be before the deposition officer or perhaps no officer at all. This suggested change clarifies the rule to allow signature before any officer authorized to administer the oath. This change would make it clear that the deposition transcript could be sent to a witness in another state for signature upon oath without the necessity of appearing before the deposition officer.

TF and to R 205 Subc SCAC J

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

CHARLES A. MATTHEWS
ASSOCIATE GENERAL ATTORNEY

~~September 13, 1985~~

DAD indicated a "no change" attitude on 9-14-85. J

Mr. Michael T. Gallagher
Fisher, Gallagher, Perrin & Lewis
1000 Louisiana
Houston, Texas 77002

Dear Mike:

You requested that I report to the Committee on the suggested changes to Rule 205 as proposed by George Hickman, as set forth in the attached correspondence. Tom Pollan and I have considered this proposal and we are not prepared to recommend any changes in the existing Rule 205, at least without further inquiry of attorneys and reporters, and of this committee, as to the need for any revision.

The suggested changes can be categorized as follows:

Correction Sheet

It is proposed that changes to the transcript be entered on a correction sheet instead of the transcript itself, which would then constitute "suggested" changes to be considered by the Court.

Retention of Original Transcript

The proposed rule would require that the Court Reporter retain the original and forward a copy to the witness for review and signature.

Signing by Witness

The proposal would allow signature before any notary.

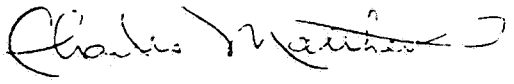
00000370

Signing by Court Reporter

The proposal eliminates the requirement that the Court Reporter "sign" the deposition if the witness does not sign and return the deposition within 20 days. The proposal provides that the reporter would certify the failure to return, state the reasons, if any, for the failure to sign, and would then furnish this certificate to the parties.

These proposals can be more fully discussed at the meeting of the Committee. However, I am not fully persuaded at this time that the problems complying with the rule as presently written (which is similar to Federal Rule 30(e)) are of such magnitude to require revision.

Very truly yours,



CWM:ch
Attachments

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

COPY

May 20, 1985

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 205

Dear Mike:

I am enclosing herewith copy of a letter from George Hickman and Associates of Bastrop.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

GEOR(HICKMAN AND ASSOCI? ES

Post Office Box 653

Bastrop, Texas, 78767

April 11, 1985

Honorable C. Raymond Judice
Administrative Director
Texas Office of Court Administration
Post Office Box 12066
Austin, Texas, 78711

In Ref: Texas Rule of Civil Procedure 205, "Submission to Witness, Changes; Signing"

Dear Mr. Judice:

The subject of this letter is Texas Rule of Civil Procedure 205 which directs the process of transcript examination and signing in Texas. I'm requesting that the Court consider the requirements of Court Reporters to operate under this Rule and the frequent difficulties it presents as we endeavor to complete our assignments. My own 20 year career as a Texas Court Reporter and the observations I've made during that time as the spirit of this rule has been attempted to be satisfied is the basis for this request.

I believe that, presently, Rule 205, assumes to instruct the witness and Counsel that the witness may withdraw, change, strike and, in other ways, manipulate previously sworn testimony; entitles the document a "deposition" when it, in fact, is the transcription of a deposition, a transcript; fails to address that the Reporter may be domiciled in a geographical location distant from the witness; causes the Reporter in certain circumstances to be unable to comply with the requirements of the Rule; and does not provide for assignment completion.

In my experience, the opportunity for a Court Reporter to complete his assignment is complicated when the transcript is not returned within a reasonable time. Many times I delay invoicing Counsel until after the completion of the entire assignment so that all appropriate charges may be reflected as cost. I know the Rule does not presently appear to provide or permit a delay but, in fact, unless the Court Reporter is permitted to retain possession of the Original Transcript, delay happens regularly and can become unmanageable. Also, a delay can be extremely costly. Should the Original Transcript become lost or purposefully not returned, the entire process of transcription must begin anew with little or no way for the Reporter to recover this added expense.

Presently, the Reporter is compelled to certify a fact upon the record without the specific provision of his possession of the Original Transcript. Usually, the Reporter spends one to two weeks constructing the transcript. Occassionally, upon its return the witness has ruined its appearance by so many changes or the manner in which his changes are reflected upon the face of the transcript.

Some times Counsel chooses to retain the Original Transcript and not return it to the Reporter. Because the Transcript is a reflection of sworn testimony previously given, the Rule should speak to the witness "suggesting changes" to the Court rather than "making changes" and suggested changes should be passed on by the Court. The APA has given State Agencies and Administrative Hearing Officers state-wide Subpoena powers. I and, no doubt, other Court Reporters often make submissions to witnesses who reside far away making it impractical for the "Deposition Officer" to enter changes upon the deposition.

The note following Rule 205 indicates about filing unsigned depositions but the Rule, itself, is silent about filing. The Reporter, rather than having to sign "it" and "stating on the record...", always without actual possession of the Original Transcript when the necessity to do so presents itself, should be able to prepare a simple, very clear certificate stating the facts, transmit copies of the additional certificate to the parties and attach the additional certificate to the Original Transcript, which he holds in his possession in the event of this very occurrance, and file the Origianl Transcript with the Clerk.

My office developes a one-page document to receive suggested changes, a copy of which is enclosed for your use, and a duplicate original of the last page of the Original Transcript containing the line for signature and a juriat and we mail these documents to Counsel or the witness with a no cost copy of the transcript. This makes a simple, effective, non-aggressive cure of each of the above problems. The following is my suggestion for Rule 205.

> Rule 205. Submission to Witness; Changes; Signing
>
> "When the testimony is fully transcribed, the deposition officer shall submit the transcript and correction sheets to the witness or, if the witness is a party with an attorney of record, to the attorney of record for examination and signature unless examination and signature are waived by the witness and the parties.
>
> "Changes in testimony which the witness desires to suggest to the Court shall be entered upon the correction sheet by the witness with a statement of the reason for the change. The transcript and correction sheets shall then be signed by the witness before any officer authorized to administer oaths unless signature before an authorized officer is waived by the witness and the parties.
>
> "When the transcript and correction sheets return, the deposition officer shall advise all parties of suggested changes. If the transcript and correction sheet does not return within twenty days, the deposition officer shall certify the failure to return or the refusal to sign and the reason(s), if any, given and shall furnish copies of such certificate to all parties. Thereafter, the deposition officer shall file the Original Transcript with the Clerk of the Court in which such cause is pending."

I appreciate the opportunity to make these suggestions. Please do not hesitate to contact me if I can assist in any way whatever.

Yours very truly,

G. H. Hickman

GHH/ms
Enclosure

00000374

SUGGESTED CORRECTIONS TO THIS TRANSCRIPT

The Witness, _____, suggests to The Court that the following changes be made to the Transcript of this Deposition.

Page	Line	Correction	Reason

_____

(Witness' Signature)

STATE OF TEXAS)

COUNTY OF _____)

SUBSCRIBED AND SWORN TO before me by the witness on this _____ day of _____, 19___.

_____

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

207

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
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RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

February 10, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P. O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 103 and 106 submitted by Mr. Edward S. Hubbard; proposed change to Rule 106 submitted by Mr. Charles Griggs; proposed change to Rule 142 submitted by Wendell Loomis; proposed changes to Rules 205, 206-1 and 207 submitted by Charles Matthews. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ passed 2-8-86

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE -
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 206-1

1. Certification and Filing by Officer. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. The officer shall include the amount of his charges for the preparation of the completed deposition in the certification. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

II. Proposed Rule:

Rule 206-1.

1. Certification and Filing by Officer. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. The officer shall include the amount of his charges for the preparation of the completed deposition in the certification. The clerk of the court where such deposition is filed shall tax as costs the charges for preparing the original copy of the deposition. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

(See Attached Comment)

Respectfully submitted,

Charles Matthews 00900377
Name

Date February 7, 1986

P. O. Box 2180
Houston, Texas 77001
Address

COMMENT

Old Rule 208a, now repealed, stated that the Clerk shall tax as costs the charges for preparing the original copy of the deposition. The current Rule 206 contains similar language to that found in former Rule 208a regarding the certification by the court reporter of his charges for the preparation of the complete deposition. The specific provision that the clerk tax such charges as costs, originally in Rule 208a, was omitted in Rule 208a. The reviser's note to Rule 206 provides in part:

> "This rule revises and incorporates former Rules 208, 208a and 210."

This proposed amendment makes clear as to who must pay for the cost of the original transcription of a deposition.

MEMO

TO: Judge Wallace
FROM: Judge Barrow

March 6, 1984

RE: 1984 Amendments - Texas Rules of Civil Procedure

It has come to my attention that the amendments due to take effect April 1 may need slight revision. Specifically, there are four different rules that need to be pointed out as possible sources of confusion.

(1) Amended Rule 204(4) requires a party to make objections to the form of questions or the nonresponsiveness of answers at the time a deposition is taken or such objections are waived. One problem that could arise because of this change is that the party noticing and taking the deposition will be unable to object at trial if his opponent introduces the deposition into evidence. The party who took the deposition generally will lead the adverse witness, and he waives the "leading" objection by failing to raise it at the deposition. Thereafter, when his opponent seeks to use the deposition at trial, including the leading question, no objection may be made, since the deposition is considered to be the evidence of the party introducing it.

It is possible that the rules should provide that an objection to the form of questions is not required if the party has no reason to make it at the time the deposition is taken. Also, should the parties be permitted to agree to waive objections.

(2) Rule 206(3) provides that the deposition officer shall furnish a copy of a deposition to any party upon payment of reasonable charges therefor. Nowhere in the new rules is there a provision as to who must pay for the cost of the original transcription of a deposition. Old Rule 208a, which has been repealed, stated that the clerk shall tax as costs the charges for preparing the original copy of the deposition. If the Court wishes to bypass the court clerk in this matter, some provision should be included in the rules to clear up this situation.

(3) Rule 207(2), which deals with the use of depositions in a susequent suit between the same parties, states that such depositions may be used in a later suit only if the original suit was dismissed. This rule originally was taken from Federal Rule 32(a)(4), but the federal rule has since been amended to do away with the requirement that the first case have been "dismissed." The federal rules advisory committee concluded that the "dismissed" language was an "oversight" that had been ignored by the courts. This language is included in the Texas rules, and it may be that it should be deleted.

(4) Rule 208(a) allows a party to notice a written deposition at any time "after commencement of the action," which presumably means the day the original petition is filed. Thereafter, cross-questions are due within ten days. It would be possible that the time limit for cross-questions could lapse before the defendant is required to answer. This problem is taken care of in the oral deposition rule, Rule 200, because it requires leave of court if a party wishes to take an oral deposition prior to the appearance day of his opponent. A similar requirement should be provided for in the case of a deposition on written questions.

Rule 207. USE OF DEPOSITIONS IN COURT PROCEEDINGS.

1. (Unchanged)

2. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit [has been brought] in a court of the United States or of this or any other state has been ~~dismissed~~ and another suit involving the same subject matter is [afterward] brought between the same parties or their representatives or successors in interest, all depositions lawfully taken ~~and duly filed~~ in the former suit may be used in the latter [, upon written notice to counsel of record for all parties at least thirty (30) days prior to trial,] as if originally taken therefor.

3. (Unchanged)

CLARK, GORIN, RAGLAND & MANGRUM

ATTORNEYS AT LAW

218 NORTH 6TH STREET

P O BOX 239

WACO, TEXAS 76703

AREA CODE 817
752 9267

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TOM L. RAGLAND
CERTIFIED SPECIALIST
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
BOYD MANGRUM
CERTIFIED SPECIALIST
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

KIM B. YOUNG
SHERYL S. SWANTON

March 17, 1986

COPY FOR YOUR INFORMATION

Mr. Jim Kronzer
1001 Texas Ave.
Suite 1030
Houston, Texas 77002

Re: Proposed Rule 209

Dear Jim:

In response to the copy of your letter to Mr. Ray Hardy dated March 11, 1986, I want to explain to you the genesis of proposed Rule 209.

First, let me state that I am not necessarily advocating the adoption of this rule. In the course of a very informal survey of some of the clerks in the major metropolitan areas, I have found that there were different intrepretations of the courts' duties with regard to maintaining discovery materials after a final judgment had been entered in the case. Some clerks placed them on microfilm; some clerks stored them separate from the papers in the case until they ran out of space and then threw them away; and some clerks felt that there was no statutory or court rule guidance for the disposition of depositions, and they disposed of them when it was convenient.

Proposed Rule 209 mentions the disposal of depositions after 180 days. There is nothing magic in this period of time as far as I am concerned. If the rule is adopted, the time period could just as easily be 401 weeks or 10 years.

My primary purpose in proposing the rule amendments dealing with the filing and/or disposal of discovery material was simply to put the issue before the advisory commitee and, ultimately, the Supreme Court, in order to possibly head off a confrontation between the court and the legislature on this matter. If the Court feels it wants to deal with legislative attempts to address this question rather than dealing with it through its rule-making powers, you certainly will hear no squawk out of me.

Additionally, I might point out that Mr. Hardy has expressed to me what I consider to be a legitimate concern about the cost of processing and storing routine discovery materials generated under the provisions of Rules 167, 168 and 169. For example, it appears to me to be

redundant to require Rule 168 interrogatories to be filed with the clerk and also require that the answers to those interrogatories be preceded by the same questions and then both the questions and answers again be filed with the clerk.

I do not suggest that the rules I have proposed are a solution to the problem. I believe they address the problem and were submitted to generate debate in hopes that a solution to the problem would result therefrom.

Thank you for your observations about proposed Rule 209.

Sincerely,

Tom L. Ragland

TLR:bb
cc: Hon. James P. Wallace
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Mr. Luther H. Soules III
Attorney at Law
800 Milam Bldg.
San Antonio, Texas 78205

215

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TELEPHONE
(512) 224-9144

April 14,1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

Enclosed are proposed changes to Rules 99, 106, 107, 145, and 215. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

00000383

THOMAS R. PHILLIPS
JUDGE, 280TH DISTRICT COURT
HOUSTON, TEXAS 77002

March 13, 1986

Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
Allied Bank Plaza, 70th Floor
Houston, Texas 77002

Re: Subcommittee on Sanctions

Dear Mike:

At the last meeting of the Committee on Administration of Justice, the subcommittee on sanctions unanimously recommended the amendment of TRCP 215 to give trial courts the express authority to treat motions for sanctions as motions to compel. This proposal was endorsed in principle by the Committee as a whole, and I was directed to prepare a draft of the change, which is attached.

The Committee seemed to feel that the Supreme Court would reject out of hand any restrictions on a trial judge's power to impose sanctions. The proposed amendment would remind the trial bench that drastic sanctions are not required for a failure to comply with discovery, but are merely permissible. Since most judges apparently already treat motions for sanctions on technical violations as mere motions to compel, the express authority to do so seems an advisable addition.

With best personal regards, I am

Very truly yours,

Original Signed
THOMAS R. PHILLIPS

Thomas R. Phillips

TRP:jjk

00000384

cc: The Honorable James P. Wallace
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Ms. Evelyn Avant
Office of Executive Assistant
State Bar of Texas
P. O. Box 12487
Austin, Texas 78711

The Honorable J. Curtiss Brown
Chief Justice, Fourteenth Court of Appeals
1307 San Jacinto, 10th Floor
Houston, Texas 77002

James L. Weber, Esq.
Mehaffy, Weber, Keith & Gonsoulin
InterFirst Tower
P. O. Box 16
Beaumont, Texas 77704

Rule 215

. . .

2. Failure to Comply with Order or with Discovery Request.

. . .

b. Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 to testify on behalf of a party fails to comply with proper discovery requests, or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) An order compelling a designation, an appearnace, an answer or answers, or inspection or production in accordance with the request;

~~(6)~~ (7) In lieu of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

~~(7)~~ (8) When a party has failed to comply with an order under Rule 167a(a) requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4), (5), or (6) of this

subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

~~(8)~~ (9) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

. . .

subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

~~(8)~~ (9) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

. . .

July 30, 1985

Mr. Luther H. Soules, III
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Re: Rule 216. Request and Fee for Jury Trial

Dear Luke,

At your request, I have redrafted Rule 216. I hope this draft is a satisfactory starting point.

Best wishes,

Bill

William V. Dorsaneo, III
Professor of Law

WVD:vm

enc.

00000389

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule 216. Request and Fee for Jury Trial

a. Request. No jury trial shall be had in any civil suit, unless ~~(application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter,~~) a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than (~~ten~~) thirty days in advance.

b. Jury Fee. A fee of five dollars if in the district court and three 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: This rule has been clarified, reorganized and modernized. The time for making the required request and fee deposit has been changed from ten to thirty days.

216

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
119 SOUTH 6TH STREET
BROWNFIELD, TEXAS 79316-0071

MAIL
P O BOX 71
BROWNFIELD, TEXAS 79316-0071

J. McGOWAN
894-1978)

BILL McGOWAN
W[illegible] J. McGOWAN II
B[illegible]DFORD L. MOORE

KELLY G. MOORE

AREA CODE 806
PHONE 637-7585

September 22, 1983

Mr. George W. McCleskey
Attorney at Law
P. O. Drawer 6170
Lubbock, Texas 79413

Dear George:

It is my understanding that you may be a current member of the Rules Committee. If you are not on the committee, then I assume you would know where to channel this letter.

For some time, I have been concerned about the fact that in Texas a party may pay a jury fee at any time, and I have even had that happen up to the day before trial was scheduled to begin and the Judge go ahead and remove the case to the jury docket. It seems this happens more frequently with defense attorneys, but I have had about equal experience on both sides of the case. What I would like to see happen is for the Supreme Court to go ahead and make a rule change that would allow either party to have a jury trial upon payment of the jury fee at any time within six months from the date the case is filed. Although this does not conform to the federal rules, I believe that it would give ample opportunity for each side to evaluate the case and to decide whether in fact a jury was needed to hear the facts. Hopefully, this would avoid the problems which I have been having regarding being on the non-jury docket for 1 1/2-2 years, finally getting to trial, then having the other party pay a jury fee and having the case removed to the jury docket for an additional 2 1/2-3 years before we could possibly get to trial. I do not see anything fair about this type of tactics since I see they are done only for delay purposes. Further, it seems it is a great inconvenience and hindrance to the Court in scheduling cases, and I would ask that you present this proposal, or in the alternative forward it on for consideration.

I appreciate your cooperation and consideration regarding this matter.

Sincerely yours,

Brad Moore

Bradford L. Moore

JOHNSON & SWANSON

ATTORNEYS AND COUNSELORS

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Founders Square
Suite 100
900 Jackson Street
Dallas, Texas 75202-4499
214-977-9000

Writer's Direct Dial Number

977-9077

Telex 55 1172
Telecopy: 214-977-9004

April 9, 1985

216/204

Ms. Evelyn A. Avent
Executive Assistant
State Bar of Texas
Box 12487, Capitol Station
Austin, Texas 78711

Re: Committee on Administration of Justice

Dear Evelyn:

Please find enclosed a proposed rule change that should be distributed as you see fit to the other members of the committee.

Sincerely yours,

Charles R. Haworth

CRH/cmr
enclosure

4800 InterFirst Two
1201 Elm Street
Dallas, Texas 75270
214-977-9800

1200 Pacific Place
1910 Pacific Avenue
Dallas, Texas 75201
214-977-9700

2200 One Galleria Tower
13355 Noel Road
Dallas, Texas 75240
214-851-5000

1600 Norwood Tower
114 West 7th Street
Austin, Texas 78701
512-474-4829

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

NONE

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

New Rule 216.

Rule 216. Stipulations Regarding Discovery Procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

(see attached comment)

April 9, 1985

Respectfully submitted,

Charles R. Haworth
Name

Charles R. Haworth
900 Jackson St., Dallas, TX
Address

00000393

COMMENT

The proposed Rule 216 is basically Federal Rule 29, which provides in full that:

> Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

It should initially be noted that the underlined portion of Federal Rule 29 is not recommended for adoption in Texas.

The proposed rule is submitted in response to an expressed desire for more flexibility in the rules to acommodate proposed agreements among parties to litigation during discovery, especially in the manner of taking depositions upon oral examination. Texas practitioners have historically entered into stipulations regarding many aspects of discovery without question of their authority to do so. Recently, concerns have been expressed that because the Texas Rules of civil Procedure do not contain express authorization to vary the terms of the rules, the rules may not be varied by agreement. In paticular, concerns have been expressed that objections to the form of questions or nonresponsiveness of answers required by Texas Rule 204-4 may not be reserved until time of trial. This proposed rule change will clearly allow that reservation.

It could perhaps be argued that Rule 11 would apply to stipulations under Rule 216. Caution may dictate, therefore, that an additional sentence be added to the proposed Rule 216 to the effect that "an agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the transcript of deposition."

The provision of Federal Rule 29 regarding court approval for stipulations extending the time limits regarding Interrogatories to Parties (Rule 33), Production of Documents (Rule 34), and Requests for Admission (Rule 36) is not recommended for adoption. Under the proposed Rule 216 the court may always override the parties' stipulation. See C. Wright and A. Miller, Federal Practice and Procedure § 2092, at 359 (1970). The order required by Federal Rule 29 is a nuisance to the court and almost always approved. Thus, some juge-time could be saved by eliminating requirement contained in the exception.

216,458

June 7, 1985

Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

AND

Honorable Luke Soules
800 Milam Building
San Antonio, Texas 78205

Gentlemen:

At the meeting of the Supreme Court Advisory Committee last week it was suggested that I transmit in writing the request for an amendment to Rule 216 of the Texas Rules of Court, and I am accordingly transmitting same.

It appears that the multi-county districts have difficulty in arranging their dockets, especially for jury trials when a demand and payment of a jury fee can be done "not less than ten days in advance." I can understand their predicament and the suggestion is that the requirement of the rule be that the request and payment of a demand for jury in a civil case be 30 to 45 days in advance.

Another suggestion for a change that had been made to me concerned a time limit on the Court of Appeals in ruling on a "motion for rehearing." Some time limit should be placed on it that if it is not ruled on, it is automatically overruled by operation of law.

I trust that the Committee will find these suggestions favorable to recommend to the Supreme Court.

Sincerely,

Solomon Casseb, Jr.

SCJR:dng

cc: Judge Robert R. Barton
216th District Court
Kerr County Courthouse
Kerrville, Texas 78028

OFFICE: 512-257-8948
RESIDENCE: 512-896-3636

COUNTIES:
BANDERA
GILLESPIE
KENDALL
KERR

ROBERT R. BARTON
DISTRICT JUDGE
216TH JUDICIAL DISTRICT COURT
KERR COUNTY COURTHOUSE
KERRVILLE, TEXAS 78028

KERR COUNTY DISTRICT CLERK:
MARY BROOKS
OFFICE: 512-257-4396
RESIDENCE: 512-367-5819

COURT REPORTER: ADERLE HERRING
OFFICE: 915-446-3353
RESIDENCE: 915-446-2101
P. O. BOX 423
JUNCTION, TEXAS 76849

June 19, 1985

Hon. Solomon Casseb, Jr.
District Judge
Casseb, Strong & Pearl
127 East Travis Street
San Antonio, Texas 78205

Dear Judge Casseb:

Thank you for the copy of your letter of June 7, 1985, concerning the recommended amendment to Rule 216 by the Supreme Court Advisory Committee.

This amendment will not only assist the multi-county District Courts in making jury settings, but will reduce the incidence of non-jury trials being obstructed by dilatory jury demands.

Sincerely yours,

ROBERT R. BARTON

RRB/fsj

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1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

WILLIAM A. BRANT, P. C.
1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

January 9, 1986

Mr. Franklin Jones
Jones, Jones, Baldwin,
Curry & Roth, Inc.
P. O. Drawer 1249
Marshall, Texas 75670

Dear Franklin:

Enclosed is a proposed change to Rule 239a submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration an appropriate Rule change for submission to the Committee and circulate it among your Standing Subcommittee members to secure their comments.

I need your proposed Rule change by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ Ltr

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 186, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomalies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

00000399

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail by first-class mail ~~[a-post-card]~~ notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. 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. ~~[Failure to comply with the provisions of this rule shall not affect the finality of the judgment.]~~

Comment: The proposed amendment conforms the rule to the 1984 amendment to Rule 306a, which requires notice by first-class mail. The last sentence of the rule is deleted to conform to the 1984 amendment to Rule 306a, which provides for up to a ninety-day extension of the date on which the time period for perfecting an appeal begins to run, if the appellant proves he has failed to receive notice of the judgment.

00000400

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county

districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 247. Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day, unless continued under the provisions of Rule 247a, or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon 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.

CA:RULE15(69th)

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

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Supreme Court Advisory Committee
Soules & Cliffe
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San Antonio, TX 78205

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36th, 156th

Rule 247a (new). Trial Continuances

Motions for continuance or agreements to pass cases set for trial shall be made in writing, and shall be filed not less than 10 days before trial date or 10 days before the Monday of the week set for trial, if no specific trial date has been set. Provided however, that agreed motions for continuance may be announced at first docket call in courts utilizing docket-call court setting methods. Emergencies requiring delay of trial arising within 10 days of trial or of the Monday preceding the week of trial shall be submitted to the court in writing at the earliest practicable time. Agreements to pass shall set forth specific legal, procedural or other grounds which require that trial be delayed. The court shall have full discretion in granting or denying delay in the trial of a case. Upon motion or agreement granted, the court shall reset the date for trial.

CA:RULE16(69th)

250

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

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Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 250 (new). . Cases Set for Trial; Announcement of Ready

Cases set for trial on the merits shall be considered ready for trial, and there shall be no need for counsel to declare ready the week, month, or term prior to trial date after initial announcement of ready has occurred. Cases not tried as scheduled due to court delay shall be considered ready for trial at all times unless informed otherwise by motion, and such cases shall be carried over to the succeeding term for trial assignment until trial occurs or the case is otherwise disposed. In all instances it shall be the attorney's or pro se party's responsibility to know the status of a case set for trial.

CA:RULE14(69th)

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule: Rule 264. Appeal Tried De Novo.

A Cases brought up from inferior courts shall be tried de novo.
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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline propose new wording; see example attached).

1 Rule 264. ~~Appeal Tried De Novo.~~ Videotape Trial.
2 ~~Cases brought up from inferior courts shall be tried de novo.~~
3 By agreement of the parties, the trial court may allow that all
4 testimony and such other evidence as may be appropriate be pre-
5 sented at trial by videotape. The expenses of such videotape re-
6 cordings shall be taxed as costs. If any party withdraws agreement
7 to a videotape trial, the videotape costs that have accrued will
8 be taxed against the party withdrawing from the agreement.
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etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule.

00000413

Respectfully submitted,

Name

AREA CODE 512 220-2525

Judge Hutson, This letter came to J.P.

JAMES C. ONION
JUDGE 73RD DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

June 14, 1983

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
Courts Building
Austin, Texas 78711

In re: Rule 265(a)

Dear Judge Pope:

As I understand, this Rule was amended in 1978 to eliminate the requirement of having to read the pleadings to the jury. The Rule was intended to have the attorneys summarize their pleadings in everyday language rather than reading a lot of legal words which most pleadings contain and which meant nothing to most jurors. I thought this was a great improvement. However, unfortunately, it did not work out that way. The trial attorneys, good and bad, are using the same as a tool to completely argue the entire facts of their case, often witness by witness. Hence, they do not summarize their pleadings but their entire case.

I attempt to control this problem, but many trial judges do not because of the wording of the Rule, and hence, when the lawyers come to my court, they want to do the same thing they have done in other courts. The net result is that we hear the facts from all sides during voir dire, then again in opening statements to the jury, then again from the witness stand, and then again during closing arguments. So in every jury case we hear the facts four times. This is a waste of judicial time.

Rule 265(a) in part says, ". . . shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought . . ."

Attorneys not only state what they expect to prove, but go into the qualification and the credibility of each and every witness and into many immaterial and irrelevant facts and conclusions. In addition, most attorneys do not know how to be brief. I would suggest that Rule 265(a) be amended to read, ". . . shall

state to the jury a brief summary of his pleadings." And eliminate the phrase, "what the parties expect to prove and the relief sought." I feel that this would be in line with the committee's intention just prior to 1978, according to my reading of the record made by the committee. Right now we have two closing arguments to the jury.

I fully realize that it will be sometime before any attention can be given to this matter. However, I hope it will be properly filed in order to be considered at the proper time by the proper committee.

Very truly yours,

James C. Onion

James C. Onion

JCO/ebt

July 29, 1985

Mr. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Re: COAJ Proposals for
Amendment to Rules 296,
297 and 306c.

Dear Luke,

In response to your letter of July 15, 1985, enclosed please find redrafted versions of proposals for amendment to Rules 296, 297 and 306c. Please note that although Rules 296 and 297 are not included in the current draft of the Proposed Appellate rules, current rule 306c is included in paragraph (c) of proposed rule 31.

Best regards,

Bill

William V. Dorsaneo, III
Professor of Law

WVD:vm

enc.

00000416

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment (~~is signed.~~) or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

COMMENT: This proposed rule change negates the change last made in Rule 296 effective April 1, 1984. The reason for recommending a restoration of the former rule is that no purpose is served in requiring a party to request findings of fact and conclusions of law at a time before motions for new trial have been dealt with by the trial judge.

Rule 297. Time to File Findings and Conclusions

When demand is made therefor, 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.~~) or order overruling the motion for new trial is signed, or the motion is overruled by operation of law. If the trial judge shall fail (~~se~~) to so 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.

COMMENT: This proposed rule change corresponds to the change in Tex. R. Civ. P. 296.

Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed (~~, but every such motion~~). Every such prematurely filed document shall be deemed to have been filed on (~~the date of but subsequent to the date of signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law and every such appeal bond or affidavit or notice of appeal or notice of limitation of appeal shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment or the date of the overruling of motion for new trial, if such a motion is filed.~~) time on the first date of the period during which the document may be filed as prescribed by the applicable rule or rules.

COMMENT: This proposed version of Rule 306c is intended to accomplish two purposes. First, it eliminates language in the current rule that treats prematurely filed requests for findings of fact and conclusions of law, appeal bonds, affidavits in lieu thereof, notices of appeal and notices of limitation of appeal as being filed "on the date of but subsequent to the date of signing of the judgment or the date of the overruling of motion for new trial, if such a motion is filed." Under current appellate practice, the times for perfecting appeals and/or limiting the scope of an appeal are not keyed to the overruling of motions for new trial. If the Committee's recommendations concerning Rules 296 and 297 are adopted, the last sentence of this proposed rule should

be interpreted to mean that a premature request for findings of fact and conclusions of law should be deemed filed on the date of but subsequent to the signing of the order overruling the motion for new trial or the overruling of the motion by operation of law.

R. 296

TAYLOR, HAYS, PRICE, McCONN & PICKERING
ATTORNEYS AT LAW
400 TWO ALLEN CENTER
HOUSTON, TEXAS 77002
(713) 654-1111

May 14, 1984

Mr. Hubert Green
Attorney at Law
900 Alamo National Bldg.
San Antonio, TX 78205

RE: Rule 296

Dear Hubert:

Pursuant to your request to send this letter to you with a copy to Justice Wallace, I am writing to point out the question I had with respect to the new Rule 296, Tex. R.Civ.P.

There is a discrepency between the amended Rule 296 as it appears in the pocket part in Vernon's and the Rule as it appears in the pull-out to the February, Texas Bar Journal. As Garson Jackson and Justice Wallace's office have informed me, the pocket part version is incorrect.

My question is whether there are any published explanations or bar comments as to the change in Rule 296? Under the prior Rule 296, it applied to hearings over motions to set aside default judgments. As you know, the Court often conducts an oral hearing in which testimony is presented. Thereafter, the motion to set aside a default judgment may be overruled by operation of law seventy-five (75) days after the default judgment was signed. Under the case law the Appellate Court might review the trial court's findings of fact and conclusions of law as to this hearing. See Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d. 16 (Tex.Civ. App.-Dallas, 1977, ref.n.r.e.). Now that the new rule has eliminated the "by operation of law" wording, does it mean that the Appellate Courts do not need findings of fact and conclusions of law on these matters, or that the "signing" in Rule 296 also applies to the operation of law time period? See Int'l. Specialty Products, Inc. v. Chem-Clean Products, Inc., 611 S.W.2d. 481 (Tex.Civ.App.-Waco, 1981, no writ).

In Guaranty Bank v. Thompson, 632 S.W.2d. 338, 340 (Tex. 1982), the Court held that a motion to set aside a default judgment "should not be denied on the basis of counter-

testimony." Accordingly, the dropping of the language in Rule 296 may have been done because findings of fact and conclusions of law are no longer necessary for appellate review.

Sincerely,

TAYLOR, HAYS, PRICE, McCONN
& PICKERING

David R. Bickel

DRB/lmm

cc: Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248
Capital Station
Austin, TX 78711

TK - send to
R 296 SubC
SCAC

HUGHES & LUCE
1000 DALLAS BUILDING
DALLAS, TEXAS 75201

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TELECOPIER (214) 651-0561
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1500 UNITED BANK TOWER
AUSTIN, TEXAS 78701
(512) 474-6050
TELECOPIER (512) 474-4258

WRITER'S DIRECT DIAL NUMBER

214/760-5421

February 27, 1985

Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002

Re: Committee on the Administration of Justice

Dear Mike:

Enclosed are proposed changes in Rules 296, 306a, and 306c. I will be ready to report on these proposals at the March 9, 1985 meeting. Please note that if the proposed addition to Rule 296 is made, there will be no need to amend Rule 306c. If, however, Rule 296 is not amended as proposed, then Rule 306c should be amended as set out in the attachment to this letter.

Respectfully,

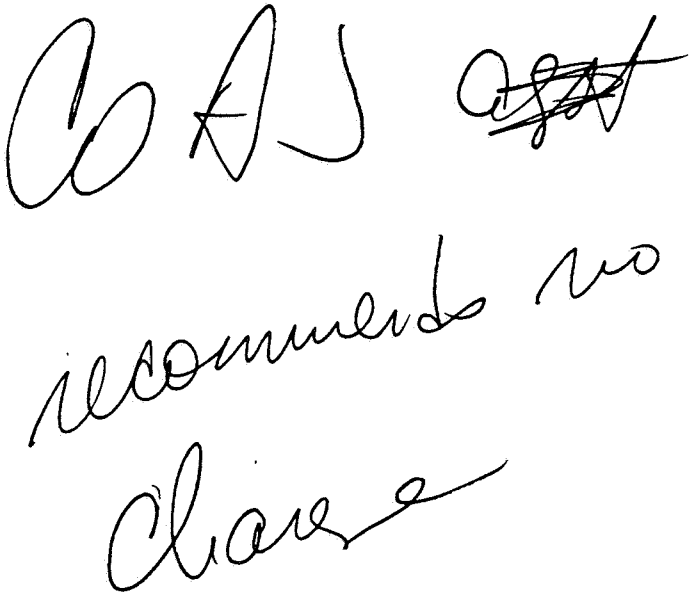
R. Doak Bishop

RDB/ls
Enclosures

cc: Ms. Evelyn Avent
State Bar of Texas

Rule 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.



Rule 306a. Periods to Run From Signing of Judgment

1. Beginning of periods. The date a judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents in connection with an appeal, including, but not limited to an original or amended motion for new trial, a motion for reinstatement of a case dismissed for want of prosecution, a request for findings of fact and conclusions of law, findings of fact and conclusions of law, an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof, and bills of exception and for filing of the petition for writ of error if review is sought by writ of error, and for filing in the appellate court of the transcript and statement of facts, but this rule shall not determine what constitutes rendition of a judgment or order for any purpose.

Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law and every such appeal bond or affidavit or notice of appeal or notice of limitation of appeal shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment, ~~or the date of the overruling of motion for new trial, if such a motion is filed~~.

Recommend adoption

Rules 296 & 306c

Gustavo Jr:
Please consider & write Prof. Wicker. J.P.

Texas Tech University

School of Law

August 6, 1984

Honorable Jack Pope, Chief Justice
The Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, TX 78711

Re: Apparent unintended anomoly in amendment to the Texas Rules of Civil Procedure, effective April 1, 1984

Dear Justice Pope:

I have recently discovered an apparent anomoly created by the amendments to Rules 296 and 306c, effective April 1, 1984. The problem is created where a premature request for findings of fact and conclusions of law is made and a motion for new trial is filed.

Rule 306c was broadened to include prematurely filed requests for findings of fact and conclusions of law. If such a request is prematurely filed and a motion for new trial is filed, the request is deemed to have been filed on the date of (but subsequent to) the date of the overruling of the motion for new trial. This amendment would have created no problem had Rule 296 not also been amended to require a request for findings and conclusions to be filed within ten days after the final judgment is signed, regardless of whether a motion for new trial is filed. The pre-1984 version permitted a request to be filed within ten days after a motion for new trial is overruled.

Reading both the amended rules together, if a premature request for findings and conclusions is made and a timely motion for new trial is filed, the request will be deemed to have been filed too late if the motion for new trial is overruled more than ten days after the judgment is signed. This is quite possible, of course, since Rule 329b(c) allows the trial court 75 days to rule on a motion for new trial before it is overruled as a matter of law.

If this result was intended, please excuse my having taken up your valuable time. If it was not intended, I hope that I have been of some assistance to the Court.

Respectfully,

Jeremy C. Wicker

Jeremy C. Wicker
Professor of Law

JCW/nt

00000427

June 3, 1985

Ms. Evelyn Avent
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, Texas 78711

Re: COAJ Proposals for
Amendment to Rules
296, 297 and 306c

Dear Evelyn,

Enclosed please find the proposed changes to Rules 296, 297 and 306c. I would appreciate it if you would place them on the agenda for the next meeting.

Respectfully,

Bill

William V. Dorsaneo, III
Professor of Law

WVD:vm
enc.
cc: Michael T. Gallagher
Judge James P. Wallace
Luther H. Soules, III
R. Doak Bishop
Charles R. Haworth
Guy E. "Buddy" Hopkins

COAJ recommends following Bishop's scheme

0C000428

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275

Rule 296. Conclusions of Fact and Law

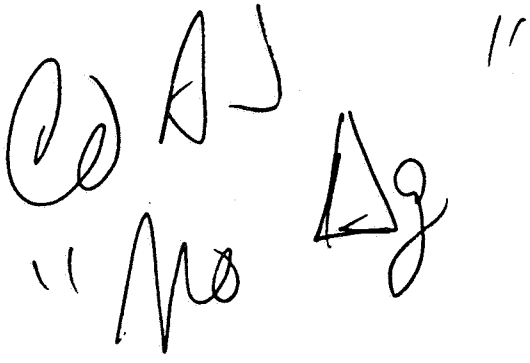
In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

Comment: This proposed rule change negates the change last made in Rule 296 effective April 1, 1984. The reason for recommending a restoration of the former rule is that no purpose is served in requiring a party to request findings of fact and conclusions of law at a time before motions for new trial have been dealt with by the trial judge.

Rule 297. Time to File Findings and Conclusions

When demand is made therefor, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment or order overruling the motion for new trial is signed, or the motion is overruled by operation of law. If the trial judge shall fail to so 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.

Comment: This proposed rule change corresponds to the change in Tex. R. Civ. R. 296.



Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. Every such prematurely filed document shall be deemed to have been filed on time on the first date of the period durng which the document may be filed as prescribed by the applicable rule or rules.

Comment: This proposed version of Rule 306c is intended to accomplish two purposes. First, it eliminates language in the current rule that treats prematurely filed requests for findings of fact and conclusions of law, appeal bonds, affidavits in lieu thereof, notices of appeal and notices of limitation of appeal as being filed "on the date of but subsequent to the date of signing of the judgment or the date of the overruling of motion for new trial, if such a motion is filed." Under current appellate practice, the times for perfecting appeals and/or limiting the scope of an appeal are not keyed to the overruling of motions for new trial. If the Committee's recommendations concerning Rules 296 and 297 are adopted, the last sentence of this proposed rule should be interpreted to mean that a premature request for findings of fact and conclusions of law should be deemed filed on the date of but subsequent to the signing of the order overruling the motion for new trial or the overruling of the motion by operation of law.

CDAJ - approved Dook
Bishop's not file

STATE BAR OF TEXAS

Office of Executive Assistant

September 6, 1985

To the Committee on Administration of Justice

From Evelyn A. Avent

The enclosed rules are on the Agenda for action by the Committee at its meeting Saturday, September 14.

Please bring your copies with you to the meeting.

Evelyn A. Avent

EAA

Enclosures

00000432

P. O. BOX 12487, CAPITOL STATION, AUSTIN, TEXAS 78711

305a

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 11, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county judicial

districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

A PROFESSIONAL CORPORATION
ATTORNEYS-AT-LAW

RICHARD H. KELSEY
MIKE GREGORY
JUDD B. HOLT
RONNIE PHILLIPS

SUITE 611, FIRST STATE BANK BLDG.
DENTON, TEXAS 76201
817/387-9551
METRO. 430-1072

March 7, 1984

Rules Committee
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

Re: Recent Rules Changes

Gentlemen:

In your recent videotape you requested comments on the proposed rules.

Rule 200 (Oral Depositions) now only requires "reasonable notice". It seems to me there should be a presumption of how many days notice is "reasonable notice"; otherwise, you may have a witness who fails to appear and upon motion for sanctions raises the defense that the notice was not "reasonable", thus interjecting a fact question to be decided by the judge, taking the time, expense and effort of all concerned. If the rule provided for a presumption, it would place the burden upon the non-complying party to show that the amount of notice was not reasonable.

You can see the difficulty if you set up extensive depositions with multiple parties and attorneys, send out notices, and one of the attorneys makes the determination that the notice was not "reasonable", thus placing the entire deposition process in jeopardy.

In regard to Rule 324(b) (Prerequisites of Appeal), it seems to me that by your requirements of filing a motion for new trial under subdivision (2) (Factual Insufficiency) and (3) (Weight and Preponderance) all you are accomplishing is for an automatic filing of motion for new trial at all appeals. If the intended purpose is to speed up the appeal process, and human nature being what it is, no lawyer is going to forego his evidence questions on appeal merely in order to save the expense and time of a motion for new trial. This is particularly true when the statement of facts may not be prepared for several months, at which time the attorney can truly evaluate his appeal position in regard to the quantum of evidence.

I commend you and the Supreme Court for the production of these new rules. By and large, they seem to solve most of the problems which have been in existence for many years.

Very truly yours,

Richard H. Kelsey

RHK:ssd

LEGAL AID
BEXAR COUNTY LEGAL AID ASSOCIATION
434 SOUTH MAIN AVENUE, SUITE 300
SAN ANTONIO, TEXAS 78204 (512) 227-0111

A United Way Service

March 19, 1984

Justice James Wallace
The Supreme Court of Texas
Box 12248
Austin, Texas 78711

Re: 1984 Amendments to the Texas Rules of Civil Procedure, Rule 329.

Dear Sir:

The revision to Rule 329, Motion for New Trial on Judgment Following Citation by Publication, effective April 11, 1984, permits a motion for new trial following judgment on publication to be filed within two years after entry of the judgment, but provides that:

> d. If the motion is filed more than thirty days after the judgment was signed, all of the periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed thirty days before the date of filing the motion.

As I read this new rule, and as it was explained in the videotape training provided by the State Bar of Texas, it is designed to kick these proceedings into the normal appellate timetable, which means that the motion is overruled by operation of law if not decided within 45 days after filing, appeal bond must be filed in 60 days and the record must be at the Court of Civil Appeals 70 days after filing of the motion.

This action, of course, reverses at least forty years of caselaw on the issue of when such a motion should be decided, and is probably an advance toward prompt disposition of such suits. The revision committee may, however, have overlooked the effect of failing to also amend subsection (a) of Rule 329, which states:

> (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases. (emphasis added)

This last sentence has been interpreted to mean that certified mail service on the attorney of record for the publication plaintiff is not sufficient. Gilbert et al. v. Lobley, 214 SW2d 646 (Tex.Civ.App.- - Ft. Worth, 1948 writ ref'd). Personal service on the parties adversely interested and an opportunity to reply "as in other cases" has been the rule. 4 McDonald, Tex.Civ.Prac. §18.23.2 (1971). Since filing the motion tolled the two-year period this procedure was reasonable, and no time limit was imposed as to the period within which the motion had to be determined. 4 McDonald Tex.Civ.Prac., §18.23.1 (1971).

The new time limits, combined with the old practice relating to service of citation creates obvious problems. Citation as in other cases would permit the respondent to answer on "the Monday next after the expiration of 20 days" after service (Rule 101). After answering, a respondent is entitled to 10 days notice of a setting (Rule 245). Therefore, under the best possible conditions of citation and setting, movant would have 14 days or less to get an order granting new trial entered. Furthermore, since the time runs from the date of filing the motion, a respondent can effectively defeat a motion for new trial simply by evading service.

It appears to me there are two appropriate remedies to this dilemma. First, the court could allow Rule 21a service of the motion for new trial following publication upon the judgment plaintiff's attorney of record, so that issue could be joined and the matter decided as in other types of motions for new trial. This resolution seems questionable to me, since most attorneys do not maintain contact with former clients in any systematic way. It is probable, therefore, that Rule 21a service would prove ineffective to give actual notice to the parties affected, especially when the judgment may be discovered a year or longer after entry. Second, the court could compute the time limits from the date issue is joined, or from the date of service on the last respondent to be served, rather than from the date of filing the motion. The rules relating

to due diligence in issuance and service of citation which have been developed with respect to tort suits could be applied to prevent abusive delays in proceeding with such motions; it should also be made clear that respondents to such motions are not entitled to more than the minimum notice of hearing provided by Rule 21, or such time as is provided by local rules relating to other motions (in Bexar County this is normally 10 days).

In the meantime, as a senior attorney at Bexar County Legal Aid, I am advising my younger colleagues to issue citation and notice of a hearing, so that the respondent is given a setting on the motion within 45 days after filing. I have also advised them to issue certified mail notice to the attorney of record in the hope that an answer will render the service question moot.

I appreciate your time and attention in reviewing this comment. If I have misconstrued the revision or can be of any assistance in addressing the problem, please feel free to call on me.

Sincerely,

Charles G. Childress

CHARLES G. CHILDRESS
Chief of Litigation

CGC:lph

352

ARCHER, CLAY AND
MONTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 817
538-5913

May 1, 1986

Luther H. Soules, III
800 Milan Building
East Travis at Soledad
San Antonio, Texas 78205

Dear Luke:

Thanks for the information from the meeting of the Supreme Court Advisory Committee. This is the second suggestion that I have made that I feel the Committee has not understood. The problems we have in rural, multi-county districts are just different than the problems in San Antonio, Houston and Dallas.

Would you please send me a list of the members of this Committee. Frankly, I want to see if the Committee is just overbalanced with city folks.

The request that the Committee virtually ignored about the 90 day, 100 day problem on statement of facts and transcripts was treated as if I wanted to give more time to court reporters. What I want, is a requirement that the lawyers let the court reporter know something before there is only 10 days left. My court reporter's office is in Henrietta. The large part of our business is in Montague and the smallest part in Archer City. Court reporters in the big cities, when the court is idle, can simply go to their office and start to work. Court reporters in the country with more than one county can work only when they're in the county where their office is.

I am getting sick and tired of hearing about court reporter delay at every meeting I go to when I know that my court reporter is working nights and weekends when he has to to get a statement of facts done. He seldom takes depositions and that is not causing any problem. In fact, he seldom has to ask for an extension of time and then only when some lawyer perfects an appeal at the last minute.

I guess I just wanted to get this off my chest. But, I'd still like a list of the members of the Committee.

It has been a long time since I've seen you and perhaps we'll run together again one of these days.

Very truly yours,

Frank J. Douthitt

FJD:lb

RCHER, CLAY AND
)NTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 817
538-5913

November 14, 1985

Hon. James P. Wallace
P.O. Box 12248
Austin, Texas 78711

Dear Jim:

In the last couple of years every time we have a judges' meeting, somebody on the Supreme Court raises criticisms of court reporter delay in preparing statements of fact for appellate purposes. I may have written you about this before. I know I have commented to the Chief on the matter.

Recently, a case tried by me has had appeal perfected in a manner timely under the rules, but impossible with respect to the clerk and court reporter. It will require my court reporter to get an extension of time, which extension will probably be later cited by some appellate judge at some meeting to demonstrate "court reporter delay".

The problem is the two rules which have to do with perfecting appeal (Rule 356) and filing of the statement of facts and transcript (Rule 386). As you know Rule 386 provides that the transcript and statement of facts will be filed in the Appellate Court within 60 days of the date the judgment is signed unless there has been a motion for new trial filed in which case it must be filed within 100 days. Rule 356 provides that appeal must be perfected by the filing of a cost bond within 30 days of the date the judgment is signed, or if a motion for new trial is filed, within 90 days after the judgment is signed.

To give you an example of the problem caused, the case I mentioned above had its final judgment signed on August 12, 1985. In perfect compliance with Rule 356, the losing attorney filed a cost bond on November 12, 1985, 92 days after the judgment was signed, but the first day following a Sunday and legal holiday. He filed it late that afternoon and therefore left 7 days for the transcript and statement of facts to be prepared and filed in the Appellate Court.

In checking with the clerk with the Second Court of Appeals, I understand that it is probably 4 to 5 months after an appeal is filed with the Court of Appeals before it is actually submitted. It seems to me that there could either be more time for the court reporter to get the statement of facts ready after the appeal is perfected, or there could be a requirement that a notice to the court reporter and clerk be earlier than 90 days after judgment when a motion for new trial has been filed.

Frankly, Jim, I don't guess I have a solution. However, if you feel the court would be interested in trying to do something about this, I would put more time into a possible solution.

Very truly yours,

Frank J. Douthitt

EJD:lb

BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

LEE ROMER

BILL ALLEN P.C.
OF COUNSEL

Received
5-4-84

Hopkins & Farley
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

103 WEST PHILLIPS
CONROE TEXAS 77301

TELEPHONES: CONROE (409) 756-0663 HOUSTON (713) 353-1477

May 2, 1984

Mr. Hubert Green
Attorney at Law
900 Alamo National Bldg.
San Antonio, Texas 78205

Re: Administration of Justice Committee
Rule 364a (Proposed)

Dear Hubert:

Please find enclosed proposed Rule 364a.

As you can see there have been some changes made which were presented recently, and hopefully these changes will satisfy any objections made at our last meeting.

I am, by copy of this letter, asking that Ms. Avant send a copy of this proposed Rule to the members of the committee.

Sincerely,

Guy E. Hopkins

GEH/blh
encl.
cc: Evelyn Avant
State Bar of Texas
Box 12467
Capitol Station
Austin, Texas 78711

Luther Soules
Jim Kronzer
Michael Hatchell

(Proposed) RULE 366a

STAY OF ENFORCEMENT OF JUDGMENT OR ORDER PENDING APPEAL

In lieu of a supersedeas bond provided for in Rule 364, the court from which or to which an appeal is taken may order a stay of all or any portion of any proceedings to enforce the judgment or order appealed from pending on appeal upon further finding that the appeal is not frivolous, not taken for purposes of delay and that the interest of justice will be served by a stay.

Either court may vacate, limit or modify the stay for good cause during the pendency of the appeal. A motion to vacate, limit, or modify the stay shall be filed and determined in the court that last rendered any order concerning the stay subject to review by any higher court.

Any order granting, limiting, or modifying a stay must provide sufficient conditions for the continuing security of the adverse party to preserve the status quo and the effectiveness of the judgment or order appealed from.

Rejected
8-5-4

376a

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

May 1, 1986

Professor William V. Dorsaneo III
School of Law
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

As I told you this morning in our telephone conversation, I just received a copy of a partial transcript of the March 7-8 meeting of the Supreme Court Advisory Committee. On page 53 I see that the Committee voted to direct you to seek further input from me regarding my proposal to amend paragraph (g) of the Supreme Court Order following Rule 376-a. (See p. 10 of my letter to Michael Gallagher, which you referred to during your meeting.) I am afraid that no one understood what I was attempting to accomplish, but I should and do accept all the blame. While the order needs to be amended, as I shall explain, the way I proposed to do so was, on further reflection, not the best way to do it.

First, I realized all along that the Order was amended, effective April 1, 1985. The problem is it still requires the trial clerk to endorse on the transcript: "Applied for by P.S. on the _____ day of _____, A.D. 19 ___, and delivered to P.S. on the _____ day of _____, A.D. 19_____, ... " Since the clerk has a duty to prepare and deliver the transcript without the request of a party, and the clerk sends it directly to the court of appeals, not to the party, the currently required endorsement is erroneous. Parties don't apply for transcripts, and they are not delivered to parties. The enclosed proposed amendment simply requires the clerk to endorse on the transcript the date he delivered it to the court of appeals.

Second, the last sentence of paragraph (g) should be deleted because the "affirmance on certificate" practice no longer exists. Prior to the amendment to Rule 387, effective January 1, 1981, it was possible to have the judgment affirmed "on certificate" if the appellee filed in the appellate court: (1) a certified copy of the judgment and (2) a "certificate" of the trial court clerk stating the time when and how such appeal or writ of error was perfected. It was this certificate that the last sentence of the Order following Rule 387-a refers to. The 1981 amendment, however, completely rewrote Rule 387 and, among other things, deleted the certificate requirement.

I hope this clears up the matter and that the Committee can expedite this change without consuming much of its valuable time.

Sincerely yours,

Jeremy C. Wicker
Professor of Law

JCW/nt

cc: Mr. Luther H. Soules. III
Chair, Supreme Court Advisory Committee

Supreme Court Order Relating to Preparation of Transcript

(following Rule 376-a)

. . .

(g) . . .

The Clerk shall deliver the transcript to the appropriate Court of Appeals and shall in all cases indorse upon it before it finally leaves his hands as follows, to wit:

"[Applied for by P.S. on the ___ day of ___, A.D. 19___ and delivered] Delivered to [P.S.] the Court of Appeals for _____ Supreme Judicial District on the ____ day of _____, A.D. 19 ____," and shall sign his name officially thereto. [The same indorsement shall be made on certificates for affirmance of the judgment.]

. . .

Comment: Since the clerk of the trial court delivers the transcript directly to the clerk of the court of appeals, and not to a party, and a party no longer has a duty to request delivery of the transcript, the language of the current endorsement requirement is erroneous. The last sentence is deleted since the "affirmance on certificate" parctice was abolished by the amendment of Rule 387, effective January 1, 1981.

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 COLORADO, SUITE 600 • P.O. BOX 12066 • AUSTIN, TEXAS 78711 • 512/475-2421

TO: Justice Wallace

FROM: C. Raymond Judice

DATE: December 4, 1984

RE: Certification of transcription
Supreme Court Order following Rule 377

On November 20, 1984 the Supreme Court promulgated amendments to the Standards and Rules for Certification of Certified Shorthand Reporters in conformity with Article 2324b, V.T.C.S.

These amendments provide, among other matters, that each shorthand reporter, when certifying to a transcription, indicate his or her certification number, date of expiration of certification, and business address and telephone number.

The Order following Rule 377 of the Rules of Civil Procedure, provides a similar certification form but it does not require the certification number, date of expiration of current certification and business address and phone number of the reporter certifying.

As it is unclear whether the Supreme Court Order of November 20, 1984 amended the Order following Rule 377 of the Rules of Civil Procedure as well as the Standards and Rules for Certification of Court Reporters, I felt that I should bring this to your attention.

If the November 20, 1984 Order had the effect of amending the Order following Rule 377 as well as the Court Reporter Standards, should this be communicated to West Publishing Company to ensure that the next printing of the Rules of Civil Procedure will include this amendment?

If the November 20, 1984 Order did not amend the Order following Rule 377, should this amendment be brought to the attention of the Advisory Committee for possible action to bring it into conformity with the action of the Supreme Court of November 20, 1984?

OCA:MEMWAL.21

ORDER OF THE COURT

IT IS ORDERED by the Supreme Court of Texas that the following changes, additions, and amendments to the Standards and Rules for Certification of Certified Shorthand Reporters as they were adopted and promulgated effective January 1, 1984, in conformity with Article 2324b, V.T.C.S., as amended by Senate Bill 565, 68th Legislature, Regular Session, shall be and read as follows:

Rule I., General Requirements and Definitions, is amended by adding Paragraphs I. and J. to read as follows:

I. Certification of transcriptions.

1. The transcription of any oral court proceeding, deposition or proceeding before a grand jury, referee or court commissioner, or any other document certified by a certified shorthand reporter for use in litigation in the courts of Texas, shall contain as a part of the certification thereof, the signature, address and telephone number of the certified shorthand reporter and his or her State certification number and the date of expiration of certification, substantially in the following form:

I, _____, a certified shorthand reporter of the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of

(insert description of material or document certified)

Certified to on this the _____ day of _____, 19___.

_____
(Signature of Reporter)

_____
(Typed or Printed Name of Reporter)

Certification Number of Reporter: _____

Date of Expiration of Current Certification: _____

Business Address: _____

_____

Telephone Number: _____

2. A certification of a transcript of a court proceeding by an official court reporter shall contain a certificate signed by the court reporter substantially in the following form:

"THE STATE OF TEXAS
COUNTY OF _____

I, ..., official court reporter in and for the . . . . . court of . . . . . County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the repsective parties.

WITNESS my hand this the . . . . day of . . . . . , 19 . . . .

. . . . . .
(Signature)
Official Court Reporter"

. . . . . .
(Typed or Printed Name of Reporter)

Certification Number of Reporter: . . . . . .

Date of Expiration of Current Certification: . . . . . .

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

3. A person not certified who performs the functions of a court reporter pursuant to Section 14 of Article 2324b, V.T.C.S., shall attach to and make a part of the certification of any deposition which requires certification, an affidavit that no certified shorthand reporter was available to take the deposition, which shall be sworn to by that person and the parties to the proceedings, or their attorneys present. The certification of a transcription of a court proceeding reported pursuant to section 14 of article 2324b, V.T.C.S., by a person not certified shall contain an affidavit sworn to by that person, the attorneys representing the parties in the court proceeding, and the judge presiding that no certified shorthand reporter was available to perform the duties of the court reporter.

(e) The statement of facts shall contain the certificate signed by the court reporter in substance as follows:

"THE STATE OF TEXAS }
COUNTY OF _____ }

I, _____, official court reporter in and for the _____ court of _____ County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the _____ day of _____, 19___.

_____
(Signature)
Official Court Reporter"

(f) As to substance, it shall be agreed to and signed by the attorneys for the parties, or shall be approved by the trial court, in substantially the following form, to-wit:

"ATTORNEYS' APPROVAL

We, the undersigned attorneys of record for the respective parties, do hereby agree that the foregoing pages constitute a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts, and other proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by the official court reporters.

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Plaintiff

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Defendant

COURT'S APPROVAL

The within and foregoing pages, including this page, having been examined by the court, (counsel for the parties having failed to agree) are found to be a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts and other proceedings, all of which occurred in open court or in chambers and were reported by the official court reporter.

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 602 • P.O. Box 12066 • Austin, Texas 78711 • 512/475-2421

TO: Chief Justice Pope

FROM: C. Raymond Judice

DATE: August 22, 1984

RE: Proposed amendments to Rules of Civil Procedure.

One of the proposed amendments to the Rules and Standards for the Court Reporters Certification Board would require that the court reporter insert in the certification of any deposition or court proceeding his or her certification number, date of expiration of current certification and his or her business address.

Presently, the Supreme Court Order Relating to the Preparation of Statement of Facts as found following Rule 377 of the Texas Rules of Civil Procedure does not require these matters to be inserted in such certification.

Attached is a draft of a proposed amendment to this order which would insert these requirements in that order.

OCA:MEMPOP.21

PROPOSED AMENDMENT TO SUPREME COURT ORDER RELATING TO THE PREPARATION OF STATEMENTS OF FACTS

Item (e) of the Supreme Court Order Relating to the Preparation of Statements of Facts (Rule 377, T.R.C.P.) is amended to read as follows:

(e) The statement of facts shall contain the certificate signed by the court reporter in substance as follows:

"THE STATE OF TEXAS
COUNTY OF _____

I, ... , official court reporter in and for the . . . . . court of . . . . . County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the repsective parties.

WITNESS my hand this the . . . . day of . . . . . , 19 . . . .

. . . . . .
(Signature)
Official Court Reporter"

. . . . . .
(Typed or Printed Name of Reporter)

Certification Number of Reporter: . . . . . .

Date of Expiration of Current Certification: . . . . . .

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

385a

LAW OFFICES

SOULES & REED

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SAN ANTONIO, TEXAS 78205

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HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

April 14, 1986

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Enclosed is a letter from Jay M. Vogelson regarding consideration of a proposed new rule relative to interlocutory appeals. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luke

LUTHER H. SOULES III

LHSIII/tat
encl/as

00000456

file

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

January 30, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Proposed New Rule Relative to
Interlocutory Appeals

Dear Luke and Mike:

I am enclosing a letter from Jay M. Vogelson of Dallas, regarding consideration of a proposed new rule relative to interlocutory appeals.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Jay M. Vogelson
Moore & Peterson
Attorneys at Law
2800 First City Center
Dallas, Tx 75201-4621

00000457

MOORE & PETERSON

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2800 FIRST CITY CENTER
DALLAS, TEXAS 75201-4621
214 754-4800

NORTH DALLAS OFFICE
4901 LBJ FREEWAY
SUITE 200
DALLAS, TEXAS 75244-6102

TELECOPIER 214 922-0208
TWX 910 861-9168
CABLE ADDRESS MOPETE

DIRECT DIAL 754-4819

January 27, 1986

Honorable Ted Z. Robertson
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

Dear Justice Robertson:

I would like to suggest for consideration a new rule for the Texas Rules of Civil Procedure relative to interlocutory appeals.

As you know, under the Federal System, 28 U.S.C. §1292(b) (a copy of which is attached for your ready reference), an interlocutory appeal can be had from an order of a trial court where the trial court is of the opinion that the order involves a controlling question of law upon which there is a substantial ground for a difference of opinion, in circumstances where an immediate appeal would materially advance the ultimate termination of the litigation. Such an appeal is discretionary with the trial court, as well as with the Court of Appeals.

There exist no similar procedure under the Texas Rules of Civil Procedure. The only presently available method to seek review is by mandamus which, because of its inherent limitations, is not satisfactory.

It has been my experience that the interlocutory appeal procedure in the Federal System is an extremely valuable route to review legal issues that could terminate litigation, and does not unduly burden the courts. Since the interlocutory appeals are limited to controlling issues of law and are discretionary, interlocutory appeals in practice are few and the limitations insure that an appeal will be permitted only where there are truly controlling issues of law. I would commend the Federal practice for consideration.

This suggestion is prompted by my involvement in a case in a District Court in Dallas. The case concerns an alleged breach of an international commercial contract. The threshold

issue is whether the contract is subject to mandatory arbitration under the Federal Arbitration Act. Assuming the District Court declines to order arbitration, a great deal of time and expense would be involved in trying the case, all of which would be held for naught if, on appeal, it was ruled that mandatory arbitration was required. This is but one example of the type of situation in which an interlocutory appeal would materially advance the disposition of the case and should be authorized.

I would be glad to render whatever assistance you might wish in analyizing the impact that such a rule amendment would have, and the propriety of instituting such a process in Texas. Thank you for your kind consideration and courtesy.

With best regards,

Sincerely yours,

Jay M. Vogelson

JMV:sm
Enclosure

6871Y/1.86-1

28 U.S.C. 1292(b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

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W. W. TORREY

TELEPHONE
(512) 224-9144

February 10, 1986

Professor William V. Dorsaneo, III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Enclosed are proposed changes to Rules 356 and 386 submitted by Judge Frank J. Douthitt. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 4, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 356 (perfecting appeal) and
Rule 386 (filing of statement of facts and transcript)

Dear Luke and Mike:

I am enclosing a letter from Judge Frank J. Douthitt of Henrietta, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Frank J. Douthitt
Judge, 97th Judicial District
P. O. Box 530
Henrietta, Texas 76365

ARCHER, CLAY AND
MONTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 817
538-5913

November 14, 1985

Hon. James P. Wallace
P.O. Box 12248
Austin, Texas 78711

Dear Jim:

In the last couple of years every time we have a judges' meeting, somebody on the Supreme Court raises criticisms of court reporter delay in preparing statements of fact for appellate purposes. I may have written you about this before. I know I have commented to the Chief on the matter.

Recently, a case tried by me has had appeal perfected in a manner timely under the rules, but impossible with respect to the clerk and court reporter. It will require my court reporter to get an extension of time, which extension will probably be later cited by some appellate judge at some meeting to demonstrate "court reporter delay"

The problem is the two rules which have to do with perfecting appeal (Rule 356) and filing of the statement of facts and transcript (Rule 386). As you know Rule 386 provides that the transcript and statement of facts will be filed in the Appellate Court within 60 days of the date the judgment is signed unless there has been a motion for new trial filed in which case it must be filed within 100 days. Rule 356 provides that appeal must be perfected by the filing of a cost bond within 30 days of the date the judgment is signed, or if a motion for new trial is filed, within 90 days after the judgment is signed.

To give you an example of the problem caused, the case I mentioned above had its final judgment signed on August 12, 1985. In perfect compliance with Rule 356, the losing attorney filed a cost bond on November 12, 1985, 92 days after the judgment was signed, but the first day following a Sunday and legal holiday. He filed it late that afternoon and therefore left 7 days for the transcript and statement of facts to be prepared and filed in the Appellate Court.

In checking with the clerk with the Second Court of Appeals, I understand that it is probably 4 to 5 months after an appeal is filed with the Court of Appeals before it is actually submitted. It seems to me that there could either be more time for the court reporter to get the statement of facts ready after the appeal is perfected, or there could be a requirement that a notice to the court reporter and clerk be earlier than 90 days after judgment when a motion for new trial has been filed.

Frankly, Jim, I don't guess I have a solution. However, if you feel the court would be interested in trying to do something about this, I would put more time into a possible solution.

Very truly yours,

Frank J. Douthitt

FJD:lb

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 600 • P.O. Box 12066 • Austin, Texas 78711 • 512/475-2421

TO: Justice Jim Wallace

FROM: C. Raymond Judice

DATE: December 11, 1984

RE: Proposed amendments to Rule 423, T.R.C.P.

During the meeting of the Chief Justices of the Courts of Appeals on Friday, November 30, 1984, the assembled Chief Justices adopted a motion by Chief Justice Summers that the attached proposed amendments to Rule 423, T.R.C.P. be submitted for consideration by the Supreme Court.

I was asked to forward it to you for consideration by the Advisory Committee.

Amend Rule 423 as per attached,

OCA:LETJIM.21

SUGGESTED AMENDMENTS TO RULE 423, TEX. R. CIV. P.

Rule 423 Argument.

(a) Right to Argument. When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court. ~~[either oral or plainly written or printed.--If written or printed, six copies shall be filed with the record.]~~

(b) Unchanged.

(c) Unchanged.

(d) Time Allowed. In the argument of cases in the Court of Appeals, each side may be allowed thirty (30) minutes in the argument at the bar, with fifteen (15) minutes more in conclusion by the appellant. In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before argument begins. The court may also align the parties for purposes of presenting oral argument. The Court may, in its discretion, shorten the time allowed for oral argument.

Not more than two counsel on each side will be heard, except on leave of the court.

Counsel for an amicus curiae shall not be permitted to argue except that an amicus may share time allotted to one of the counsel who consents and with leave of the court obtained prior to argument.

(e) Unchanged.

(f) A party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. Failure of a party to

file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the Court of Appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case.

The Court of Appeals may, in its discretion, advance cases for submission without oral argument where oral argument would not materially aid the Court in the determination of the issues of law and fact presented in the appeal. Notice of the submission date of cases without oral argument shall be given by the Clerk in writing to all attorneys of record, and to any party to the appeal not represented by counsel, at least twenty-one (21) days prior to the submission date. The date of the notice shall be deemed to be the date such notice is delivered into the custody of the United States Postal Services in a properly addressed post-paid wrapper (envelope).

NOTE: Additions in text indicated by underline; deletions by [~~strikeouts~~].

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

July 9, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Tex. R. Civ P. 216, 439, 440, 441

Dear Luke:

Enclosed is a memo from Judge Robertson supporting deletion of Rules 439, 440 and 441. His suggestion is that all remittiturs should be eliminated.

The First Court in Houston recently handed down an unpublished opinion in First State Bank of Bellaire v. C. H. Adams, a copy of which is enclosed. To avoid the problem in the future, I suggest that Rule 216 be amended to require both a jury fee and a request for jury not less than ten days before trial.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

MEMORANDUM

TO : Judge Wallace
FROM: Judge Robertson
DATE: July 8, 1985

RE : Supreme Court Advisory Committee

It is suggested that the Supreme Court Advisory Committee consider deleting and/or abolishing Rules 439, 440 and 441 of the Texas Rules of Civil Procedure.

Court of Appeals
First Supreme Judicial District

OPINION C 4032

C.H. ADAMS, APPELLANT

NO. 01-84-0536-CV VS.

FIRST STATE BANK OF BELLAIRE, APPELLEE

On Appeal from the 189th Judicial District Court
of Harris County, Texas
Trial Court Cause No. 78-8109

The appellant, C.H. Adams, brought this suit for damages alleging an illegal offset by the appellee, First State Bank of Bellaire, against funds that Tri-State Oil and Gas, Inc. had on deposit with the bank. The appellant was a shareholder of Tri-State Oil and Gas, Inc. and, as its successor in interest, intervened in the suit. The trial court granted a summary judgment for the appellee, and the appellant now asserts three points of error on appeal. He alleges that the trial court based its judgment on issues not expressly set out in the appellant's motion for summary judgment; that the four-year statute of limitations is applicable to his cause of action, not the two-year statute of limitations; and he asserts that the doctrines of res judicata and estoppel prevent a recovery by the appellee.

Tri-State's relationship with the appellee was as a depositor and a borrower. It maintained four bank accounts with the appellee, and on January 16, 1976, borrowed $100,000 from appellee. The loan was evidenced by a note which was secured by warehouse receipts. On February 20, 1976, Tri-State borrowed another $30,000 from the appellee, executed a second note and secured that note by an assignment of oil leases.

On March 1, 1976, the State of Texas filed suit against Tri-State and some of its officers and stockholders, alleging irregularities in Tri-State's operations and prayed for a receiver to be appointed. The state court, after an ex parte hearing, granted the state's request and appointed a receiver.

On March 3, 1976, because of an article in a Houston newspaper concerning the state's activities against Tri-State, the appellee became aware of the state court action. Although the appellant's notes had not matured, the appellee declared itself to be insecure, and offset $102,000 of the appellant's deposits against the $100,000 note. Thereafter, numerous checks which Tri-State had issued were dishonored by the bank.

Unknown to the appellee, on March 1, 1976, Tri-State had filed with the Federal Bankruptcy Court a petition under Chapter XI of the Federal Bankruptcy Act, seeking an arrangement to pay off and satisfy the debts it owed to its creditors. The appellee became aware of the bankruptcy action about two or three days after it was filed.

On March 31, 1976, the bankruptcy court entered its order appointing a receiver and authorizing the receiver to operate the business and manage the property of Tri-State until further order of that court. The bankruptcy court also ordered the appellee to set up a special trust account and place the $102,000, which it had offset against Tri-State's note, in that account. Funds could not be withdrawn except by order of the bankruptcy court. The appellee protested the setting up of this special account and appealed to the Federal District Court.

On appeal, the district court reversed the judgment of the bankruptcy court. That order also noted that the appellant had reached an arrangement with its creditors, that the issue of the special trust account was then moot, and dismissed the appeal. The appellant then appealed to the 5th Circuit Court of Appeals, which dismissed that appeal as being moot.

The appellants filed the present lawsuit on March 2, 1978. The trial court's docket sheet reflects that the appellee filed two motions for summary judgment which were denied. In May of 1983, the case was certified as being ready for trial, was placed on the non-jury docket of the civil district courts of Harris County, Texas, and in April of 1984, the case was assigned to trial in another district court.

After briefly discussing the issues of the case with

the attorneys, the trial judge stated as follows:

> The court, as a matter of judicial economy, is going to reconsider the defendant's motions for summary judgment and the Plaintiff's responses to them and all of the attachments, affidavits and documents furnished with them.

The parties apparently acquiesced in this procedure because no objections were made, and the court's action is not raised as a point of error on appeal.

After the court made its announcement, the parties presented their marked exhibits to the court. The parties also made several stipulations to the court. After a discussion between the court and the attorneys, the court announced its ruling.

Although the court's reasons for granting the summary judgment are not shown on the face of its final judgment, the record made at the summary judgment hearing reveals that the court stated its reasons as follows:

> My holding is that in any event the checks were presented after the filing and the property not then being the property of the drawer but the property of the estate of the bankrupt, they were lawfully dishonored.

The appellant's complaint in its first point of error is that the trial court erred in granting a summary judgment on issues that were not expressly set out in a motion, answer, or any other response.

The appellee's amended motion for summary judgment stated that the appellee was entitled to a summary judgment as there was no genuine issue of material fact and no disputed issue of fact in the instant case: (1) because appellee had fully complied with the orders of the court (bankruptcy court); and, (2) that the appellant's cause of action was barred by the Texas two-year statute of limitations. See Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon Supp. 1985).

It is manifest that the trial court's judgment was not based upon the two grounds set forth in the appellee's motion for summary judgment. However, the appellee contends that although the question of lawful dishonor was not raised in its written motion for summary judgment, the parties orally agreed at the

summary judgment hearing to consider the question of the dishonoring of the checks. We have reviewed the record made at the summary judgment hearing, and we find nothing in that record to substantiate the appellant's contention.

Texas Rules of Civil Procedure 166-A(c) requires that a motion for summary judgment must state the specific grounds therefor. If the trial court finds there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in the answer or other response, the court must then render summary judgment for the moving party. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671 (Tex. 1979).

Thus, since the basis of the trial court's judgment was not on either of the two grounds expressly set forth in the appellee's motion for summary judgment, the basis for its judgment must be contained in appellant's response or answer to the motion, or the judgment cannot stand. Tex. R. Civ. P. 166A(c).

The appellant's response and answer to appellee's amended motion for summary judgment initially reiterates the facts set forth in its petition. It then asserts the defenses of res judicata, estoppel, and asserts that the four-year statute of limitations is applicable, not the two-year statute. These defenses do not raise the issue of the bankruptcy court having the appellant's deposits in custodia legis at the time the appellee made its offset against the appellant's accounts, which was the basis of the trial court's summary judgment.

We find that the summary judgment granted by the trial court was not based on issues expressly presented to it by written motion, answer or other response. We hold that such action is prohibited by Rule 166-A(c), and sustain the appellant's first point of error.

We also hold that the record would not support a summary judgment on the grounds asserted by the appellee in its motion for summary judgment. The appellee asserts that the two-year statute of limitations bars a recovery by the appellant.

As heretofore stated, the parties agreed that the checks which were dishonored were dishonored after March 4, 1976. The docket sheet reflects that this law suit was filed on March 2, 1978. Thus, the present suit was filed within the two-year statute.

The appellee's second basis for summary judgment was that it had fully complied with all the orders of the bankruptcy court and accordingly had the legal right to dishonor the Tri-State checks. The record indicates that the first order of the bankruptcy court was dated March 31, 1976. The appellant introduced into evidence approximately seventy checks that were dishonored by the appellee after March 4, 1976. Because of the numerous stamped endorsements on the back of each of the checks, we cannot ascertain how many of the checks were dishonored between the dates of March 4 and March 31. We assume, as the appellee asserts, that it did follow all the bankruptcy court's orders, but the issue, as we understand it, is whether the appellee wrongfully offset Tri-State's debts prior to the bankruptcy court accepting jurisdiction over the assets and liabilities of Tri-State. This issue requires a legal determination of when the bankruptcy court's jurisdiction attached. It also requires a factual determination of when the appellee became aware of the bankruptcy action and whether it applied the offset before or after it became aware of the bankruptcy action. Also, there is the issue of whether the appellee was justified in making the offset when all of its loans were secured by collateral which it had deemed adequate just a few weeks before it declared itself insecure and applied the offset. Further, there is the issue of what checks were dishonored and when the dishonor occurred. Since there were factual issues to be determined, appellee was not entitled to a summary judgment on the basis it had complied with the bankruptcy court's orders.

We do not reach the issue of whether the trial was correct in its holding that Tri-State's bank accounts were in custodia legis at the time its checks were dishonored by appellee. The reason for this is that the issue was not raised

in the party's pleadings in the summary judgment proceedings.

The judgment of the trial court is reversed and this cause of action is remanded to the trial court.

/s/ JACK SMITH
Jack Smith
Associate Justice

Associate Justices Bass and Levy sitting.

No Publication. Tex. R. Civ. P. 452.

JUDGMENT RENDERED AND OPINION DELIVERED FEBRUARY 14, 1985.

TRUE COPY ATTEST;

Kathryn Cox
KATHRYN COX
CLERK OF THE COURT

Justice Pope
answer to D.P.'s

LAW OFFICES
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GALVESTON, TEXAS 77550

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HOUSTON (713) 331-2442

W E GREER
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THOMAS P HEWITT
RONALD M GIPSON
CHARLES M JORDAN
STEPHEN G SCHULZ, P.C.

THOMAS W MCQUAGE
SIMONE S LEAVENWORTH
DEBRA G JAMES
CHARLES A DAUGHTRY
I NELSON HEGGEN
BENJAMIN R BINGHAM
RICHARD B DREYFUS
JOHN A BUCKLEY, JR.

June 26, 1984

Chief Justice Jack Pope
The Supreme Court of Texas
P. O. Box 12248
Capital Station
Austin, Texas 78711

Dear Mr. Chief Justice:

This letter is meant to call your attention to a problem that has become apparent with current practice under the Texas Rules of Civil Procedure, specifically Rules 456 and 457. This problem does not involve a case currently pending before any court. As you are aware, these rules require several notices of judgment to go to the attorneys involved in a case at the Court of Appeals. Rule 457 requires immediate notice of the disposition of the case. Rule 456 additionally requires a copy of the opinion to be sent out within three (3) days after rendition of the decision, in addition to a copy of the judgment to be mailed to the attorneys within ten (10) days after rendition of the decision. As you can see, the Rules contemplate three (3) separate notices to be mailed out by first class letter, which should, in this most perfect of all possible worlds, result in at least one of them getting through to an attorney to give him notice of the Court of Appeal's decision.

The problem arises when, as has been done, the office of the Clerk of a Court of Appeals decides to mail a copy of the judgment and the opinion together in one envelope to, in their minds at least, satisfy the combined requirements of Rules 456 and 457. With this as a regular practice, it takes very little in the way of a slip-up by a clerk or the post office to result in no notice at all being sent to an unsuccessful party.

The combination of Rules 21c and 458 as interpreted by the Supreme Court make jurisdictional the requirement that any Motion for Extension of Time to File a Motion for Rehearing be filed within thirty (30) days of the rendition of judgment. It can happen, and has happened, that because of failure of the Clerk of the Court to mail notice of the rendition of judgment the party can be foreclosed from pursuing Application for Writ of Error to the Texas Supreme Court.

While strict adherence to the requirements of the Rules for three (3) separate notices would go far to eliminate the problem, there are no adequate sanctions or protections for the parties when the clerks fail to provide the proper notices. One possible solution that may create some additional burden upon the staff of the Clerk of the Courts of Appeals, but would go far to protect the appellate attorney from clerical missteps, would be to amend the Rules to require at least one of the notices to be sent registered mail, return receipt requested. The second step could take one of two forms. One method would be to require proof of delivery of the notice by registered mail before the time limits for the Motion for Rehearing would be used to foreclose a party from further pursuant of their appeal. A second alternative would require the clerk of the court to follow up by telephone call if the green card is not returned within, say, fifteen (15) days. An amendment to the rules along these lines would help to push towards the goal expressed by the Supreme Court in B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 8680 (Tex. 1982), when it said that the Texas Rules of Civil Procedure had been amended "to eliminate, insofar as practical, the jurisdictional requirements which have sometimes resulted in disposition of appeals on grounds unrelated to the merits of the appeal."

A second, more unwieldy alternative would be to make it explicit that Rule 306a(4) also applies to judgments by the Courts of Appeals. This would allow an attorney to prove lack of notice of the judgment of the Court of Appeals to prevent being foreclosed from filing a motion for rehearing and subsequent appeal to the Supreme Court.

Because of the problem outlined in this letter, we have now made it a practice, as a part of our appellate work, to call the clerk's office every week, after oral argument, to see if a decision has been rendered. If this becomes standard practice by all attorneys, it will add significantly to the work load of our already overburdened clerks.

We certainly appreciate your consideration of these suggestions made above.

Yours very truly,

Charles M. Jordan

I. Nelson Heggen

:tt

483

LAW OFFICES

SOULES, CLIFFE & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

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(409) 245-1122

January 9, 1986

Mr. Russell McMains
Edwards, McMains & Constant
P. O. Drawer 480
Corpus Christi, Texas 78403

Dear Rusty:

Enclosed are proposed changes to Rules 483, 496, and 499a submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ Ltr

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomalies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

000004'79

Rule 469. Requisites of Application

In line 4 of subdivision (d), delete "Subdivision 2 of Article 1728" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

In lines 6 and 7 of subdivision (d), delete "subdivision of Article 1728" and substitute:

subsection of section 22.001 of the Texas Government Code

In lines 8 and 9 of subdivision (d), delete "Subdivision 6 of Article 1728" and substitute:

subsection (a)(6) of section 22.001 of the Texas Government Code

Rule 483. Orders on Application for Writ of Error, Petition for Mandamus and Prohibition

In the second paragraph, delete "subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

00000480

92, 376a
492, 758, 109

TO Justice Hecht.

Texas Tech University

School of Law

April 30, 1984

Honorable Jack Pope, Chief Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: Conflicts and oversights in 1984 amendments to the Texas Rules of Civil Procedure

Dear Justice Pope:

In going over the 1984 amendments, I have discovered several conflicts and oversights, other than the ones I had related to Justice Spears earlier this year.

1. Rule 72. The first sentence changed the phrase "the adverse party or his attorney of record" to "all parties or their attorneys of record." Shouldn't the phrase read: "all adverse parties or their attorneys of record"? This would be consistent with the remaining language of Rule 72 and with other rules which normally refer to service on the "adverse," "opposite" or "opposing" party.

2. Rule 92. The second paragraph was added, but it refers to a "plea of privilege." Obviously, this should be changed to "motion to transfer venue under Rule 86."

Aside - the phrase "plea of privilege" had perhaps one sole virtue. When it was used everyone knew this was an objection to venue under Rule 86, rather than a motion for a discretionary change of venue under Rule 257. Unfortunately, a motion to change venue under Rule 257 may also properly be referred to as a motion to transfer venue. See Rules 86(1), 87(2)(c), (3)(c), (5), 258, 259. And see Article 1995(4)(c)(2).

3. Rule 165a(3). In the second sentence the word "is" should be changed to "are."

4. Rules 239a and 306a. Prior to the 1984 amendments, the language of Rule 306d (repealed), which dealt with notification of appealable orders generally, and Rule 239a, which deals with notification of default judgments (also an appealable order) were worded slightly differently, but in substance

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were the same. Both rules provided: "Failure to comply with the provisions of this rule shall not affect the finality of the judgment or order."

New Rule 306a(4),(5), however, which superseded old Rule 306d, makes it possible for the finality of a judgment to be extended for up to ninety days. Rule 239a was not amended. In my opinion, this creates an anomoly in that, unless Rule 239a is to be ignored, it is possible to have the periods for a motion for new trial, perfecting an appeal, etc., to start running at a later date (if a party proves he did not receive notice of a judgment) for all appealable orders and judgments, except a default judgment. Unless this was so intended, Rule 239a should be amended to conform to Rule 306a(4),(5).

5. Rules 360(5), (8) and 363. New Rule 360(5) requires that, in addition to filing the petition for writ of error, a notice of appeal must be filed if a cost bond is not required. Rule 360(8) says, in effect, that in such circumstances the writ of error is perfected when the petition and a notice of appeal are filed. It had been my understanding, at least prior to the 1984 amendments, that where a cost bond was not required by law, an appellant in an appeal by writ of error to the court of appeals needed only to file the petition. Rule 363, which was not amended in 1984, supports this view. Thus the last sentence of Rule 363 conflicts with Rule 360(8).

Aside from this problem, the word "is" in the last line of Rule 360(8) should be changed to "are."

6. Rule 376a. Part (g) of the Supreme Court order relating to the preparation of the transcript needs to be amended. The last paragraph of part (g) should be deleted. It is obsolete in view of the 1984 repeal of Rule 390 and the 1981 and 1984 amendments of Rule 376. A party no longer needs the authority to apply to the clerk to have the transcript prepared and delivered to him, since Rule 376 makes it clear that the clerk has the duty to prepare and transmit the transcript to the court of appeals.

7. Rule 418. Amended Rule 414 incorporates all the provisions of Rule 418, as well as several other rules. These Rules (415-417) were repealed, but Rule 418 was not. Rule 418 should be repealed.

8. Rules 469(h) and 492. New Rule 469(h) requires the application for writ of error to state that a copy has been served on "each group of opposite parties or their counsel." Rule 492, however, requires that a copy of each instrument (including "applications") filed in the Supreme Court to be served on "the parties or their attorneys." Since two or more parties may belong to one group, only one copy would have to be served on them as a group under Rule 469(h), but under Rule 492, each party would have to be served with a copy. Are these two rules conflicting in their requirements or does Rule 492 apply to all filings in the Supreme Court except the application for writ of error?

9. Rules 758 and 109. Rule 109 was amended to delete the proviso (last sentence). Rule 758, which was not amended, states: "but the proviso of Rule 109, adapted to this situation, shall apply." Rule 758 needs to be amended to delete any reference to the now nonexistent proviso of Rule 109.

One final note: Section 8 of Article 2460a, the Small Claims Court Act, was not amended by the legislature along with the repeal of Article 2008, which

had allowed an interlocutory appeal from the trial court's ruling on a plea of privilege. Arguably, section 8 allows such an interlocutory appeal. On the other hand, the right to interlocutory appeal may be geared to or depend on a right in some other statute, such as now repealed Article 2008, since section 8 begins with the phrase "nothing in this Act prevents."

I hope my comments and suggestions have been helpful.

Respectfully yours,

Jeremy C. Wicker
Professor of Law

JCW:tm

in other respects shall conform to the rules laid down for typewritten transcripts.

(d) The caption of the transcript shall be in substantially the following form, to wit:

"The State of Texas,
County of _____

At a term of the _____ (County Court or _____ Judicial District Court) of _____ County, Texas, which began in said county on the _____ day of _____, 19___, and which terminated (or will terminate by operation of law) on the _____ day of _____, 19___, the Honorable _____ sitting as Judge of said court, the following proceedings were had, to wit:

A.B., Plaintiff,
v. No. _____
C.D., Defendant. } In the _____ Court of _____ County, Texas."

(e) There shall be an index on the first pages preceding the caption, giving the name and page of each proceeding, including the name and page of each instrument in writing and agreement, as it appears in the transcript. The index shall be double spaced. It shall not be alphabetical, but shall conform to the order in which the proceedings appear as transcribed.

(f) It shall conclude with a certificate under the seal of the court in substance as follows:

"The State of Texas,
County of _____ } I, _____

Clerk of the _____ Court, in and for _____ County, State of Texas, do hereby certify that the above and foregoing are true and correct copies of (all the proceedings or all the proceedings directed by counsel to be included in the transcript, as the case may be) had in the case of _____ v. _____, No. _____, as the same appear from the originals now on file and of record in this office.

Given under my hand and seal of said Court at office in the City of _____, on the _____ day of _____, 19___.

_____

Clerk _____ Court, _____ County, Texas.

By _____ Deputy."

(g) The front cover page of the transcript shall contain a statement showing the style and number of the suit, the court in which the proceeding is pending, the names and mailing addresses of the attorneys in the case, and it shall be labeled in bold type "TRANSCRIPT." The following form will be sufficient for that purpose:

"TRANSCRIPT

No. _____
District Court No. _____

_____
Appellant___
v.
_____
Appellee___

_____ _____

Transcript from the _____ District Court of _____ County, at _____, Texas.

Hon. _____, Judge Presiding.

Attorney___ for Appellant___:
_____ Address: _____
Attorney___ for Appellee___:
_____ Address: _____"

The Clerk shall deliver the transcript to the party, or his counsel, who has applied for it, and shall in all cases indorse upon it before it finally leaves his hands as follows, to wit:

"Applied for by P. S. on the _____ day of _____, A.D. 19___, and delivered to P. S. on the _____ day of _____, A.D. 19___," and shall sign his name officially thereto. The same indorsement shall be made on certificates for affirmance of the judgment.

(h) In the event of a flagrant violation of this rule in the preparation of a transcript, the appellate court may require the Clerk of the trial court to amend the same or to prepare a new transcript in proper form at his own expense.

Entered this the 20th day of January, A.D. 1944.

_____
Chief Justice.

_____
Associate Justice.

_____
Associate Justice.

Change in form by amendment effective January 1, 1981: Paragraph (b) is changed to provide that judgments shall show the date on which they were *signed*, rather than "rendered" or "pronounced." *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978). The first sentence of paragraph (c) is changed to permit duplication of pages by methods other than typing and printing.

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 COLORADO, SUITE 600 • P.O. BOX 12066 • AUSTIN, TEXAS 78711 • 512/475-2421

TO: Justice Wallace

FROM: C. Raymond Judice

DATE: December 4, 1984

RE: Certification of transcription
Supreme Court Order following Rule 377

On November 20, 1984 the Supreme Court promulgated amendments to the Standards and Rules for Certification of Certified Shorthand Reporters in conformity with Article 2324b, V.T.C.S.

These amendments provide, among other matters, that each shorthand reporter, when certifying to a transcription, indicate his or her certification number, date of expiration of certification, and business address and telephone number.

The Order following Rule 377 of the Rules of Civil Procedure, provides a similar certification form but it does not require the certification number, date of expiration of current certification and business address and phone number of the reporter certifying.

As it is unclear whether the Supreme Court Order of November 20, 1984 amended the Order following Rule 377 of the Rules of Civil Procedure as well as the Standards and Rules for Certification of Court Reporters, I felt that I should bring this to your attention.

If the November 20, 1984 Order had the effect of amending the Order following Rule 377 as well as the Court Reporter Standards, should this be communicated to West Publishing Company to ensure that the next printing of the Rules of Civil Procedure will include this amendment?

If the November 20, 1984 Order did not amend the Order following Rule 377, should this amendment be brought to the attention of the Advisory Committee for possible action to bring it into conformity with the action of the Supreme Court of November 20, 1984?

OCA:MEMWAL.21

ORDER OF THE COURT

IT IS ORDERED by the Supreme Court of Texas that the following changes, additions, and amendments to the Standards and Rules for Certification of Certified Shorthand Reporters as they were adopted and promulgated effective January 1, 1984, in conformity with Article 2324b, V.T.C.S., as amended by Senate Bill 565, 68th Legislature, Regular Session, shall be and read as follows:

Rule I., General Requirements and Definitions, is amended by adding Paragraphs I. and J. to read as follows:

I. Certification of transcriptions.

1. The transcription of any oral court proceeding, deposition or proceeding before a grand jury, referee or court commissioner, or any other document certified by a certified shorthand reporter for use in litigation in the courts of Texas, shall contain as a part of the certification thereof, the signature, address and telephone number of the certified shorthand reporter and his or her State certification number and the date of expiration of certification, substantially in the following form:

I, _____, a certified shorthand reporter of the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of

(insert description of material or document certified)

Certified to on this the _____ day of _____, 19___.

_____
(Signature of Reporter)

_____
(Typed or Printed Name of Reporter)

Certification Number of Reporter: _____

Date of Expiration of Current Certification: _____

Business Address: _____

_____

Telephone Number: _____

2. A certification of a transcript of a court proceeding by an official court reporter shall contain a certificate signed by the court reporter substantially in the following form:

"THE STATE OF TEXAS
COUNTY OF _____

I, ..., official court reporter in and for the . . . . . court of . . . . . County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the repsective parties.

WITNESS my hand this the . . . . day of . . . . . , 19 . . . .

. . . . . .
(Signature)
Official Court Reporter"

. . . . . .
(Typed or Printed Name of Reporter)

Certification Number of Reporter: . . . . . .

Date of Expiration of Current Certification: . . . . . .

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

3. A person not certified who performs the functions of a court reporter pursuant to Section 14 of Article 2324b, V.T.C.S., shall attach to and make a part of the certification of any deposition which requires certification, an affidavit that no certified shorthand reporter was available to take the deposition, which shall be sworn to by that person and the parties to the proceedings, or their attorneys present. The certification of a transcription of a court proceeding reported pursuant to section 14 of article 2324b, V.T.C.S., by a person not certified shall contain an affidavit sworn to by that person, the attorneys representing the parties in the court proceeding, and the judge presiding that no certified shorthand reporter was available to perform the duties of the court reporter.

(e) The statement of facts shall contain the certificate signed by the court reporter in substance as follows:

"THE STATE OF TEXAS }
COUNTY OF _____ }

I, _____, official court reporter in and for the _____ court of _____ County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the _____ day of _____, 19___.

_____
(Signature)
Official Court Reporter"

(f) As to substance, it shall be agreed to and signed by the attorneys for the parties, or shall be approved by the trial court, in substantially the following form, to-wit:

"ATTORNEYS' APPROVAL

We, the undersigned attorneys of record for the respective parties, do hereby agree that the foregoing pages constitute a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts, and other proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by the official court reporters.

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Plaintiff

SIGNED this _____ day of _____, 19___.

_____
(Signature)
Attorney for Defendant

COURT'S APPROVAL

The within and foregoing pages, including this page, having been examined by the court, (counsel for the parties having failed to agree) are found to be a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts and other proceedings, all of which occurred in open court or in chambers and were reported by the official court reporter.

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

PART V, SECTION 2 - INSTITUTION OF SUIT

Move the heading "SECTION 2. INSTITUTION OF SUIT" from its present location between Rules 527 and 528 to the new location before Rule 525.

COMMENT: The heading "SECTION 2. INSTITUTION OF SUIT" is moved to a new location above Rule 525.

The purpose of this amendment is to place the heading in its proper place before the rules governing pleadings and motions to transfer.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

Rule 566 - Judgments by Default

A justice may within ten days after a judgment by default or dismissal is signed set aside such judgment, on motion in writing, for good cause shown, [~~supported by affidavit~~] in compliance with Rule 568. Notice of such motion shall be given to the opposite party at least on full day prior to the hearing thereof.

COMMENT: The phrase "supported by affidavit" has been deleted and replaced with the phrase "in compliance with Rule 568." Rule 568 sets out the requirements for sworn motions. The purpose of the proposed amendment is to bring Rule 566 into compliance with Rule 568 and eliminate possible conflict between the requirements under the two rules.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

NOTE: Problems arising from the application of Rule 525 (Oral Pleadings in Justice Court) in forcible entry and detainer actions require this subcommittee to recommend changes in section 2 of Rules Relating to Special Proceedings (Forcible Entry and Detainer, Rules 738-755).

Rule 749 - May Appeal

No motion for a new trial shall be necessary to authorize an appeal.

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 (5) 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 that this rule has been substantially complied with.

COMMENT: The last paragraph has been added.

The purpose of this proposed amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court. The present rules on forcible entry and detainer do not require that any notice of appeal be given to the appellee. A defendant/appellee who did not file a written answer in justice court is subject to default judgment for not filing one in the county court even though that party was not aware that an appeal had been perfected.

The language of the proposed amendment is taken from Rule 571, which governs appeal bonds and notice thereof in other types of actions in the justice courts. Due to the accelerated nature of appeals in forcible entry and detainer suits, though, this proposed rule requires only substantial compliance with Rule 21a.

The proposed amendment prevents the taking of a default judgment against an adverse party who had no notice of the appeal. It also affords the appealing party protection from dismissal of the appeal due to technical

defects or irregularities in a notice which otherwise effectively alerts an adverse party that an appeal is being prosecuted.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

NOTE: Problems arising from the application of Rule 525 (Oral Pleadings in Justice Court) in forcible entry and detainer actions require this subcommittee to recommend changes in Section 2 of Rules Relating to Special Proceedings (Forcible Entry and Detainer, Rules 738-755).

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 where 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.

COMMENT: The second paragraph has been added.

The purpose of this proposed amendment is to notify the parties of the date from which time for trial began to run and the docket number for the case in county court. The amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in justice court. (See Rules 525 and 753).

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

Supreme Court Advisory Committee
Rules 523-591 Subcommittee
Proposed Amendment
3-08-86

NOTE: Problems arising from the application of Rule 525 (Oral Pleadings in Justice Court) in forcible entry and detainer actions require this subcommittee to recommend changes in section 2 of Rules Relating to Special Proceedings (Forcible Entry and Detainer, rules 738-755).

Rule 753 - Judgment by Default

Said cause shall be subject to trial at any time after the expiration of ~~[five]~~ eight full days after the day the transcript if filed in the county court. If the defendant has filed a written answer in the justice court, the same shall be taken to constitute his appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and if he fails to file a written answer within ~~[five]~~ eight full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

COMMENT: The word "five" has been deleted and replaced with "eight."

The purpose of this proposed amendment is to extend the time periods for trial date and filing a written answer in county court. The extension is required for due

process considerations, in order to give a pro se defendant the opportunity to receive notice of the appeal and file a written answer where he or she has pleaded orally in the justice court.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

DJ:jk .004

KEMP, SMITH, DUNCAN & HAMMOND

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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WILLIAM DUNCAN
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PLEASE REPLY TO:

July 19, 1985

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Re: Proposed Change in the Texas Rules of Civil Procedure

Dear Mr. Soules:

In March of this year I attended the Advanced Civil Trial Short Course in Dallas, at which you spoke. At that time, you solicited comments and suggestions on possible changes in the Texas Rules of Civil Procedure. Under rather unfortunate circumstances, I recently discovered what I believe to be a loophole in the rules, and I wish to bring it to your attention. If you are no longer a member of the committee that is responsible for rule changes, I would appreciate your forwarding this letter to an appropriate person or letting me know to whom it should be sent.

I was recently retained to defend a forcible detainer action in a Justice Court here in El Paso County. As I am sure you know, Rule 525 provides that pleadings in Justice Court need not be written. Because time was extremely short and my client, the tenant, wanted to keep expenses to a minimum, I did not file a written answer in the case. Rather, we appeared at the hearing with all of our witnesses and successfully defended the lawsuit. Having won the hearing, I assumed that the litigation was concluded and that, should the landlord pursue an appeal, I would receive some type of formal notice.

Pursuant to Rule 749c, the landlord perfected his appeal by the filing of an appeal bond. He also requested that the Justice Court transcript be filed in the County Court and that the cause be docketed. All of this was done without my knowledge, as there is no rule requiring notice of the appeal. I was informed that an appeal had been taken approximately three weeks after the hearing in Justice Court, when my client called me to inform me that he had received notice of a default judgment taken against him in County Court. Upon investigation, I learned that a default judgment had been taken against us pursuant to Rule 753. The pertinent part of that rule provides as follows:

> If the defendant made no answer in writing in the justice court, and if he fails to file a written answer within five full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

It then became necessary for me to expend considerable time having the default judgment set aside. Not only was the experience terrifying for my client, who thought that he had been evicted, but I was also shocked to learn that an appeal could be taken and a default judgment rendered without any notice to the opposing party whatsoever. It was my contention in my motion to set aside the default judgment that the County Court's judgment was void for want of due process. I honestly believe that the failure to require notice of appeal in a forcible detainer action renders this procedure constitutionally defective.

As a general proposition, I am struck by what I consider an inconsistency in the rules. An appeal to the County Court from the Justice Court grants the appellant a trial de novo. However, Rule 753 dictates that a defendant's answer in Justice Court shall serve as his answer in county court. Therefore, the defendant's pleadings in Justice Court, at least initially, become his pleadings in County Court. It seems rather anomalous that the Justice Court proceedings should have such impact in a trial de novo. The result, at least in my case, is that I was caught completely unaware of the need to file a written answer in justice court.

While I have no excuse for my ignorance of Rule 753, I am concerned that, as the rules are currently written, Rule 753 can work a severe hardship on tenants who successfully defend

forcible detainer actions in Justice Court without the assistance of an attorney. It is fair to assume that in the majority of cases, a landlord who files a forcible detainer action will be represented by an attorney. I would guess that a number of tenants who defend such actions do so pro se. Rule 753 poses a very real threat to a tenant who has successfully defended a forcible detainer action without an attorney. It is unfair, and I believe unconstitutional, to permit a default judgment to be taken on appeal in County Court without the requirement of notice to the opposing party.

I strongly suggest that another rule be added or that one of the existing rules be amended to require formal notice to the opposing party that an appeal from the Justice Court in a forcible detainer action has been perfected upon the filing of the transcript in County Court. The rule should expressly provide that notice be given once the case has been docketed in County Court, so that the appellee can be notified not only of the appeal, but also of the cause number of the case in County Court. In my own case, we would have been required to monitor the docketing of new causes in the County Clerk's office every day until the time for perfecting an appeal had expired. That certainly is unfair and should not be the law. The appellant should bear the burden of notifying the appellee of an appeal. Accordingly, I will very much appreciate it if serious consideration is given to the request that I make in this letter.

Mr. Soules, I will be more than happy to discuss this with you further either by telephone or in correspondence. Thank you very much for your consideration.

Yours truly,

Ken Coffman

KC/ysp

LAW OFFICES
BEARD & KULTGEN
1229 NORTH VALLEY MILLS DRIVE
WACO, TEXAS
76702

PAT BEARD

P. O. BOX 21117
PHONE 776-5500
CABLE BEKUWA
TELECOPIER 776-3591

February 7, 1986

Mr. Luther H. Soules III, Chariman
SOULES, CLIFFE & REED
800 Milam Building
San Antonio, Texas 78205

Re: Proposed Changes in Ancillary Proceedings
Rules 621a., 657 and 696

Dear Luther:

Enclosed herewith are the proposed changes in the referenced rules for submission to the Texas Supreme Court Advisory Committee. There has been no objection from any member of this committee regarding the proposed changes. Also enclosed is a xeroxed copy of my letter to all members of this committee dated January 24, 1986.

Very truly yours,

Pat Beard,
Chairman

PB:gaj

All Members of the Subcommittee
on Ancillary Proceedings

LAW OFFICES
BEARD & KULTGEN
1229 NORTH VALLEY MILLS DRIVE
WACO, TEXAS
76702

PAT BEARD

P. O. BOX 21117
PHONE 776-5500
CABLE: BEKUWA
TELECOPIER: 776-3591

January 24, 1986

TO: ALL MEMBERS OF THE STANDING SUBCOMMITTEE ON ANCILLARY PROCEEDINGS RULES 592-734.

Gentlemen:

Enclosed herewith are the proposed amended Rules 621a., 657, and 696 for your comment. In the absent of objection by any of you prior to February 5, 1986 these proposed changes will be forwarded to Luther H. Soules, III for submission.

Very truly yours,

Pat Beard,
Chairman

PB:gaj

Enclosure

RULE 657. JUDGMENT FINAL FOR GARNISHMENT

In the case mentioned in [~~subdivision 3 of Article 4076 of the Revised Civil Statutes of Texas, 1925~~] subsection 3, section 63.001, Texas Civil Practice and Remedies Code, the judgment whether based upon a liquidated demand or an unliquidated demand, shall be deemed final and subsisting for the purpose of garnishment from and after the date it is signed, unless a supersedeas bond shall have been approved and filed in accordance with Rule 364.

COMMENT: Amends rule to reflect statutory amendments.
Proposed by Jeremy C. Wicker

Approved _____ Approved with modifications _____

Disapproved _____ Deferred _____

657

RULE 621a. DISCOVERY IN AID OF INFORCEMENT OF JUDGMENT

At any time after rendition of judgment, and so long as said judgment has not been suspended by a supersedeas bond or by order of a proper court and has not become dormant as provided by [~~Article 3773, V.A.T.S.~~], Section 34.001, Texas Civil Practice and Remedies Code, the successful party may, for the purpose of obtaining information to aid in the enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pretrial matters, and rules governing and related to such pretrial discovery proceedings shall apply in like manner to discovery proceedings after judgment. The rights herein granted to the successful party shall inure to a successor or assignee, in whole or in part, of the successful party. Judicial supervision of such discovery proceedings after judgment shall be the same as that provided by law or these rules for pretrial discovery proceedings insofar as applicable.

621a

COMMENT: Amends r ments.

Proposed

Approved _____ is _____

Disapproved _____

00000504

RULE 696. APPLICATION FOR WRIT OF SEQUESTRATION AND ORDER

Either at the commencement of a suit or at any time during its progress the Plaintiff may file an application for writ of sequestration. The application shall be supported by affidavits of the plaintiff, his agent, his attorney, or other persons having knowledge of relevant facts. The application shall comply with all statutory requirements and shall state the grounds for issuing the writ, including the description of the property to be sequestered with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located, and the specific facts relied upon by the plaintiff to warrant the required findings by the court. The writ shall not be quashed because two or more grounds are stated conjunctively or disconjunctively. The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

No writ shall issue except upon written order of the court after a hearing, which may be ex parte. The court, in its order granting the application, shall make specific findings of facts to support the statutory grounds found to

exist, and shall describe the property to be sequestered with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which it is located. Such order shall further specify the amount of bond required of plaintiff which shall be in an amount which, in the opinion of the court, shall adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect and pay all damages and costs as shall be adjudged against him for wrongfully suing out the writ of sequestration including the elements of damages stated in [~~Article 6840, Revised Civil Statutes~~] sections 62.044 and 62.045, Texas Civil Practice and Remedies Code. The Court shall further find in its order the amount of bond required of defendant to replevy, which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff's claim and one year's accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the estimated costs of court. The order may direct the issuance of several writs at the time, or in succession, to be sent to different counties.

COMMENT: Amends rule to reflect statutory amendments.

Proposed by Jeremy C. Wicker.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

LAW OFFICES
BEARD & KULTGEN
1229 NORTH VALLEY MILLS DRIVE
WACO, TEXAS
76702

PAT BEARD

P O BOX 21117
PHONE 776-5500
CABLE: BEKUWA
TELECOPIER 776-3591

February 13, 1986

Mr. Luther H. Soules III, Chairman
SOULES, CLIFFE & REED
800 Milam Building
San Antonio, Texas 78205

Re: Proposed Change in New Rule 737

Dear Luther:

Enclosed herewith is the proposed New Rule 737 for submission to the Texas Supreme Court Advisory Committee. The only objection came from John O'Quinn and a copy of his telephone message is enclosed.

Very truly yours,

Pat Beard

PB:gaj

Enclosures

cc: All Members of the Standing Subcommittee on Ancillary Proceedings

SECTION 10 INTERLOCUTORY APPEAL

Rule 737 Interlocutory Orders Not Otherwise Appealable

When a district judge, in making in a civil action an order not otherwise appealable until after final judgment, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of an order: Provided, however, That the provisions of Rule 385(b) notwithstanding, application for an appeal hereunder shall stay proceedings in the district court if the district judge or the Court of Appeals shall so order.

. . .

Source: 28 U.S.C. 1292(b)

Suggested by: Jay M. Vogelson, Dallas

Una
Rej
R737

Approved _____ Approved with modi

Disapproved _____ Deferred _____

DICTAPHON MESSAGE

Mr. O'Quinn

February 12, 1986

Dear Pat:

I am adamantly opposed to proposed Rule 737.

For years we have followed rule that there can be no appeal after a final judgment. This system has, on balance, worked well. I realize that there are certain extraordinary situations in which someone could argue that there ought to be the right to interloctory appeal, but on the other hand the federal practice just encourages and causes inordinate delays as lawyers wrangle over trying to appeal all the preliminary rulings. Any benefit out of the interlocutory appeal practice in Federal Court is, in my judgment, far outweighed by the delay that it genders.

Chief Justice John Hill and other members of the court have advised that they were going to get rid of delay in civil cases and set up procedures that encourages the prompt trial of cases. This proposed Rule 737 is a retreat from that goal.

Verbatim from Regina whose is Mr. O'Quinn's secretary of his letter to you that mailed today.

LAW OFFICES
BEARD & KULTGEN
1229 NORTH VALLEY MILLS DRIVE
WACO, TEXAS
76702

PAT BEARD

P. O. BOX 21117
PHONE 776-5500
CABLE BEKUWA
TELECOPIER 776-3591

February 7, 1986

TO: ALL MEMBERS OF THE STANDING SUBCOMMITTEE ON ANCILLARY PROCEEDINGS - Rule 737

Gentlemen:

Enclosed herewith is the proposed new Rule 737 for your comment. In the absent of objection by any of you prior to February 12, 1986, this proposed change will be forwarded to Luther H. Soules III for submission.

Very truly yours,

Pat Beard

PB:gaj

Enclosure

621a

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
PETER F. GAZDA
ROBERT D. REED
SUSAN D. REED
RAND J. RIKLIN
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

April 14,1986

Mr. Pat Beard
Beard & Kultgen
P.O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed are proposed changes to Rules 621a and 627 submitted by John Pace. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

✓ bcc: Ewing

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 10, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 621a and Rule 627

Dear Luke and Mike:

I am enclosing a letter from Mr. John A. Pace of Dallas, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. John A. Pace
Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

621a & 627 Rejected Urban

Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

JOHN A. PACE
LEWIS CHANDLER
GERARD B. RICKEY
JONATHAN A. PACE

March 6, 1986

The Honorable James P. Wallace
Justice of the Supreme Court of Texas
Supreme Court Building
Austin, Texas

RE: T.R.C.P. Rules 621a and 627

Dear Justice Wallace:

In 1984 our firm was retained in connection with prosecuting an appeal from a judgment entered by one of the Dallas District Courts.

Immediately after the judgment, notice to take deposition was issued by Plaintiff to Defendant under Rule 621a. Conferences were held concerning the furnishing of an indemnity bond or escrow agreement pending prosecution of the appeal. Finally, our firm agreed to produce the Defendant for deposition. He was not in Texas at the time and did not appear.

Execution was issued which was superseded under Rules 364-368, T.R.C.P. Shortly thereafter Plaintiff filed a Motion for Contempt and Application for Turn Over Relief. Defendant replied stating that the execution had been superseded.

At the hearing the Trial Judge held the Defendant in contempt, ordered payment of a fine of $500.00 and sentenced him to 24 hours in the Dallas County Jail. At the jail this Defendant was subjected to customary treatment including a strip search.

I believe such treatment inexcusable.

At the meeting of the Texas Bar Association in San Antonio in July 1984 Justice Calvert spoke to the Bar in connection with the issuance and amendment of the Texas Rules of Civil Procedure. I wrote Justice Calvert and requested a conference. He replied stating that the matter should be submitted to the Supreme Court of Texas. Because of illness in my family and personal problems, this has been delayed.

I now request the Court to examine the provisions of these rules and my suggestion that Rule 621a be amended requiring the issuance of execution prior to proceedings under Rule 621a. This amendment would give the judgment Defendant the right to supersede.

I have the complete record in the suit referred to and will come to Austin at any time if my presence is requested.

Yours very truly,

John A. Pace

JAP/dvb

Enclosure

Rule 621a. Discovery in Aid of Enforcement of Judgment

At any time after rendition of judgment, and so long as said judgment has not been suspended by a supersedeas bond or by order of a proper court and has not become dormant as provided by Article 3773, V.A.T.S., the successful party may, for the purpose of obtaining information to aid in the enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pretrial matters, and the rules governing and related to such pretrial discovery proceedings shall apply in like manner to discovery proceedings after judgment. The rights herein granted to the successful party shall inure to a successor or assignee, in whole or in part, of the successful party. Judicial supervision of such discovery proceedings after judgment shall be the same as that provided by law or these rules for pretrial discovery proceedings insofar as applicable.

(Added by order of July 21, 1970, eff. Jan. 1, 1971.)

Note: This is a new rule effective January 1, 1971.

Rule 627. Time for Issuance

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

(Amended by orders of July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984.)

Source: Arts. 2148 and 3771.

Change by amendment effective January 1, 1976: The word "twenty" is changed to "thirty."

Change by amendment effective January 1, 1981: The rule is textually revised. It is changed so time will run from the time the judgment or order is signed or overruled by operation of law.

Change by amendment effective April 1, 1984: The words, "from the time the motion," are inserted after the word "or" in the second sentence.

PROPOSED AMENDMENT

It is submitted that the provisions of Rule 621a, Discovery in Aid of Enforcement of Judgment, T.R.C.P., do not protect the judgment debtor's rights to privacy but instead make him and the assets of his business fair game to an unscrupulous judgment creditor who has obtained a judgment.

The provisions of Rule 621a authorize the judgment plaintiff to give notice for depositions to enforce the judgment immediately after entry of the judgment. Such a course of discovery can be followed regardless of the finality of the judgment or the rights of the judgment debtor to supersede the judgment under the provisions of Rules 364-368, T.R.C.P.

Art. 627, Time for Issuance, provides "If no supersedeas bond . . . has been filed . . . the clerk of the Court shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed" or motion for new trial overruled.

These rules do NOT require the judgment to be final nor do they require that an execution be issued so the judgment debtor can supersede the judgment. The rules make available to the judgment creditor all of the information which could be secured by deposition prying into his personal and business financial affairs in a manner so thorough and detailed as to lay bare to the judgment creditor all of the business facts and assets of the judgment debtor. An example of the detail of inquiry for a subpoena duces tecum is attached as an exhibit.

This certainly was not the intent upon the issuance of Rule 621a.

It is proposed that discovery proceedings in aid of a judgment should not be authorized until AFTER the issuance of an execution so the judgment debtor can have the right to protect from the prying eyes and ears of creditors and adversaries the innermost facts of his business. The rule should be amended to require that execution be issued BEFORE the discovery proceedings. This gives the judgment debtor the right to keep private his personal and business affairs.

EXHIBIT "A"

"You" and its derivatives refers to Deponent.

Each and every document showing every property or asset in which you have any direct or indirect financial interest, including but not limited to the following: savings accounts, certificates of deposit, money market certificates, checking accounts and/or any other sum of money on deposit in, or owed to you by, any financial institution; stock certificates, bonds debententures, partnership and/or joint venture agreements, and each and every other document that relates to any ownership interest in, or debt owed to you by, any business or commercial organization; real property interests owned by you, including any lease, or any mineral interests or oil and gas royalties, working interests, etc.; retirement pension, or payroll savings plan or any similar assets; policies of insurance which you own; titles to each and every automobile you own, including station wagons, trucks, etc; right of access to a safe deposit box or storage vault; money or any other property held in trust either vested or contingent; judgments, promissory notes, debentures, or other documents evidencing a debt owed to you and conditional sales contracts, security agreements, deeds of trust, mortgages or other documents relating to security for a debt that is owed to you, documents relating to copyrights or patents which you hold; licenses or franchises under which you hold rights as a license or franchishee; contracts or agreement under which you have rights, including any accounts payable owed to you; any other asset or property owned by you that is not mentioned in the preceding list.

A copy or original of each and every financial statement or other document submitted or prepared by you on or after January 1, 1980 in connection with, or related to, activities involving any financial institution, including but not limited to documents prepared in connection with an application for a loan from any financial institution.

A copy of original of each and every insurance policy or other document relating or pertaining to personal property on which you now have, or at any time after January 1, 1980 have had, insurance coverage, including but not limited to, documents relating or pertaining to insurance coverage on automobiles in which you own an interest or which are in your possession or are subject to your control. The foregoing also includes but is not limited to documents relating to insurance coverage on jewelry in which you own an interest or which is subject to your control or in your possession, such as lists of items of jewelry which are to be covered by such policies, or for which coverage is requested.

Your income tax returns for the years 1979, 1980, and 1981, including all schedules, attachments, W-2 forms, and other documents pertaining or relating to the preparation of those returns.

Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

JOHN A. PACE
LEWIS CHANDLER
GERARD B. RICKEY
JONATHAN A. PACE

TELEPHONE
AREA CODE 214
871-7577

March 12, 1986

The Honorable James P. Wallace
Justice, The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Rule 621a and Rule 627

Dear Justice Wallace:

I am in receipt of a copy of your letter to Mr. Soules and to Mr. Gallagher referring to my requested Amendment of Rules 621a and 627 of T.R.C.P.

I think additional information might be helpful:

1. Execution issued February 6, 1984 (copy)

2. Supersedeas Bond furnished and approved February 17, 1984 (copy)

3. Writ of Supersedeas February 20, 1984 (copy)

4. Motion by Plaintiff for Contempt filed March 15, 1984

5. Court sets hearing April 20, 1984

6. Order holding Defendant in contempt (copy)

7. Petition for Writ of Habeas Corpus (overruled) (copy)

I believe the rules should be amended to provide that execution MUST be issued BEFORE discovery may be commenced under Rule 621a. This amendment will give to the Defendant the right to supersede the judgment and thus prevent the harrassment of discovery, a possible fine and jail sentence involving a strip search.

I enclose a copy of a column in the Dallas Morning News of March 11, 1986 which might be of interest.

Yours very truly,

John A. Pace

JAP/dvb
Enclosure

00000518

cc: Mr. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

cc: Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, Texas 77010

Court backs strip search restriction

By William J. Choyke
Washington Bureau of The News

WASHINGTON — The U.S. Supreme Court refused Monday to consider a challenge to court-ordered restrictions on strip searches by Texas police and jail officials.

Without comment, the court let stand rulings by a federal district judge and the U.S. Court of Appeals for the 5th Circuit that the strip-search policy of the Lubbock County sheriff's office was unconstitutional.

The county's practice was to conduct strip searches of all detainees before they were booked, regardless of the severity of the crime for which they were held. The case stemmed from a complaint brought by two women, one who had been arrested for public intoxication and the other jailed after a routine traffic stop uncovered an outstanding warrant for issuing a bad check.

The 5th Circuit Court, upholding the ruling by U.S. District Court Judge Halbert O. Woodward, said last summer that the county's policy of "permitting a strip search of any arrestee, including minor offenders awaiting bond . . . was an unconstitutional violation of the Fourth Amendment guarantees against unreasonable searches and seizures."

A number of jurisdictions across Texas have similar policies, although many have limited their use of strip searches of detainees in the aftermath of other court decisions.

The policy of the Dallas County sheriff's office, which is responsible for all prisoners booked in the four county jails, already meets constitutional guidelines. Spokesman Jim Ewell said that no one is stripped searched until he or she is assigned housing and then only when given jail garb.

Woodward's guidelines prohibit the county from strip searching any detainees without probable cause before placing them in the general jail population, which occurs after bond has been set and the arrestee has had the opportunity to post it. They allow the sheriff to conduct pat-down searches for weapons and contraband and to conduct strip searches "if . . . there is reason to believe that an individual detainee is concealing a weapon or contraband."

In another matter, the court rejected the appeal by Humble Exploration Co. and its owner, Pat Holloway, that they must pay $82 milion in a suit charging them with fraud. The suit was filed by Jane H. Browning, her family and others in 1979 and charged that Holloway illegally acquired shares of Humble stock and defrauded them out of their rightful shares in the company. A jury ruled in the Brownings' favor, but the case has been mired in the courts for years.

Staff writer Eliot Kleinberg in Dallas contributed to this report.

EXECUTION Form No. 362 THE STATE OF TEXAS

TO ANY SHERIFF OR ANY CONSTABLE OF THE STATE OF TEXAS.....

GREETINGS:

WHEREAS, ON THE .....7th.....Day of.....Jly.....A.D. 19.....83.....

IN THAT CERTAIN CAUSE NO. 79-4260-D styled CSI ELECTRONICS, INC. as Plaintiff and DICK WITKOVSKI Dba BESCO INTERNATIONAL as Defendant and WHEREIN said Plaitiff

recovered a Judgment in the District Court of Dallas County, Texas,
..95th.....Judicial District, State of Texas, against the said Defendant

DICK WITKOVSKI Dba BESCO INTERNATIONAL

for the sum of 17,000.00 plus atty. fees of $3,500.00 (total $20,500.00) DOLLARS besides the costs in that behalf expended, as of record is manifest in Book D84 .....at page ..427....of the records of said Court.

THEREFORE YOU ARE HEREBY COMMANDED that of the goods and chattels, lands and tenements of the said Defendant

DICK WITKOVSKI Dba BESCO INTERNATIONAL

you cause to be made the sum of .$20,500.00..... DOLLARS with interest thereon at the rate of....9%.....per cent, per annum from July 7, 1983

(costs through Judgment)

together with the sum of $193.32 .....costs of said suit, and the further costs of executing this writ.

HEREIN FAIL NOT, and have you the said moneys, together with this Writ, before said Court, at the Courthouse in the City of Dallas, within ninety days from the date of this writ.

WITNESS: BILL LONG, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and seal of said Court at office in the City of Dallas, Texas, this the ..6th.....day of....February.....A.D. 1984.....

ATTEST: BILL LONG DISTRICT CLERK

By.....Deputy

160/388 SHFF (Demand paper as per a

No. 79-4260-D.....

90 days

DISTRICT COURTS

DALLAS COUNTY

VERIFIED

.CSI ELECTRONICS, INC.....

.....

vs.

DICK WITKOVSKI Dba BESCO INTERNATIONA

5946 CLUB OAKS DR. 4R

DALLAS, TX

H/M 931-6020 Wk. 630-360

EXECUTION

Atty: Page Pr. 74-3933

Judgement	$17,000.00
Aty. Fees	3,500.00
Costs	$ 193.32
	costs through Jud
Total	$

ISSUED

This .6th....day of...February D. 19 ..84

BILL LONG

Clerk, District Court.

By .. Donna Lah .....Deputy

MORRIS C. GORE, ATTORNEYAT LAW
LBJ Frwy at Forest Lane
9500 Forest Lane Suite 435
Dallas, Texas 75243
214-345-8752

Came to hand on the 8 day of Feb 1984 at 11:20 O'clock A M.
And executed on the 21 day of Feb A.D. 1984 by Returned to
Court per Writ of Supersedeas

Fee: 40.00

Constable Pr. 2
Dallas County, Texas
By [signature] Deputy

FILED
IN SUPREME COURT
OF TEXAS
APR 20 1984
GARSON R. JACKSON, Clerk
By _____ Deputy

DEFENDANT'S EXHIBIT
5-11-84

84-4260-D

CAUSE NO. ~~05-83-01288-CV~~

Dick Witkovski d/b/a Besco International Appellant	I	IN THE 95th JUDICIAL DISTRICT
vs.	I	COURT OF DALLAS COUNTY, TEXAS
CSI Electronics, Inc. Appellee	I	SUPERSEDEAS BOND

WHEREAS, in the above entitled and numbered cause pending in the 95th Judicial District Court of Dallas County, Texas, judgment was signed on the 29th day of July, 1983, in favor of CSI Electronics, Inc., Appellee, in the sum of Seventeen Thousand and no/100 ($17,000.00) Dollars, plus cost of attorney, in the amount of Three Thousand Five Hundred and no/100 ($3,500.00) Dollars, plus interest thereon at nine percent (9%) per annum until paid, from which judgment Dick Witkovski d/b/a Besco International, Appellant, desires to appeal to the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, sitting in Dallas County, Texas; and

WHEREAS, Appellant desires to suspend execution of said judgment pending the termination of such appeal:

NOW, THEREFORE, we, Dick Witkovski d/b/a Besco International and Gramercy Insurance Company as Surety, acknowledge ourselves bound to CSI Electronics, Inc., Appellee, the sum of Twenty Six Thousand Three Hundred Forty Five and 52/100 ($26,345.52) Dollars, said sum being at least the amount of the judgment, and costs, plus interest at the rate of nine percent per annum on the sum of Twenty Six Thousand Three Hundred Forty Five and 52/100 Dollars, from the date of the judgment until final disposition of the appeal, conditioned that Appellant shall prosecute the appeal with effect; and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as the Court may award against him.

Witnessed our hands this 17th day of February, 1984.

APPROVED THIS 17th DAY OF February 1984
BILL LONG
Clerk of the District Courts
Dallas County, Texas
By Margie Dayton Deputy

Besco International
By: Dick Witkovski President
Dick Witkovski/President

Gramercy Insurance Company
By:
Attorney-in-fact

00000523

GRAMERCY INSURANCE COMPANY
Houston, Texas

GI-00070V

POWER OF ATTORNEY AND CERTIFICATE OF AUTHORITY OF ATTORNEY(s)-IN-FACT

KNOW ALL MEN BY THESE PRESENTS THAT GRAMERCY INSURANCE COMPANY, a corporation duly organized under the laws of the State of Texas, and having its principal office in the City of Houston, County of Harris, State of Texas, hath made, constituted and appointed, and does by those presents make, constitute and appoint

William V. Vansyckle

of Dallas, Texas , its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or if the following line be filled in, within the area there designated Texas ,the following instrument(s): bonds, except bail bonds

by his/her sole signature and act, any and all bonds, and other writings obligatory in the nature of the bond, and any and all consents incidents thereto not exceeding one-hundred thousand dollars ($100,000)

and to bind GRAMERCY INSURANCE COMPANY, thereby as fully and to the same extent as if the same were signed by the fully authorized officers of GRAMERCY INSURANCE COMPANY, and and all the acts of said Attorney(s)-in-Fact, pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following Standing Resolutions of said Company which Resolutions are now in full force and effect:

VOTED: That each of the following officers: Chairman, President, Executive Vice President, Any Vice President, Secretary, Any Assistant Secretary, may from time to time appoint Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority and other writings obligatory in the nature of a bond, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

VOTED: That any bond, or writing obligatory in the nature of a bond, shall be valid and binding upon the Company when (a)signed by the Chairman, the President, Executive Vice President, or a Vice President, or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power described in his or their certificate or certificates of authority.

This Power of Attorney and Certificate of Author is signed and sealed by facsimile under and by authority of the following Standing Resolution of GRAMERCY INSURANCE COMPANY which Resolution is now IN full force and effect:

VOTED: That the signature of each of the following officers: Chairman, President, Executive Vice President, Any Vice President, Secretary, Any Assistant Secretary, and the seal of the Company may be affixed by Attorneys-in-Fact for purposes only of executing bonds and other writings obligatory in the nature thereof, and any shall be valid and binding upon the Company in the future with respect to any bond to which it is attached.

IN WITNESS WHEREIF, GRAMERCY INSURANCE COMPANY has caused this instrument to be signed by its President, and its corporate seal to be hereto affixed this 13th day of Sept. ,1983.

GRAMERCY INSURANCE COMPANY

BY _____
President

SEAL
HOUSTON, TEXAS

State of New York
County of New York

On this 13th day of Sept. , 1983, before me personally came Brian A. Lewis, to me known, who being by me duly sworn, did depose and say: that he is President of GRAMERCY INSURANCE COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he executed the said instrument on behalf of the corporation by authority of his office under the Standing Resolutions thereof.

_____
Notary Public

MYRA MAC FARLANE
Notary Public, State of New York
No. 31-4710209
Qualified in New York County
Commission Expires March 30, 19 84

CERTIFICATE:

I, the undersigned Secretary of GRAMERCY INSURANCE COMPANY, a stock corporation of the State of Texas, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney and Certificate of Authority remains in full force and has not been revoked; and furthermore, that the Standing Resolutions, as set forth in the Certificate of Authority are now in force.

Signed and Sealed in the City of Houston, State of Texas. Dated this 7th day of Oct. , 1983.

00000524

By _____
Secretary

SHERIFF'S RETURN

CAME TO HAND this 21 day of Feb A. D. 19 84
at 10:15 o'clock P M., and executed this 21 day of Feb A. D. 19 84
at 12:26 o'clock P M., by delivering to Jack Richardson Constable

C 2964

THIS IS TO CERTIFY THAT I HAVE THIS DAY COPIED AND COMPARED THE OFFICER'S RETURN
BILL LONG, DISTRICT CLERK
BY _____ DEPUTY

the within named defendant..... in person, a true copy of this writ.

Original Petition.

FEES:
Serving ..... Cop ..... - - $.....
Mileage ..... Miles - - $.....
Total - - - - $.....

VERIFIED

JACK RICHARDSON
CONSTABLE PRECINCT TWO
1411 W. BELT LINE ROAD
RICHARDSON, Texas.

Sheriff, Dallas County, Texas.
By _____ Deputy.

FILED
MAR 8 1984
BILL LONG
DIST. CLERK, DALLAS CO., TEXAS
_____ DEPUTY

CONSTABLE
PRECINCT NO. 2
84 FEB 21 P12:15

FILED
IN SUPREME COURT
OF TEXAS
APR 20 1984
GARSON R. JACKSON, Clerk
By _____ Deputy

DEFENDANT'S EXHIBIT
5-11-84

13 84C0251R1
RICHARDSON

No. 79-4260-D

95th DISTRICT COURT

DALLAS COUNTY

CSI ELECTRONICS, INC.

vs.

Writ of Supersedeas

DICK WITKOVSKI DBA

ISSUED

This 20th day of FEBRUARY A. D. 19 84

BILL LONG District Clerk.

By GIALYN SHEPARD Deputy

Attorney for DEFENDANT

MR. JOHN A. PACE, ATTAORNEY
2720 FAIRMOUNT STREET
DALLAS, TEXAS 75201

00000525

WRIT OF SUPERSEDEAS.

THE STATE OF TEXAS

To the Sheriff or any Constable of Dallas County—GREETING:

Whereas, on the 29th day of JULY A. D. 19 83, in cause No. 79-4260-D entitled XBXBKXMXXXBXBKXXBXBXXBBXBBXXMXBRMXXXBMXK

CSI ELECTRONICS, as Plaintiff,

versus

DICK WITKOVSKI d/b/a BESCO INTERNATIONAL, as Defendant,

in the 95th Judicial District Court of Dallas County, Texas, judgment was rendered in said court in favor of said plaintiff and against said defendant for the sum of $26,345.52 Dollars, and all costs in that behalf expended, and to enforce the collection of which judgment the clerk of said court did, on the 6th day of February A. D. 19 84, at the request of the plaintiff, issue an execution against the property of the said defendant, which execution is now in the hands of JACK RICHARDSON, CONSTABLE XXXX of Dallas County.

And, whereas, since the issuance of said execution on, to-wit: the 6th day of FEBRUARY A. D. 19 84, the defendant in said judgment filed in this court a supersedeas bond in said cause;

Therefore you are hereby commanded that you require the said JACK RICHARDSON, CONSTABLE Sheriff of said County aforesaid, to suspend all further proceedings under the aforesaid execution, until said cause is finally determined by the Court of Civil Appeals, in and for the Fifth Judicial District of Texas, at Dallas, Texas, to which the same has been appealed.

Herein Fail Not, but of this writ make due return showing how you have executed the same.

Witness: BILL LONG, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and seal of said Court, at office in Dallas, on this the 20th day of FEBRUARY A. D. 19 84.

BILL LONG
Clerk of the District Courts, Dallas County, Texas.

By [signature] Deputy.
GAILYN SHEPPARD

00000526

NO. 79-4260-D

CSI ELECTRONICS, INC.	)	IN THE DISTRICT COURT OF
v.	)	DALLAS COUNTY, TEXAS
DICK WITKOVSKI d/b/a Besco International	)	95TH JUDICIAL DISTRICT

ORDER

On April 20, 1984, the Court heard plaintiff's motion for contempt. Plaintiff appeared by counsel, and defendant appeared in person and by counsel.

The Court finds and concludes that defendant Dick Witkovski has willfully violated this Court's Order signed October 15, 1983, by failing and refusing to appear for his deposition as therein ordered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Dick Witkovski is in contempt of this Court by his willful violation of this Court's Order signed October 15, 1983;

2. Dick Witkovski is sentenced to pay a fine of $500.00 by April 30, 1984, payable to the State of Texas and delivered to the District Clerk of Dallas County; and

3. Dick Witkovski is sentenced to 24 hours in the Dallas County jail, and he shall immediately be taken into the custody of the Dallas County Sheriff and held and detained in the Dallas County jail until 9:00 a.m., April 21, 1984.

Defendant excepts to this Order.

Signed: April 20, 1984, at 9:10 a.m.

DISTRICT JUDGE

DEFENDANT'S EXHIBIT 3 5-11-84

00000527

COURT OF APPEALS
FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS, TEXAS

EX PARTE:

DICK WITKOVSKI, Relator

PETITION FOR WRIT OF HABEAS CORPUS

TO THE SAID HONORABLE COURT:

DICK WITKOVSKI, relator, petitions for a Writ of Habeas Corpus, and as grounds therefor shows:

I.

Relator is within the jurisdiction of this Court, and this Court has jurisdiction over this matter pursuant to Article 1824a, Revised Civil Statutes of Texas. The following person would be directly affected by this proceeding: CSI Electronics, Inc., Plaintiff in Cause No. 79-4260-D.

II.

Relator is illegally confined and restrained of his liberty in Dallas County, Texas by Don Byrd, Sheriff of said County. Included in the transcript filed herewith is a certificate from the Sheriff indicating the fact that relator is in his

custody.

III.

Relator's confinement and restraint is by virtue of a commitment and capias pro fine issued by order of the 95th District Court of Dallas County, Texas, rendered the 20th day of April, 1984, whereby relator was adjudged and held as for contempt of such Court in a cause numbered 79-4260-D and styled CSI Electronics, Inc. vs. Dick Witkovski d/b/a Besco International. The contempt arose out of the relator's alleged violation of an order of the court rendered on or about October 15, 1983, ordering relator to:

> "ORDERED THAT Defendant DICK WITKOVSKI appear for deposition at the office of Plaintiff's counsel, Morris C. Gore, 9500 Forest Lane, Suite 435, Dallas, Texas 75243, at 2:00 P.M. on November 11, 1983, and then and there produce the documents requested by Plaintiff in its Notices of Deposition."

Certified copies of the order dated October 15, 1983, the order dated April 20, 1984, and the commitment and capias pro fine are included in the transcript of papers filed herewith, to which reference is made for all purposes.

IV.

Relator would further show that his confinement and restraint is illegal for the following reasons:

1. The order of the Court dated April 20, 1984, is void for the reason that:

(a) Counsel for both partis to this suit agreed that the appearance of relator on November 15, 1983 could be changed because negotiations were in progress for furnishing CSI security for the payment of the judgment rendered in this cause. Therefore, there is no order of the 95th District Court for the relator to appear on January 26, 1984.

(b) That relator on his return to Dallas, Texas did obtain a Supersedeas Bond and deliver it to the District Clerk of Dallas County and the District Clerk did issue his Writ of Supersedeas to the Constable of Princinct No. 2 that the execution in this cause had been superseded.

(c) That 27 days after this action CSI filed this Motion for Contempt which relator believes is harassment and intended to threaten him in connection with the judgment since he had previously furnished a supersedeas bond in this cause.

2. Relator's confinement denies him due process of law for the following reasons:

(a) CSI has issued Notices to take the deposition before the judgment in this cause was final, and again after the Motion for Rehearing was overruled and many months before an execution was issued. That when execution was issued, the relator did obtain and furnish a Supersedeas Bond in this cause and this Motion for Contempt was filed 27 days AFTER the judgment had been superseded.

(b) That this commitment in contempt for failure to appear at the taking of a deposition is imprisonment for debt and

there has been no showing of representations made to the court that CSI should have early issuance of execution, and such action denies this relator the equal protection of the law.

WHEREFORE, relator requests that this Honorable Court, or one of its Justices, upon examination of this application, admit relator to bail, issue a Writ of Habeas Corpus, and fix a time and place of appearance thereon, and order that Don Byrd, Sheriff of Dallas County, Texas, be notified to appear and show cause, if any he has, why he holds relator in restraint, and further order that the Sheriff be notified forthwith, by telephone or telegraph, to release relator pending further orders of this Court; and further, relator requests that he be brought without delay before this Court and that he may be discharged from such illegal confinement and restraint to the end that justice prevails.

Respectfully submitted,

John A. Pace #15394000

Kevin P. Jordan #11014900

2720 Fairmount Street
Dallas, Texas 75201
214/741-3933

Attorneys for Defendant

00000531

V E R I F I C A T I O N

STATE OF TEXAS X
X
COUNTY OF DALLAS X

BEFORE ME, the undersigned Notary Public, on this day personally appeared JOHN A. PACE, who being by me duly sworn on his oath deposed and said that he is the attorney for the relator in the above-entitled and numbered cause; that he has read the above and foregoing petition for Writ of Habeas Corpus; and that every statement contained therein is within his knowledge and true and correct.

JOHN A. PACE

SUBSCRIBED AND SWORN TO BEFORE ME on this the 20th day of April, 1984, to certify which witness my hand and official seal.

Notary Public, State of Texas

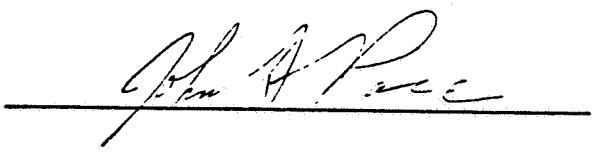
DIXIE BRANCH

My Commission Expires:
6-30-84

0C300532

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Writ of Habeas Corpus has been served on Morris Gore, attorney of record for CSI Electronics, Inc. by delivery of atrue copy to him by certified mail, by depositing same, postpaid in an official depository under the care and custody of the United States Postal Service on the 20th day of April, 1984, addressed as follows: Mr. Morris C. Gore, 9500 Forest Lane, Suite 435, Dallas, Texas 75243, Attorney for Plaintiff, on this 20th day of April, 1984.



00000533

A. 521

Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

JOHN A. PACE
LEWIS CHANDLER
GERARD B. RICKEY
JONATHAN A. PACE

TELEPHONE
AREA CODE 214
741-8988

June 29, 1984

AC recommends "no change" 9-14-85

TO: Committee of Administration of Justice
Committee of Consumer Law
Committee of Individual Rights & Responsibilities

RE: T.R.C.P. Rule 621a

Dear Committee Members:

I am sending to the members of the above committees copies of a proposed resolution in connection with Rule 621a T.R.C.P. which I believe should be approved.

If you believe this is a matter which might be under the jurisdiction of your committee, I would appreciate your considering it.

I hope to be in San Antonio for the meeting of the Texas Bar, but other problems may prevent my attendance.

Yours very truly,

John A. Pace

JAP/dvb

Enclosure

RESOLUTION

It is submitted that the provisions of Rule 621a, Discovery in Aid of Enforcement of Judgment, T.R.C.P., do not protect the judgment debtor's rights to privacy but instead make him and the assets of his business fair game to an unscrupulous judgment creditor who has obtained a judgment.

The provisions of Rule 621a authorize the judgment plaintiff to give notice for depositions to enforce the judgment immediately after entry of the judgment. Such a course of discovery can be followed regardless of the finality of the judgment or the rights of the judgment debtor to supersede the judgment under the provisions of Rules 364-368, T.R.C.P.

Art. 627, Time for Issuance, provides "If no supersedeas bond . . . has been filed . . . the clerk of the Court shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed" or motion for new trial overruled.

These rules do NOT require the judgment to be final nor do they require that an execution be issued so the judgment debtor can supersede the judgment. The rules make available to the judgment creditor all of the information which could be secured by deposition prying into his personal and business financial affairs in a manner so thorough and detailed as to lay bare to the judgment creditor all of the business facts and assets of the judgment debtor. An example of the detail of inquiry for a subpoena duces tecum is attached as an exhibit.

This certainly was not the intent upon the issuance of Rule 621a.

It is believed that discovery proceedings in aid of a judgment should not be authorized until AFTER the issuance of an execution so the judgment debtor can have the right to protect from the prying eyes and ears of creditors and adversaries the innermost facts of his business. The rule should be amended to require that execution be issued BEFORE the discovery proceedings. This gives the judgment debtor the right to keep private his personal and business affairs.

621a

LAW OFFICES

SOULES, CLIFFE & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

STEPHANIE A. BELBER
JAMES R. CLIFFE
ROBERT E. ETLINGER
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SUSAN D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
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LUTHER H. SOULES III

BINZ BUILDING, SIXTH FLOOR
1001 TEXAS AT MAIN
HOUSTON, TEXAS 77002
(713) 224-6122

1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

WILLIAM A. BRANT, P. C.
1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

January 9, 1986

Mr. Pat Beard
Beard & Kultgen
P. O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed are proposed changes to Rules 621a, 657, and 696 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ Ltr

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomolies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

0C000537

Rule 499a. Direct Appeals

In the first paragraph, delete "Article 1738a" and substitute:

section 22.001(c) of the Texas Government Code

Rule 621a. Discovery in Aid of Enforcement of Judgment

Delete "Article 3773, V.A.T.S." and substitute:

section 34.001 of the Texas Civil Practice and Remedies Code

Rule 657. Judgment Final for Garnishment

Delete "subdivision 3 of Article 4076 of the Revised Civil Statutes of Texas, 1925" and substitute:

subsection 3 of section 63.001 of the Texas Civil Practice and Remedies Code

00000538

627

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

STEPHANIE A. BELBER
ROBERT E. ETLINGER
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JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

April 14, 1986

Mr. Pat Beard
Beard & Kultgen
P.O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed are proposed changes to Rules 621a and 627 submitted by John Pace. Please draft, in proper form for Committee consideration, appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

✓ bcc: Tunnell

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

March 10, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 621a and Rule 627

Dear Luke and Mike:

I am enclosing a letter from Mr. John A. Pace of Dallas, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. John A. Pace
Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

00300540

Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

JOHN A. PACE
LEWIS CHANDLER
GERARD B. RICKEY
JONATHAN A. PACE

TELEPHONE
AREA CODE 214
871-7577

March 6, 1986

The Honorable James P. Wallace
Justice of the Supreme Court of Texas
Supreme Court Building
Austin, Texas

RE: T.R.C.P. Rules 621a and 627

Dear Justice Wallace:

In 1984 our firm was retained in connection with prosecuting an appeal from a judgment entered by one of the Dallas District Courts.

Immediately after the judgment, notice to take deposition was issued by Plaintiff to Defendant under Rule 621a. Conferences were held concerning the furnishing of an indemnity bond or escrow agreement pending prosecution of the appeal. Finally, our firm agreed to produce the Defendant for deposition. He was not in Texas at the time and did not appear.

Execution was issued which was superseded under Rules 364-368, T.R.C.P. Shortly thereafter Plaintiff filed a Motion for Contempt and Application for Turn Over Relief. Defendant replied stating that the execution had been superseded.

At the hearing the Trial Judge held the Defendant in contempt, ordered payment of a fine of $500.00 and sentenced him to 24 hours in the Dallas County Jail. At the jail this Defendant was subjected to customary treatment including a strip search.

I believe such treatment inexcusable.

At the meeting of the Texas Bar Association in San Antonio in July 1984 Justice Calvert spoke to the Bar in connection with the issuance and amendment of the Texas Rules of Civil Procedure. I wrote Justice Calvert and requested a conference. He replied stating that the matter should be submitted to the Supreme Court of Texas. Because of illness in my family and personal problems, this has been delayed.

I now request the Court to examine the provisions of these rules and my suggestion that Rule 621a be amended requiring the issuance of execution prior to proceedings under Rule 621a. This amendment would give the judgment Defendant the right to supersede.

I have the complete record in the suit referred to and will come to Austin at any time if my presence is requested.

Yours very truly,

John A. Pace

JAP/dvb

Enclosure

Rule 621a. Discovery in Aid of Enforcement of Judgment

At any time after rendition of judgment, and so long as said judgment has not been suspended by a supersedeas bond or by order of a proper court and has not become dormant as provided by Article 3773, V.A.T.S., the successful party may, for the purpose of obtaining information to aid in the enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pretrial matters, and the rules governing and related to such pretrial discovery proceedings shall apply in like manner to discovery proceedings after judgment. The rights herein granted to the successful party shall inure to a successor or assignee, in whole or in part, of the successful party. Judicial supervision of such discovery proceedings after judgment shall be the same as that provided by law or these rules for pretrial discovery proceedings insofar as applicable.

(Added by order of July 21, 1970, eff. Jan. 1, 1971.)

Note: This is a new rule effective January 1, 1971.

Rule 627. Time for Issuance

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

(Amended by orders of July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984.)

Source: Arts. 2448 and 3771.

Change by amendment effective January 1, 1976: The word "twenty" is changed to "thirty."

Change by amendment effective January 1, 1981: The rule is textually revised. It is changed so time will run from the time the judgment or order is signed or overruled by operation of law.

Change by amendment effective April 1, 1984: The words, "from the time the motion," are inserted after the word "or" in the second sentence.

PROPOSED AMENDMENT

It is submitted that the provisions of Rule 621a, Discovery in Aid of Enforcement of Judgment, T.R.C.P., do not protect the judgment debtor's rights to privacy but instead make him and the assets of his business fair game to an unscrupulous judgment creditor who has obtained a judgment.

The provisions of Rule 621a authorize the judgment plaintiff to give notice for depositions to enforce the judgment immediately after entry of the judgment. Such a course of discovery can be followed regardless of the finality of the judgment or the rights of the judgment debtor to supersede the judgment under the provisions of Rules 364-368, T.R.C.P.

Art. 627, Time for Issuance, provides "If no supersedeas bond . . . has been filed . . . the clerk of the Court shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed" or motion for new trial overruled.

These rules do NOT require the judgment to be final nor do they require that an execution be issued so the judgment debtor can supersede the judgment. The rules make available to the judgment creditor all of the information which could be secured by deposition prying into his personal and business financial affairs in a manner so thorough and detailed as to lay bare to the judgment creditor all of the business facts and assets of the judgment debtor. An example of the detail of inquiry for a subpoena duces tecum is attached as an exhibit.

This certainly was not the intent upon the issuance of Rule 621a.

It is proposed that discovery proceedings in aid of a judgment should not be authorized until AFTER the issuance of an execution so the judgment debtor can have the right to protect from the prying eyes and ears of creditors and adversaries the innermost facts of his business. The rule should be amended to require that execution be issued BEFORE the discovery proceedings. This gives the judgment debtor the right to keep private his personal and business affairs.

EXHIBIT "A"

"You" and its derivatives refers to Deponent.

Each and every document showing every property or asset in which you have any direct or indirect financial interest, including but not limited to the following: savings accounts, certificates of deposit, money market certificates, checking accounts and/or any other sum of money on deposit in, or owed to you by, any financial institution; stock certificates, bonds debententures, partnership and/or joint venture agreements, and each and every other document that relates to any ownership interest in, or debt owed to you by, any business or commercial organization; real property interests owned by you, including any lease, or any mineral interests or oil and gas royalties, working interests, etc.; retirement pension, or payroll savings plan or any similar assets; policies of insurance which you own; titles to each and every automobile you own, including station wagons, trucks, etc; right of access to a safe deposit box or storage vault; money or any other property held in trust either vested or contingent; judgments, promissory notes, debentures, or other documents evidencing a debt owed to you and conditional sales contracts, security agreements, deeds of trust, mortgages or other documents relating to security for a debt that is owed to you, documents relating to copyrights or patents which you hold; licenses or franchises under which you hold rights as a license or franchishee; contracts or agreement under which you have rights, including any accounts payable owed to you; any other asset or property owned by you that is not mentioned in the preceding list.

A copy or original of each and every financial statement or other document submitted or prepared by you on or after January 1, 1980 in connection with, or related to, activities involving any financial institution, including but not limited to documents prepared in connection with an application for a loan from any financial institution.

A copy of original of each and every insurance policy or other document relating or pertaining to personal property on which you now have, or at any time after January 1, 1980 have had, insurance coverage, including but not limited to, documents relating or pertaining to insurance coverage on automobiles in which you own an interest or which are in your possession or are subject to your control. The foregoing also includes but is not limited to documents relating to insurance coverage on jewelry in which you own an interest or which is subject to your control or in your possession, such as lists of items of jewelry which are to be covered by such policies, or for which coverage is requested.

Your income tax returns for the years 1979, 1980, and 1981, including all schedules, attachments, W-2 forms, and other documents pertaining or relating to the preparation of those returns.

Pace, Chandler & Rickey
Attorneys and Counselors
2720 Fairmount Street
Dallas, Texas 75201

JOHN A. PACE
LEWIS CHANDLER
GERARD B. RICKEY
JONATHAN A. PACE

TELEPHONE
AREA CODE 214
871-7577

March 12, 1986

The Honorable James P. Wallace
Justice, The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Rule 621a and Rule 627

Dear Justice Wallace:

I am in receipt of a copy of your letter to Mr. Soules and to Mr. Gallagher referring to my requested Amendment of Rules 621a and 627 of T.R.C.P.

I think additional information might be helpful:

1. Execution issued February 6, 1984 (copy)

2. Supersedeas Bond furnished and approved February 17, 1984 (copy)

3. Writ of Supersedeas February 20, 1984 (copy)

4. Motion by Plaintiff for Contempt filed March 15, 1984

5. Court sets hearing April 20, 1984

6. Order holding Defendant in contempt (copy)

7. Petition for Writ of Habeas Corpus (overruled) (copy)

I believe the rules should be amended to provide that execution MUST be issued BEFORE discovery may be commenced under Rule 621a. This amendment will give to the Defendant the right to supersede the judgment and thus prevent the harrassment of discovery, a possible fine and jail sentence involving a strip search.

I enclose a copy of a column in the Dallas Morning News of March 11, 1986 which might be of interest.

Yours very truly,

John A. Pace

JAP/dvb
Enclosure

00000546

cc: Mr. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

cc: Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, Texas 77010

Court backs strip search restriction

By William J. Choyke
Washington Bureau of The News

WASHINGTON — The U.S. Supreme Court refused Monday to consider a challenge to court-ordered restrictions on strip searches by Texas police and jail officials.

Without comment, the court let stand rulings by a federal district judge and the U.S. Court of Appeals for the 5th Circuit that the strip-search policy of the Lubbock County sheriff's office was unconstitutional.

The county's practice was to conduct strip searches of all detainees before they were booked, regardless of the severity of the crime for which they were held. The case stemmed from a complaint brought by two women, one who had been arrested for public intoxication and the other jailed after a routine traffic stop uncovered an outstanding warrant for issuing a bad check.

The 5th Circuit Court, upholding the ruling by U.S. District Court Judge Halbert O. Woodward, said last summer that the county's policy of "permitting a strip search of any arrestee, including minor offenders awaiting bond . . . was an unconstitutional violation of the Fourth Amendment guarantees against unreasonable searches and seizures."

A number of jurisdictions across Texas have similar policies, although many have limited their use of strip searches of detainees in the aftermath of other court decisions.

The policy of the Dallas County sheriff's office, which is responsible for all prisoners booked in the four county jails, already meets constitutional guidelines. Spokesman Jim Ewell said that no one is stripped searched until he or she is assigned housing and then only when given jail garb.

Woodward's guidelines prohibit the county from strip searching any detainees without probable cause before placing them in the general jail population, which occurs after bond has been set and the arrestee has had the opportunity to post it. They allow the sheriff to conduct pat-down searches for weapons and contraband and to conduct strip searches "if . . . there is reason to believe that an individual detainee is concealing a weapon or contraband."

In another matter, the court rejected the appeal by Humble Exploration Co. and its owner, Pat Holloway, that they must pay $82 milion in a suit charging them with fraud. The suit was filed by Jane H. Browning, her family and others in 1979 and charged that Holloway illegally acquired shares of Humble stock and defrauded them out of their rightful shares in the company. A jury ruled in the Brownings' favor, but the case has been mired in the courts for years.

Staff writer Eliot Kleinberg in Dallas contributed to this report.

EXECUTION Form No. 362 THE STATE OF TEXAS

160/388 SHFF (Demand paper as per a

TO ANY SHERIFF OR ANY CONSTABLE OF THE STATE OF TEXAS.....

GREETINGS:

WHEREAS, ON THE ....7th....Day of....Jly.....A.D. 19 83...

IN THAT CERTAIN CAUSE NO. 79-4260-D styled CSI ELECTRONICS, INC. as Plaintiff and DICK WITKOVSKI Dba BESCO INTERNATIONAL as Defendant and WHEREIN said Plaitiff

recovered a Judgment in the District Court of Dallas County, Texas,

...95th.....Judicial District, State of Texas, against the said Defendant

DICK WITKOVSKI Dba BESCO INTERNATIONAL

for the sum of $17,000.00 plus atty. fees of $3,500.00 (total $20,500.00) ..../..... DOLLARS besides the costs in that behalf expended, as of record is manifest in Book D84 .....at page ..427....of the records of said Court.

THEREFORE YOU ARE HEREBY COMMANDED that of the goods and chattels, lands and tenements of the said Defendant

DICK WITKOVSKI Dba BESCO INTERNATIONAL

you cause to be made the sum of .$20,500.00..... DOLLARS with interest thereon at the rate of....9%.....per cent, per annum from July 7, 1983

(costs through Judgment)

together with the sum of..$193.32/.....costs of said suit, and the further costs of executing this writ.

HEREIN FAIL NOT, and have you the said moneys, together with this Writ, before said Court, at the Courthouse in the City of Dallas, within ninety days from the date of this writ.

WITNESS: BILL LONG, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and seal of said Court at office in the City of Dallas, Texas, this the ..6th.....day of....February.....A.D. 1984.....

ATTEST: BILL LONG DISTRICT CLERK

By.....De

No. 79-4260-D.....

90 days

DISTRICT COURTS

DALLAS COUNTY

VERIFIED

.CSI ELECTRONICS, INC.....

.....

vs.

DICK WITKOVSKI Dba BESCO INTERNATIONA

5946 CLUB OAKS DR 4R

DALLAS, TX

931-6020 Wk. 630-360

EXECUTION

Atty: Pace 214-744-3933

Judgement ----------, $17,000.00

Aty. Fees ---- 3,500.00

Costs ---------- $ 193.32

costs through Jud

Total ------ $.....

ISSUED

This .6th....day of...February D. 19 ..84

BILL LONG

740: no.....

Clerk, District Court.

R31360

By ..Donna Lab.....Deputy

MORRIS C. GORE, ATTORNEYAT LAW
LBJ Frwy at Forest Lane
9500 Forest Lane Suite 435
Dallas, Texa 524
214-343-8752

C 2964

FILED
MAR 6 1984
BILL LONG
DIST. CLERK, DALLAS CO., TEXAS
DEPUTY

entered

CONSTABLE
PRECINCT NO. 2

84 FEB 8 AM 11:20

BILL OF COSTS

RECAPITULATION	
District Clerk's Fees	$56.00
Sheriff's Fees	1.00
Constable's Fees	18.00
County Law Library Fund	3.00
Stenographer's Fee	3.00
All Other Fees	104.32
Iss. Exec.	8.00
TOTAL FEES	$193.32

00000550

Came to hand on the 8 day of Feb 1984 at 11:30 O'clock A M
and executed on the 21 day of Feb A.D. 1984 by Return to Court per Writ of Supersedeas

Fee: 40.00

Constable Pr. 2
Dallas County, Texas
By [signature] Deputy

FILED
IN SUPREME COURT
OF TEXAS

APR 20 1984

GARSON R. JACKSON, Clerk
By ______ Deputy

DEFENDANT'S EXHIBIT
5-11-84
PENGAD-Bayonne, N. J.

84-4260-D

CAUSE NO. ~~05-83-01288-CV~~

Dick Witkovski d/b/a Besco International Appellant	I	IN THE 95th JUDICIAL DISTRICT
vs.	I	COURT OF DALLAS COUNTY, TEXAS
CSI Electronics, Inc. Appellee	I	SUPERSEDEAS BOND

WHEREAS, in the above entitled and numbered cause pending in the 95th Judicial District Court of Dallas County, Texas, judgment was signed on the 29th day of July, 1983, in favor of CSI Electronics, Inc., Appellee, in the sum of Seventeen Thousand and no/100 ($17,000.00) Dollars, plus cost of attorney, in the amount of Three Thousand Five Hundred and no/100 ($3,500.00) Dollars, plus interest thereon at nine percent (9%) per annum until paid, from which judgment Dick Witkovski d/b/a Besco International, Appellant, desires to appeal to the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, sitting in Dallas County, Texas; and

WHEREAS, Appellant desires to suspend execution of said judgment pending the termination of such appeal:

NOW, THEREFORE, we, Dick Witkovski d/b/a Besco International and Gramercy Insurance Company as Surety, acknowledge ourselves bound to CSI Electronics, Inc., Appellee, the sum of Twenty Six Thousand Three Hundred Forty Five and 52/100 ($26,345.52) Dollars, said sum being at least the amount of the judgment, and costs, plus interest at the rate of nine percent per annum on the sum of Twenty Six Thousand Three Hundred Forty Five and 52/100 Dollars, from the date of the judgment until final disposition of the appeal, conditioned that Appellant shall prosecute the appeal with effect; and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as the Court may award against him.

Witnessed our hands this 17th day of February, 1984.

APPROVED THIS 17th DAY OF February 1984
BILL LONG
Clerk of the District Courts
Dallas County, Texas
By Margie Layton Deputy

Besco International
By: Dick Witkovski Pres. dent
Dick Witkovski/President

Gramercy Insurance Company
By:
Attorney-in-fact

00000551

GRAMERCY INSURANCE COMPANY
Houston, Texas

GI-00070V

.OWER OF ATTORNEY AND CERTIFICATE OF AUTHORITY OF ATTORNEY(s)-IN-FACT

[redacted] ALL MEN BY THESE PRESENTS THAT GRAMERCY INSURANCE COMPANY, a corporation duly organized under the laws of the State of Texas, and having its principal office in the City of Houston, County of Harris, State of Texas, hath made, constituted and appointed, and does by those presents make, constitute and appoint

William V. Vansyckle

of Dallas, Texas , its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or if the following line be filled in, within the area there designated Texas ,the following instrument(s): bonds, except bail bonds

by his/her sole signature and act, any and all bonds, and other writings obligatory in the nature of the bond, and any and all consents incidents thereto not exceeding one-hundred thousand dollars ($100,000)

and to bind GRAMERCY INSURANCE COMPANY, thereby as fully and to the same extent as if the same were signed by the fully authorized officers of GRAMERCY INSURANCE COMPANY, and and all the acts of said Attorney(s)-in-Fact, pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following Standing Resolutions of said Company which Resolutions are now in full force and effect:

VOTED: That each of the following officers: Chairman, President, Executive Vice President, Any Vice President, Secretary, Any Assistant Secretary, may from time to time appoint Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority and other writings obligatory in the nature of a bond, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

[redacted]D: That any bond, or writing obligatory in the nature of a bond, shall be valid and binding upon the [redacted]any when (a)signed by the Chairman, the President, Executive Vice President, or a Vice President, or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power described in his or their certificate or certificates of authority.

This Power of Attorney and Certificate of Author is signed and sealed by facsimile under and by authority of the following Standing Resolution of GRAMERCY INSURANCE COMPANY which Resolution is now IN full force and effect:

VOTED: That the signature of each of the following officers: Chairman, President, Executive Vice President, Any Vice President, Secretary, Any Assistant Secretary, and the seal of the Company may be affixed by Attorneys-in-Fact for purposes only of executing bonds and other writings obligatory in the nature trhereof, and any shall be valid and binding upon the Company in the future with respect to any bond to which it is attached.

IN WITNESS WHEREOF, GRAMERCY INSURANCE COMPANY has caused this instrument to be signed by its President, and its corporate seal to be hereto affixed this 13th day of Sept. ,1983.

GRAMERCY INSURANCE COMPANY

BY _____
President

SEAL
HOUSTON, TEXAS

State of New York
County of New York

[redacted] this 13th day of Sept. , 1983, before me personally came Brian A. Lewis, to me known, who being by me duly sworn, did depose and say: that he is President of GRAMERCY INSURANCE COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he executed the said instrument on behalf of the corporation by authority of his office under the Standing Resolutions thereof.

_____
Notary Public

MIRA MAC FARLANE
Notary Public, State of New York
No. 31-4710208
Qualified in New York County
Commission Expires March 30, 19[redacted]

CERTIFICATE:

I, the [redacted]ned Secretary of GRAMERCY INSURANCE COMPANY, a stock corporation of the State of Texas, DO [redacted]Y CERTIFY that the foregoing and attached Power of Attorney and Certificate of Authority remains in full [redacted]e and has not been revoked; and furthermore, that the Standing Resolutions, as set forth in the Certificate of Authority are now in force.

Signed and Sealed in the City of Houston, State of Texas. Dated this 7th day of [redacted] 1983

000000552

By _____
Secretary

SHERIFF'S RETURN

CAME TO HAND this 21 day of Feb A. D. 19 84
at 10:15 o'clock P M., and executed this 21 day of Feb A. D. 19 84
at 12:26 o'clock P M., by delivering to Jack Richardson, Constable

C 29641

THIS IS TO CERTIFY THAT I HAVE THIS DAY COPIED AND COMPARED THE OFFICER'S RETURN
BILL LONG, DISTRICT CLERK
BY _____ DEPUTY

the within named defendant..... in person, a true copy of this writ.

Original Petition.

FEES:
Serving ..... Cop ..... - - $.....
Mileage ..... Miles - - $.....
Total - - - - $.....

JACK RICHARDSON
CONSTABLE PRECINCT TWO
1411 W. BELT LINE ROAD
RICHARDSON, Sheriff, Dallas County, Texas.

VERIFIED

By J Bookout Deputy.

FILED
MAR 8 1984
BILL LONG
DIST. CLERK, DALLAS CO., TEXAS
DEPUTY

CONSTABLE
PRECINCT NO. 2
84 FEB 21 P12:15

FILED
IN SUPREME COURT
OF TEXAS
APR 20 1984
GARSON R. JACKSON, Clerk
By _____ Deputy

DEFENDANT'S EXHIBIT
5-11-84

No. 79-4260-D

95th DISTRICT COURT

DALLAS COUNTY

CSI ELECTRONICS, INC.

vs.

DICK WITKOVSKI DBA

Writ of Supersedeas

ISSUED

This 20th day of FEBRUARY A. D. 19 84

BILL LONG District Clerk.

By GIALYN SHEPARD Deputy

Attorney for DEFENDANT

MR. JOHN A. PACE, ATTAORNEY
2720 FAIRMOUNT STREET
DALLAS, TEXAS 75201

RICHARDSON

WRIT OF SUPERSEDEAS.

THE STATE OF TEXAS

To the Sheriff or any Constable of Dallas County—GREETING:

Whereas, on the 29th day of JULY A. D. 19 83, in cause No. 79-4260-D entitled XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

CSI ELECTRONICS, as Plaintiff,

versus

DICK WITKOVSKI d/b/a BESCO INTERNATIONAL, as Defendant,

in the 95th Judicial District Court of Dallas County, Texas, judgment was rendered in said court in favor of said plaintiff and against said defendant for the sum of $26,345.52 Dollars, and all costs in that behalf expended, and to enforce the collection of which judgment the clerk of said court did, on the 6th day of February A. D. 19 84, at the request of the plaintiff, issue an execution against the property of the said defendant, which execution is now in the hands of JACK RICHARDSON, CONSTABLE XXXX of Dallas County.

And, whereas, since the issuance of said execution on, to-wit: the 6th day of FEBRUARY A. D. 19 84, the defendant in said judgment filed in this court a supersedeas bond in said cause;

Therefore you are hereby commanded that you require the said JACK RICHARDSON, CONSTABLE Sheriff of said County aforesaid, to suspend all further proceedings under the aforesaid execution, until said cause is finally determined by the Court of Civil Appeals, in and for the Fifth Judicial District of Texas, at Dallas, Texas, to which the same has been appealed.

Herein Fail Not, but of this writ make due return showing how you have executed the same.

Witness: BILL LONG, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and seal of said Court, at office in Dallas, on this the 20th day of FEBRUARY A. D. 19 84.

BILL LONG
Clerk of the District Courts, Dallas County, Texas.

By [signature] Deputy.
GAILYN SHEPPARD

0C000554

NO. 79-4260-D

CSI ELECTRONICS, INC.	)	IN THE DISTRICT COURT OF
v.	)	DALLAS COUNTY, TEXAS
DICK WITKOVSKI d/b/a Besco International	)	95TH JUDICIAL DISTRICT

ORDER

On April 20, 1984, the Court heard plaintiff's motion for contempt. Plaintiff appeared by counsel, and defendant appeared in person and by counsel.

The Court finds and concludes that defendant Dick Witkovski has willfully violated this Court's Order signed October 15, 1983, by failing and refusing to appear for his deposition as therein ordered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Dick Witkovski is in contempt of this Court by his willful violation of this Court's Order signed October 15, 1983;

2. Dick Witkovski is sentenced to pay a fine of $500.00 by April 30, 1984, payable to the State of Texas and delivered to the District Clerk of Dallas County; and

3. Dick Witkovski is sentenced to 24 hours in the Dallas County jail, and he shall immediately be taken into the custody of the Dallas County Sheriff and held and detained in the Dallas County jail until 9:00 a.m., April 21, 1984.

Defendant excepts to this Order.

Signed: April 20, 1984, at 9:10 a.m.

DISTRICT JUDGE

DEFENDANT'S EXHIBIT 3 5-11-84

00000555

COURT OF APPEALS
FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS, TEXAS

EX PARTE:

DICK WITKOVSKI, Relator

PETITION FOR WRIT OF HABEAS CORPUS

TO THE SAID HONORABLE COURT:

DICK WITKOVSKI, relator, petitions for a Writ of Habeas Corpus, and as grounds therefor shows:

I.

Relator is within the jurisdiction of this Court, and this Court has jurisdiction over this matter pursuant to Article 1824a, Revised Civil Statutes of Texas. The following person would be directly affected by this proceeding: CSI Electronics, Inc., Plaintiff in Cause No. 79-4260-D.

II.

Relator is illegally confined and restrained of his liberty in Dallas County, Texas by Don Byrd, Sheriff of said County. Included in the transcript filed herewith is a certificate from the Sheriff indicating the fact that relator is in his

custody.

III.

Relator's confinement and restraint is by virtue of a commitment and capias pro fine issued by order of the 95th District Court of Dallas County, Texas, rendered the 20th day of April, 1984, whereby relator was adjudged and held as for contempt of such Court in a cause numbered 79-4260-D and styled CSI Electronics, Inc. vs. Dick Witkovski d/b/a Besco International. The contempt arose out of the relator's alleged violation of an order of the court rendered on or about October 15, 1983, ordering relator to:

> "ORDERED THAT Defendant DICK WITKOVSKI appear for deposition at the office of Plaintiff's counsel, Morris C. Gore, 9500 Forest Lane, Suite 435, Dallas, Texas 75243, at 2:00 P.M. on November 11, 1983, and then and there produce the documents requested by Plaintiff in its Notices of Deposition."

Certified copies of the order dated October 15, 1983, the order dated April 20, 1984, and the commitment and capias pro fine are included in the transcript of papers filed herewith, to which reference is made for all purposes.

IV.

Relator would further show that his confinement and restraint is illegal for the following reasons:

1. The order of the Court dated April 20, 1984, is void for the reason that:

(a) Counsel for both partis to this suit agreed that the appearance of relator on November 15, 1983 could be changed because negotiations were in progress for furnishing CSI security for the payment of the judgment rendered in this cause. Therefore, there is no order of the 95th District Court for the relator to appear on January 26, 1984.

(b) That relator on his return to Dallas, Texas did obtain a Supersedeas Bond and deliver it to the District Clerk of Dallas County and the District Clerk did issue his Writ of Supersedeas to the Constable of Princinct No. 2 that the execution in this cause had been superseded.

(c) That 27 days after this action CSI filed this Motion for Contempt which relator believes is harassment and intended to threaten him in connection with the judgment since he had previously furnished a supersedeas bond in this cause.

2. Relator's confinement denies him due process of law for the following reasons:

(a) CSI has issued Notices to take the deposition before the judgment in this cause was final, and again after the Motion for Rehearing was overruled and many months before an execution was issued. That when execution was issued, the relator did obtain and furnish a Supersedeas Bond in this cause and this Motion for Contempt was filed 27 days AFTER the judgment had been superseded.

(b) That this commitment in contempt for failure to appear at the taking of a deposition is imprisonment for debt and

there has been no showing of representations made to the court that CSI should have early issuance of execution, and such action denies this relator the equal protection of the law.

WHEREFORE, relator requests that this Honorable Court, or one of its Justices, upon examination of this application, admit relator to bail, issue a Writ of Habeas Corpus, and fix a time and place of appearance thereon, and order that Don Byrd, Sheriff of Dallas County, Texas, be notified to appear and show cause, if any he has, why he holds relator in restraint, and further order that the Sheriff be notified forthwith, by telephone or telegraph, to release relator pending further orders of this Court; and further, relator requests that he be brought without delay before this Court and that he may be discharged from such illegal confinement and restraint to the end that justice prevails.

Respectfully submitted,

John A. Pace #15394000

Kevin P. Jordan #11014900

2720 Fairmount Street
Dallas, Texas 75201
214/741-3933

Attorneys for Defendant

00300559

V E R I F I C A T I O N

STATE OF TEXAS X
X
COUNTY OF DALLAS X

BEFORE ME, the undersigned Notary Public, on this day personally appeared JOHN A. PACE, who being by me duly sworn on his oath deposed and said that he is the attorney for the relator in the above-entitled and numbered cause; that he has read the above and foregoing petition for Writ of Habeas Corpus; and that every statement contained therein is within his knowledge and true and correct.

JOHN A. PACE

SUBSCRIBED AND SWORN TO BEFORE ME on this the 21st day of April, 1984, to certify which witness my hand and official seal.

Notary Public, State of Texas

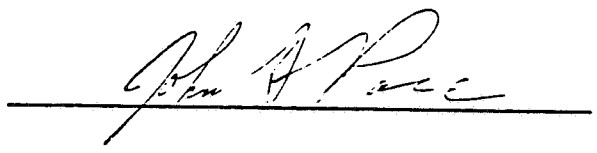
DIXIE BRANCH

My Commission Expires:
6-30-84

00000560

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Writ of Habeas Corpus has been served on Morris Gore, attorney of record for CSI Electronics, Inc. by delivery of atrue copy to him by certified mail, by depositing same, postpaid in an official depository under the care and custody of the United States Postal Service on the 20th day of April, 1984, addressed as follows: Mr. Morris C. Gore, 9500 Forest Lane, Suite 435, Dallas, Texas 75243, Attorney for Plaintiff, on this 20th day of April, 1984.



00000561

657

LAW OFFICES

SOULES, CLIFFE & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

STEPHANIE A. BELBER
JAMES R. CLIFFE
ROBERT E. ETLINGER
ROBERT D. REED
SUSAN D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III

BINZ BUILDING, SIXTH FLOOR
1001 TEXAS AT MAIN
HOUSTON, TEXAS 77002
(713) 224-6122

1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

WILLIAM A. BRANT, P. C.
1605 SEVENTH STREET
BAY CITY, TEXAS 77414
(409) 245-1122

January 9, 1986

Mr. Pat Beard
Beard & Kultgen
P. O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed are proposed changes to Rules 621a, 657, and 696 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomolies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

00000563

Rule 499a. Direct Appeals

In the first paragraph, delete "Article 1738a" and substitute:

section 22.001(c) of the Texas Government Code

Rule 621a. Discovery in Aid of Enforcement of Judgment

Delete "Article 3773, V.A.T.S." and substitute:

section 34.001 of the Texas Civil Practice and Remedies Code

Rule 657. Judgment Final for Garnishment

Delete "subdivision 3 of Article 4076 of the Revised Civil Statutes of Texas, 1925" and substitute:

subsection 3 of section 63.001 of the Texas Civil Practice and Remedies Code

00000564

SEE NEXT PAGE FOR POST-IT NOTE

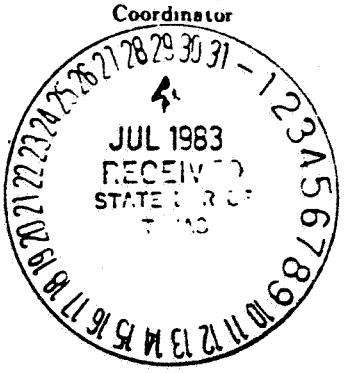
WM. C. MARTIN, III
Judge
214-758-6181

CONTENT

MARGARET KUHN
Reporter
PATT LINDSEY
Coordinator

The Family District Court

307th Judicial District
Gregg County, Texas
P.O. Box 8 • Longview, Texas 75601



July 27, 1983

Honorable Hubert W. Green
Attorney at Law
900 Alamo National Bank Bldg.
San Antonio, Texas 78205

Re: Suggested Change to Rule 680

Dear Mr. Green:

Enclosed is a copy of my proposal made on July 6 to Justice Pope and his reply to me. I am forwarding a copy also to Judge George Thurmond in Del Rio and to Professor William Dorsaneo.

As we discussed in our conversation Tuesday, it is difficult for me to visualize how to get interest in this change drummed-up from trial court judges. About the most I can say is that the change will enable them to pattern temporary restraining hearings according to the needs of their courts and their constituencies. Nobody runs court on a 10-calendar-day schedule.

I don't believe that any of the other trial court judges are using the kind of setting system I use, and it is difficult to ask them to fly in the face of present Rule 680. For about 10 years, I "interpreted" the rule to read as I have proposed the change and it is thoroughly accepted by the lawyers in this area who practice regularly in this court. Of course, it could well be that if the local rule was for everyone to go shirtless on Tuesday, the bar would finally get used to it, but I really believe the change would be beneficial as applied to any temporary restraining order -- not just those in Family Law.

In the past, when I urged the change in regard to Family Law cases only through a change in Chapters 3 and 11 of the Family Code, the response from the Family Law Section and the legislative committees of the House and Senate has been that the change should be of general application and that the rule should be modified rather than having a special procedure for Family Law cases. I concur with that view and think that the change would be particularly helpful for courts of general jurisdiction and multi-county courts. I will phone anyone, correspond with anyone, or appear before any subcommittee or full committee that has the change under consideration. I will appreciate hearing from any member of the committee or the Rules Advisory Committee of the Supreme Court.

Kindest regards,

Wm. C. Martin, III

WCM:pl
Encl.
cc: Judge George Thurmond
Professor William Dorsaneo
Ms. Evelyn Avent

00000565

WM. C. MARTIN, III
Judge
214-758-6181

CCA 6 recommends

MARGARET KUHN
Reporter
PATT LINDSEY
Coordinator

The Family District Court

307th Judicial District
Gregg County, Texas
P.O. Box 8 • Longview, Texas 75601

July 27

Honorable Hubert W. Green
Attorney at Law
900 Alamo National Bank Bldg.
San Antonio, Texas 78205

Re: Su

Dear Mr. Green:

Enclosed is a copy of my proposal
Pope and his reply to me. I am forward
George Thurmond in Del Rio and to Profe

As we discussed in our conversatic
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Kindest regards,

Wm. C. Martin, III

WCM:pl
Encl.
cc: Judge George Thurmond
Professor William Dorsaneo
Ms. Evelyn Avent

W. M. C. MARTIN, III
Judge
214-758-6181

MARGARET KUHN
Reporter
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Coordinator

The Family District Court

307th Judicial District
Gregg County, Texas
P.O. Box 8 • Longview, Texas 75601

July 6, 1983

Honorable Jack Pope
Chief Justice
Supreme Court of Texas
Austin, Texas 78710

RE: Proposed Change in Rule 680, Temporary Restraining Order

Dear Judge Pope:

For several years I have had in mind a proposal for changing Rule 680. Although I have mentioned it in various quarters, my ineptitude has prevented my finding the proper forum and procedure to advance the proposal. Therefore, I am writing you directly in the hope that you will put the matter in the proper channels and let me know what to do next to advance the proposal.

The proposed changes arise out of my experience with matters under the Texas Family Code, but the problems with the Rule and the benefits of the proposed change would relate to other Temporary Restraining Orders (hereafter TRO) as well. The volume of family law litigation merely exaggerates the visible effect on trial court litigation and court administration.

The primary problem with the administration of Rule 680 in its present form is the expiration of the TRO within 10 days of its being granted by the court's signature. The time for expiration should run from service of process or appearance for the following reasons:

a. A TRO does not govern a party defendant or respondent until receipt of personal notice of its terms, so the existence of the order cannot inconvenience anyone until notice (which is usually documented by service of process because of the difficulty of documenting notice otherwise).

b. A party inconvenienced by a TRO can, under the presently worded rule, appear and demand an early hearing. This practice should be encouraged in preference to the present dominant ploy (i.e., evading service in the hope the TRO will expire before documentable notice is received).

c. The "ten days from granting" rule guarantees that a good number of TRO's will expire before service or so short a time after service (less than three days, Rule 21, TRCP) that the party restrained would be entitled to continue the hearing as a matter of right, while requiring that the plaintiff or petitioner be prepared at all times to proceed with testimony.

d. Although there is no quarrel with ten days as a reasonable length of time, combined with the expiration time running from "granting", the expiration day often falls on weekends or holidays.

e. A corollary to c. and d. above is that running the expiration from service or appearance allows the court to set a particular date and time in the week to hear these temporary and emergency matters. (For instance, I use the phrase "first Thursday after the expiration of three days following service hereof at 9:00 o'clock a.m.") Any day of the week will count the same way and will allow the court and the bar to pattern its practice accordingly.

f. A further corollary to e. above is that by local rule the trial court could provide for hearing on the pattern day and time a week earlier if the party restrained wants an earlier hearing or becomes confused and appears earlier. The trial court could also provide for obtaining an emergency hearing under such statutes as Family Code Sections 11.11 and 3.58.

Two further matters need to be addressed in the rule.

1. The rule should expressly provide for extension and resetting by the trial court on the docket sheet instead of by written (i.e., minuted) order. This repetitive paper work accomplishes nothing by way of due process notice and runs up costs and attorney fees unnecessarily. It is especially burdensome to the litigants, the bar and the trial court in view of the present running of the expiration time limit and often results in pro

having to be recalled so that the extension and resetting can accompany it. If service must be accomplished by mailing to an out of county sheriff or constable, the logistics are nightmarish. If service of process is by certified mail under the rules, the logistics are impossible. This change is somewhat less important if expiration runs as I have suggested above, but it will alleviate the necessity for preparing a detailed, minuted order to last a week or less.

2. The requirement for entering the reason for extension and resetting of record should be eliminated unless the party restrained appears and excepts to the continuance. This change is for the same reason as the change suggested above. It adds nothing of value to the person restrained and is a burdensome formal requirement to keep the TRO in effect.

The Rule as it is written has become the subject of the lowest forms of ambush practice and advantage seeking. Restricting the power of the trial courts to issue emergency orders corrects some abuses by inviting others. The answer lies in phrasing the Rule so that the trial courts can administer it in a fair and orderly manner and afford timely hearings. A suggested rephrasing of the rule is enclosed.

I would appreciate knowing how to get the proposed changes considered and will travel at my own expense to confer or to testify.

Kindest regards,

Wm. C. Martin, III
Judge, 307th Family District Court, Gregg County, Texas

WCM:mk
Enclosure

RULE 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after service of process or appearance of the party restrained, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period by action of the trial court or agreement of the parties contained in a written order or noted on the docket sheet unless the party against whom the order is directed consents that it may be extended for a longer period. ~~The reasons for the extension shall be entered of record~~. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

WM. C. MARTIN, III
Judge
214-758-6181

MARGARET KUHN
Reporter
PATT LINDSEY
Coordinator

The Family District Court

307th Judicial District
Gregg County, Texas
P.O. Box 8 • Longview, Texas 75601

January 27, 1984

Honorable James P. Wallace
and The Supreme Court of Texas
Austin, Texas 78711

Honorable Hubert W. Green
and Members of the Committee
on the Administration of Justice

Re: New Version of Rule 680 and 683
Effective 1 April 1984 -- AGAIN!

Honored Court and Committee:

During July and August, 1983, I sent the enclosed suggestion regarding Rule 680 to Chief Justice Pope, then at his suggestion to Mr. Green and other members of the Committee on the Administration of Justice. The suggestion appeared to be well received, and I have awaited the time with patience for the Rule to be considered for revision.

Having been assured that I was addressing the correct forum and was in the process, I was shocked to find the new model Rules 680 and 683 in the January 17 West's TEXAS CASES. After a few days, I called Professor Dorsaneo and discovered that the new version of the Rule was adopted by the Committee on the Administration of Justice back in 1982. Apparently my letter has not come to the attention of the Committee or the Court.

At this point, I hesitate to write because the following polemics may be viewed as pejorative. Let me say that they are not meant to be so. They are presented in the spirit I believe Chief Justice Pope has evoked in his presentations to the Judiciary and to the Legislature, out of a concern for the way our system of justice works at the trial court level and out of thirteen years of experience as a trial court judge.

First, I am not sure either the Committee or the Court can be aware of the impact of Rules 680, et seq., on the trial court docket because of the dearth of statistical information available. Temporary restraining orders may be relatively rare in most civil disputes, but they are commonplace in litigation under the Family Code, which may well constitute half of the civil litagation in the trial courts of Texas. I underline "may" because it is impossible to tell from the structure of the reports filed by the district clerks what the scope of the family law docket is. Only the filing and final disposition of divorce cases is singled out for counting. The

approximately thirty other kinds of cases are scattered among the "non-adversary" category (including at least three matters on which there is an absolute right to a jury trial) and "show causes" (which include at least two matters on which there is an absolute right to a jury trial, but no place on the form to report one).

I digress to stress these matters only because, from the report of the clerks and the Office of Court Administration, both the Committee and the Court would be justified in believing that temporary restraining orders have a very narrow legitimate application in civil litigation. In fact, under the Family Code, temporary restraining orders, temporary injunction hearings and enforcement proceedings are available in eight different categories of suits and constitute 18% of the hearings in this court, which disposed of 70.6% of all civil matters in this county in 1983, by our actual count. Supposing this county to be typical, practice under Rules 680-693 is a very significant part of trial practice in this State, both in terms of numbers of hearings and the time they consume in the trial courts. If this hearing volume is to be handled with justice, efficiency and dispatch and is to be kept within reasonable economic bounds so that effective access to the courts is widely available, close and informed attention needs to be paid to this section of the rules.

Second, if the new rule changes effective April 1 were recommended by the Committee as early as 1982, then I would suppose they were put forward as early as 1981, and I would suggest that any "evils" or "abuses" they would have been designed to redress were probably addressed by legislative changes to Family Code Sections 3.58, 3.581, and 11.11 in the 1981 and 1983 sessions. The requirements for and scope of ex parte relief were extensively addressed, especially in 1983. The changes effective April 1, 1984, run counter to the thrust of those amendments. Is the Court really out of countenance with the legislative changes, or has delayed implementation resulted in "fixing" something that is no longer "broken", and that in an inappropriate manner?

Certainly, the Rules and the practice under them need attention and revision, especially in their application to family law litigation, as my enclosed correspondence discusses. This raises the question whether family law should be excluded from operation of the Rules, at least as regards ex parte equitable relief and turned over to the legislature to regulate, or should be kept in the mainstream of civil rules application. I understand that there may be some tension involved in both efficiently handling a major and qualitatively different part of the trial docket and keeping the civil rules applicable to all civil litigation. My letter of July, 1983, is premised on keeping family law procedure in the mainstream. If this is to be acomplished, the Rules must be evaluated for their effect on practices in this 18% of

the trial docket. The only reasonable alternative is specifically to exempt litigation under the Family Code from operation of Rules 680-693.

Third, on the merits of the changes to Rules 680 and 683, the problem of extensions is discussed in my July, 1983, letter. Limiting the extensions would usually be unnecessary if the expiration date ran from notice to the party restrained, and more especially on a seven or fourteen day schedule. The Gregorian calendar, which predates our State constitution by some centuries, just does not accommodate a ten-day work cycle. The requirement that reasons for extensions shall be entered of record, if taken seriously, will require a weekly "no service" docket call and entry of written orders, involving extra, totally useless appearances of counsel, higher fees and costs and fatter court minutes to no real effect except to prevent expiration of a fiat that is not effective until notice in any event. Continuing present pleading formalities in a revised Rule raises the question whether the Court is overruling the legislative changes to the Family Code cited above.

In regard to Rule 683, the requirement that every temporary injunction include an order setting the final hearing is impracticable and unnecessary. Injunctive relief is both adjusted and usually made mutual at a contested temporary hearing. Final hearings are governed by sixty day, thirty day or twenty day minimum filing and notice requirements which are often longer than the trial court's average "request-to-hearing" lag. Few counsel on either side are in a position to respond meaningfully to a proposed setting for final hearing at the temporary order hearing.

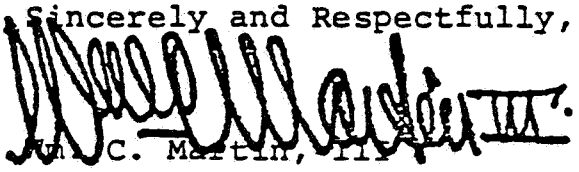
I regret the nagging, preachy tone of this letter. I am at a loss to know how else to assist, as I am obliged to do under Canon Four. I confess that if the Committee and the Court are disinclined to consider this matter, I may follow the tongue-in-cheek suggestion of a colleague and start following the Rules just as they are written. As he remarked, "That'll fix 'em! The whole d----d docket will fall apart."

As an example of how far typical trial court thinking on the matter diverges from the spirit of the new Rules, I enclose an actual set of local rules from a set of courts in another Texas county (identity blanked). I'm not sure I would go as far in streamlining as they have, but you can imagine what they will say about the new Rules if they do decide to write.

The cumbersome procedures set out in the Rules have already resulted in enactment of Title 4 of the Family Code. Title 4 "invented" and limited existing equitable remedies. It is in conversation neither with the Rules nor with the scope of

injunctive relief and enforcement generally existing in Texas law. The additions to the Rules worsen the situation to which Title 4 was a response. If this keeps up, we can expect more of the same responses and can almost guarantee an unwanted increase in the criminal caseload from domestic violence.

Sincerely and Respectfully,



Wm. C. Martin, III

WCM:pl
Encl.

Rules 680 & 6

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MIKE McCURLEY
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TEXAS BOARD OF LEGAL SPECIALIZATION
ROBERT E. HOLMES, JR.

COA J
No Dave
4-14-85

February 10, 1984

Mr. Luther H. Soules, III.
Chairman Supreme Court Advisory Committee
1235 Milam Building
San Antonio, Texas 78205

Revision of T.R.C.P. 680 and 683

Dear Mr. Soules:

I am sorry we have been unable to make contact by phone in order to discuss possible revisions of Texas Rules of Civil Procedure 680 and 683.

On Friday, February 3, 1984, I had a conference with Associate Justice James Wallace of the Texas Supreme Court regarding what I perceive to be possible problems with rules 680 and 683. These problems came to light when I was meeting in my capacity as Chairman of the Family Law section with the committee revising the Family Law Practice Manual.

It came to our attention that the January 1, 1981 version of rule 680 dealing with temporary restraining orders provided:

> "Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed ten days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period of time."

The new rule as promulgated in the February issue of the Texas Bar Journal provides:

> "No more than one extension may be granted unless subsequent extensions are unopposed."

This new provision works an undue hardship in many cases involving family law. Temporary restraining orders are issued in better than fifty percent of the cases that are expected to be contested. It is not unusual for these ten-day restraining orders to expire prior to service being affected, particularly in metropolitan areas where large numbers of papers must be served. The problem is not limited to merely divorce cases but cuts across many areas of family law including suits affecting the parent-child relationship, Title IV suits for the protection of families, annulments and suits to declare marriages void as well as after-judgment suits for clarification and to enforce orders regarding property division.

I have discussed this problem with several of my colleagues on the Family Law Council who are involved in drafting the Family Law Practice Manual. It is our suggestion that Rule 680 be amended to read as follows:

> "No more than one extension may be granted unless subsequent extensions are unopposed <u>except in suits governed by the Texas Family code</u>."

I can likewise envision that this provision might cause problems in other types of litigation and I only address the wording of the language as it would affect the family law practice.

We likewise have a problem with the proposed change to rule 683 because the following language was added which had not previously been a part of the rule:

> "Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought."

This language also causes considerable problems for the family law practitioner. In most cases where

temporary restraining orders are granted they are generally followed by some form of a temporary injunction which, as a general rule, is not carried over into a permanent injunction. The state of the crowded dockets and the nature of the type injunctive relief generally sought in family law cases does not lend itself to a setting on the merits at the time of the granting of the temporary injunction. Again our suggestion would be that the proposed rule will be amended to read as follows:

> "Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought except in suits governed by the Texas Family Code."

Again I would think the language in the rule as now proposed would cause problems for judges, attorneys and litigants involved in other types of litigation other than family law.

I have written this letter at the suggestion of Mr. Justice Wallace. I have also discussed this problem with our family law council representative in San Antonio, Mr. John Compere, whose phone number and address is The North Frost Center, 1250 Northcast Loop 410, Suite 725, San Antonio, Texas 78209, 915/682-2018. I would invite your thoughts regarding these proposed recommended changes or other language that would cure the problem. If either myself or Mr. Compere can be of assistance in anyway regarding this matter please feel free to call. I have likewise written a similar letter this one to Hubert Green, Chairman of the Administration of Justice Committee.

Respectfully,

Kenneth D. Fuller

Kenneth D. Fuller

KDF/kap

cc: The Honorable William C. Martin, III
Judge, 307th District Court, Greeg County, Texas
John Compere
Scott Cook
Larry Schwartz
✓ Harry Tindall

685

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TELEPHONE
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February 10, 1986

Mr. Pat Beard
Beard & Kultgen
P. O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed is proposed change to Rule 685 submitted by Mr. David Keltner. Please draft, in proper form for Committee consideration appropriate Rule changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rule changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

Rule 685 ~~Not~~ Destruction

1417

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MICHAEL T. GALLAGHER
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

January 24, 1986

Re: COAJ

Mr. John Collins
3500 Oak Lawn, Suite 220
Dallas, Texas 75219

Dear John:

Enclosed is a copy of a letter from David Keltner regarding Rule 685. I would apprciate your looking into this.

Thanks.

Sincerely,

Michael T. Gallagher

MTG:mam

Enclosure

LAW OFFICES
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817 336-9333

DAVID E. KELTNER
BOARD CERTIFIED PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

January 13, 1986

R685
Unan
Rej.

Michael T. Gallagher
7000 Allied Bank Plaza
1000 Louisiana
Houston TX 77002

Re: Administration of Justice Committee

Dear Mike:

A recent case has demonstrated a possible problem with TEX.R. CIV.P. 685, "Filing and Docketing" (temporary restraining orders).

In Fort Worth, as in Houston, the normal practice has been to file the temporary restraining order petition, take an assignment to the court, and then approach that court about granting the temporary restraining order. I believe that this practice is common in almost all multi-court districts. My checks with Fort Worth, Dallas, and San Antonio indicate that they all follow the same practice, both by local rules and by practice.

However, in reviewing Rule 685, it is obvious that that practice is contrary to the actual rules. In pertinent part, Rule 685 states, "on the grant of a temporary restraining order or an order fixing time for hearing upon application for a temporary injunction, the party to whom the same is granted shall file his petition therefor,...."

In other words, the Rule states that the temporary restraining order should be granted first, and then the case filed. The evils of this practice are obvious. It allows parties who are seeking temporary restraining orders to forum shop and pick a judge who is less cautious in granting the orders. Likewise, once the judge signs the order and the case is filed, the lottery system may dictate that the case is filed in another court. Therefore, a court who did not sign the temporary restraining order will actually hear the case.

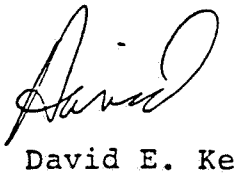
Yet another evil exists. Suppose that one judge is approached on a temporary restraining order and refuses to grant it. Instead of there being a docket entry in the case, the party seeking the order can simply go to another court and try again. This can lead to inconsistent results and jealousy among courts.

Therefore, I would suggest that the language of the first sentence of the Rule be changed to read as follows, "Upon the filing of a petition for a temporary restraining order or an order fixing time for a hearing on an application for a temporary injunction, a party may approach the judge to have either motion granted. If the judge grants the motion, the order shall be filed with the clerk of the proper court. If such orders do not pertain to a pending suit in said court, the cause should be entered on the docket of the court in its regular order and the name of the party applying for the writ as plaintiff and the opposite party as defendant."

I must admit that this letter is being dictated rather hastily, and the language might be improved. However, I will be delighted to do any research you wish to clarify this matter. In reviewing Rule 685 and its predecessor statute, Articles 4650, I found that there are no cases actually attacking a temporary restraining order for being improperly filed. However, as you well know, courts have routinely held that there are no technicalities in this practice in any error in granting temporary restraining order can be used to overturn the order at the temporary injunction phase of the trial.

The temporary restraining order and temporary injunction practice is extremely important to commercial law practitioners and even more important to domestic law practitioners. As a result, I have discussed this rule with some local people, and they agree that the change would be in order. Again, let me know if I can be of assistance in further researching this.

Sincerely yours,



David E. Keltner

mer

696

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(409) 245-1122

January 9, 1986

Mr. Pat Beard
Beard & Kultgen
P. O. Box 529
Waco, Texas 76702-2117

Dear Pat:

Enclosed are proposed changes to Rules 621a, 657, and 696 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ Ltr

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomolies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

00000582

Rule 696. Application for Writ of Sequestration and Order

In the second paragraph, delete "Article 6840, Revised Civil Statutes" and substitute:

sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code

Rule 741. Requisites of Complaint

Delete "Articles 3973, 3974 and 3975, Revised Civil Statutes" and substitute:

sections 24.001-24.004 of the Texas Property Code

Rule 746. Only Issue

Delete "Articles 3973-3994, Revised Civil Statutes" and substitute:

sections 24.001-24.008 of the Texas Property Code

00000583

Rule 737

MOORE & PETERSON
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DIRECT DIAL: 754-4819

January 27, 1986

Honorable Ted Z. Robertson
Supreme Court of Texas
Supreme Court Building
Austin, Texas 78711

Dear Justice Robertson:

I would like to suggest for consideration a new rule for the Texas Rules of Civil Procedure relative to interlocutory appeals.

As you know, under the Federal System, 28 U.S.C. §1292(b) (a copy of which is attached for your ready reference), an interlocutory appeal can be had from an order of a trial court where the trial court is of the opinion that the order involves a controlling question of law upon which there is a substantial ground for a difference of opinion, in circumstances where an immediate appeal would materially advance the ultimate termination of the litigation. Such an appeal is discretionary with the trial court, as well as with the Court of Appeals.

There exist no similar procedure under the Texas Rules of Civil Procedure. The only presently available method to seek review is by mandamus which, because of its inherent limitations, is not satisfactory.

It has been my experience that the interlocutory appeal procedure in the Federal System is an extremely valuable route to review legal issues that could terminate litigation, and does not unduly burden the courts. Since the interlocutory appeals are limited to controlling issues of law and are discretionary, interlocutory appeals in practice are few and the limitations insure that an appeal will be permitted only where there are truly controlling issues of law. I would commend the Federal practice for consideration.

This suggestion is prompted by my involvement in a case in a District Court in Dallas. The case concerns an alleged breach of an international commercial contract. The threshold

issue is whether the contract is subject to mandatory arbitration under the Federal Arbitration Act. Assuming the District Court declines to order arbitration, a great deal of time and expense would be involved in trying the case, all of which would be held for naught if, on appeal, it was ruled that mandatory arbitration was required. This is but one example of the type of situation in which an interlocutory appeal would materially advance the disposition of the case and should be authorized.

I would be glad to render whatever assistance you might wish in analyizing the impact that such a rule amendment would have, and the propriety of instituting such a process in Texas. Thank you for your kind consideration and courtesy.

With best regards,

Sincerely yours,

Jay M. Vogelson

JMV:sm
Enclosure

6871Y/1.86-1

28 U.S.C. 1292(b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

O'QUINN & HAGANS
ATTORNEYS AT LAW
3200 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002
(713) 223-1000

J. M. O'QUINN, P.C.

Exhibit 6

February 13, 1986

Mr. Pat Beard
Law Offices of Beard & Kultgen
1229 North Valley Mills Dr.
Waco, Texas 76702

Re: Rule 737

Dear Pat:

I am adamantly opposed to Proposed Rule 737.

For years, we have followed the rule that there can be no appeal until after a final judgment. This system has, on balance, worked well.

I realize that there are certain extraordinary situations in which arguably there ought to be the right to interlocutory appeal, but to a large extent these are currently handled by mandamus and the federal practice just encourages and causes inordinate delays. Any benefit out of the interlocutory appeal practice in federal court is, in my judgment, far outweighed by the delay that it engenders.

Chief Justice John Hill and other members of the Court are committed to reducing the delay in civil cases. Proposed Rule 737 is a retreat from that goal.

Very truly yours,

O'QUINN & HAGANS

John M. O'Quinn

JMO/rwg
cc: The Honorable James P. Wallace
Luke Soules, III
Rusty McMains

ST. MARY'S UNIVERSITY

February 19, 1986

Mr. Luther Soules, Chairman
Supreme Court Advisory Committee
Soules, Cliffe and Reed
800 Milam Building
San Antonio, Texas 78205

Re: Proposed new Rule 737 permitting interlocutory appeal

Dear Luke:

Due to the press of other matters I have delayed my comment on proposed New Rule 737 which purports to confer on the Court of Appeals appellate jurisdiction prior to the entry of a final judgment.

It is my belief that the Supreme Court may not promulgate a rule of procedure which attempts to confer appellate jurisdiction either upon itself or upon the Court of Appeals. This is a matter within the exclusive jurisdiction of the Legislature. Rule 816 provides that "These rules shall not be construed to extend or limit the jurisdiction of the courts of the State of Texas nor the venue of actions therein."

I also doubt that the Legislature can confer upon the Court of Appeals a jurisdiction not granted under the Constitution, i.e., the rendition of an advisory opinion. The Supreme court held in Morrow v. Corbin, 62 S.W.2d 631 (1933) that prior to a trial on the merits and before judgment the legislature may not confer upon the trial court the power to certify any question of law to the appellate court involving the constitutionality of any order of a State Commission.

Yours very truly,

Orville C. Walker
Professor of Law

OCW:cba

cc: Mr. Pat Beard
Hon. James P. Wallace,
Justice, Supreme Court of Texas

00000588

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IRVIN & RAY
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FERSON J. IRVIN
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(512) 824-0518

January 16, 1985

Luther H. Soules, III, Esq.
Soules, Cliff & Reed
Attorneys at Law
800 Milam Building
San Antonio, Texas 78205

Re: Revisions to the Texas Rules of Civil Procedures,
Especially Rules 738 through 755,
Forcible Entry and detainer Rules

Dear Mr. Soules:

Congratulations upon being named to chair the Advisory Committee to the Supreme Court of Texas concerning revisions to the Texas Rules of Civil Procedure. Our Chief Justice and his companions on the Court have shown a great deal of confidence in you.

This firm has its own peculiar area of expertise and would like to volunteer to assist you in the area of Rules 735 through 755, concerning forcible entry and detainer suits. During the past few years we have filed over six thousand forcible detainer suits. This experience has shown the two of us where the problems lie in eviction suits at this time and where improvements to the rules might assist the administration of justice. I should also add that our firm specializes in landlord-tenant law, representing the owners/management of something over seventy-five thousand residential and commercial rental units.

The attorney for the Texas Apartment Association, Mr. Larry Niemann of Austin, Texas, has brought to our attention the fact that he intends to request a number of changes to Rules 789 through 755 from the Supreme Court in the near future. Assuming that such request(s) are sent to you for examination, our firm would gladly assist in the evaluation of the same, if such be your wish.

Your consideration of our offer would be greatly appreciated.

Very truly yours,

Jefferson J. Irvin

Robert N. Ray

JJI/fs
RNR/fs

00000589

741

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January 9, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Newell:

Enclosed are proposed changes to Rules 741, 746, 772, 806, 807, 808, 810, and 811 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ file

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomalies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

0000591

Rule 696. Application for Writ of Sequestration and Order

In the second paragraph, delete "Article 6840, Revised Civil Statutes" and substitute:

sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code

Rule 741. Requisites of Complaint

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sections 24.001-24.004 of the Texas Property Code

Rule 746. Only Issue

Delete "Articles 3973-3994, Revised Civil Statutes" and substitute:

sections 24.001-24.008 of the Texas Property Code

00000532

746

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January 9, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Newell:

Enclosed are proposed changes to Rules 741, 746, 772, 806, 807, 808, 810, and 811 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ 2

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 687, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of those proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomalies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

00000594

Rule 696. Application for Writ of Sequestration and Order

In the second paragraph, delete "Article 6840, Revised Civil Statutes" and substitute:

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Rule 741. Requisites of Complaint

Delete "Articles 3973, 3974 and 3975, Revised Civil Statutes" and substitute:

sections 24.001-24.004 of the Texas Property Code

Rule 746. Only Issue

Delete "Articles 3973-3994, Revised Civil Statutes" and substitute:

sections 24.001-24.008 of the Texas Property Code

00000595

Jim 748

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January 8, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Newell:

Enclosed are proposed changes to Rules 748 and 755 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

January 2, 1986

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice Committee

Dear Mike:

Enclosed are my proposed amendments to Rules 748 and 755, made necessary by the 1985 amendments of the Property Code.

Please add these proposed amendments to the agenda of the January meeting. I am prepared to report on these proposals at that meeting.

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/tm

Enclosures

cc: Ms. Evelyn Avent, State Bar Staff Liaison
Mr. Luther H. Soules, III
Justice James P. Wallace

00000597

Rule 748. Judgment and Writ

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for [~~restitution~~] possession of the premises, costs, and damages; and he shall award his writ of [~~restitution~~] 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 [~~restitution~~] possession shall issue until the expiration of five days from the time the judgment is signed, unless a possession bond has been filed under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

Comment: The amendment is necessary to conform Rule 748 to the 1985 amendments adding section 24.0061 to the Property Code.

Rule 755. Writ of [~~Restitution~~] Possession

The writ of [~~restitution~~] possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of [~~restitution~~] possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used for residential purposes only.

Comment: The amendment is necessary to conform Rule 755 to the 1985 amendment of section 24.007 of the Property Code.

1755

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W. W. TORREY

TELEPHONE
(512) 224-9144

February 10, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Jim:

Enclosed are proposed changes to Rules 748 and 755. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

00000600

Recommended by C&J
2-8-86
except last clause

Rule 748. Judgment and Writ

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for [~~restitution~~] possession of the premises, costs, and damages; and he shall award his writ of [~~restitution~~] 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 [~~restitution~~] possession shall issue until the expiration of five days from the time the judgment is signed, unless a possession bond has been filed under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

Comment: The amendment is necessary to conform Rule 748 to the 1985 amendments adding section 24.0061 to the Property Code.

Recommended (C of A)
2-8-86

Rule 755. Writ of [~~Restitution~~] Possession

The writ of [~~restitution~~] possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment ~~rendered, and the same~~ shall be executed by the sheriff or constable, as in other cases; and such writ of [~~restitution~~] possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~for residential purposes only~~ as the principal residence of ~~[illegible]~~ a party.

Comment: The amendment is necessary to conform Rule 755 to the 1985 amendment of section 24.007 of the Property Code.

00000602

COA & SCAC

December 13, 1983

Honorable Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, Texas 78205

Dear Luke:

I have had complaints-suggestions concerning several rules so I will pass them on to you for your committee's consideration.

Rule 272:

Some members of the court as well as several lawyers have expressed concern that present Rule 272 is unduly restrictive and results in an injustice in instances where specific objections are made to the court's charge but the trial court does not specifically rule on the objection. The most common suggestion is that the rule be amended to require only that a specific objection be made in the record. The trial judge would thus be made aware of the objection but he could not refuse to rule and thus avoid having his decision reviewed on appeal.

Rule 296 and 297:

Professor Wicker's letter is enclosed.

Rule 373:

It has been suggested that Rule 373 and Rules of Evidence 103 are inconsistent, i.e., under the Rules of Evidence the attorney could tell the judge in narrative form what his witness would testify to and thus preserve his point for appellate review. Rules of Procedure 373 requires a bill of exception setting out the proffered testimony. The committee may have suggestion as to which if either of these rules should be amended.

00000603

Rule 749:

This rule provides that in a forceable entry and detainer suit an appeal bond must be filed within five days of judgment. The rules of practice in justice courts, specifically Rule 569, provides five days for filing a motion for new trial in the justice court and Rule 567 provides that the justice of the peace has ten days to act on the motion for new trial. In a recent motion for leave to file a petition for a writ of mandamus we were presented with a situation where the defendant filed a motion for new trial five days after judgment, the next day the justice of the peace overruled the motion, but it was too late to file an appeal bond under Rule 749.

The question presented is whether forcible entry and detainer actions should be an express exception to the rules of practice in justice courts so as to clarify the procedural steps such as occurred in the above case.

As usual I leave further action on these matters to your and the committee's good judgment.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

P.S.

I am enclosing a letter from John O'Quinn concerning Rules 127 and 131. Ray Hardy's correspondence has been previously forwarded to you.

KEMP, SMITH, DUNCAN & HAMMOND

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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TAD R. SMITH
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DONNA CHRISTOPHERSON
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STEPHEN R. NELSON*

*MEMBERS OF NEW MEXICO BAR
**MEMBERS OF TEXAS AND NEW MEXICO BARS
OTHERS MEMBERS OF TEXAS BAR

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TELECOPIER (505) 982-4214

PLEASE REPLY TO:

July 19, 1985

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Re: Proposed Change in the Texas Rules of Civil Procedure

Dear Mr. Soules:

In March of this year I attended the Advanced Civil Trial Short Course in Dallas, at which you spoke. At that time, you solicited comments and suggestions on possible changes in the Texas Rules of Civil Procedure. Under rather unfortunate circumstances, I recently discovered what I believe to be a loophole in the rules, and I wish to bring it to your attention. If you are no longer a member of the committee that is responsible for rule changes, I would appreciate your forwarding this letter to an appropriate person or letting me know to whom it should be sent.

I was recently retained to defend a forcible detainer action in a Justice Court here in El Paso County. As I am sure you know, Rule 525 provides that pleadings in Justice Court need not be written. Because time was extremely short and my client, the tenant, wanted to keep expenses to a minimum, I did not file a written answer in the case. Rather, we appeared at the hearing with all of our witnesses and successfully defended the lawsuit. Having won the hearing, I assumed that the litigation was concluded and that, should the landlord pursue an appeal, I would receive some type of formal notice.

Pursuant to Rule 749c, the landlord perfected his appeal by the filing of an appeal bond. He also requested that the Justice Court transcript be filed in the County Court and that the cause be docketed. All of this was done without my knowledge, as there is no rule requiring notice of the appeal. I was informed that an appeal had been taken approximately three weeks after the hearing in Justice Court, when my client called me to inform me that he had received notice of a default judgment taken against him in County Court. Upon investigation, I learned that a default judgment had been taken against us pursuant to Rule 753. The pertinent part of that rule provides as follows:

> If the defendant made no answer in writing in the justice court, and if he fails to file a written answer within five full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

It then became necessary for me to expend considerable time having the default judgment set aside. Not only was the experience terrifying for my client, who thought that he had been evicted, but I was also shocked to learn that an appeal could be taken and a default judgment rendered without any notice to the opposing party whatsoever. It was my contention in my motion to set aside the default judgment that the County Court's judgment was void for want of due process. I honestly believe that the failure to require notice of appeal in a forcible detainer action renders this procedure constitutionally defective.

As a general proposition, I am struck by what I consider an inconsistency in the rules. An appeal to the County Court from the Justice Court grants the appellant a trial de novo. However, Rule 753 dictates that a defendant's answer in Justice Court shall serve as his answer in county court. Therefore, the defendant's pleadings in Justice Court, at least initially, become his pleadings in County Court. It seems rather anomalous that the Justice Court proceedings should have such impact in a trial de novo. The result, at least in my case, is that I was caught completely unaware of the need to file a written answer in justice court.

While I have no excuse for my ignorance of Rule 753, I am concerned that, as the rules are currently written, Rule 753 can work a severe hardship on tenants who successfully defend

forcible detainer actions in Justice Court without the assistance of an attorney. It is fair to assume that in the majority of cases, a landlord who files a forcible detainer action will be represented by an attorney. I would guess that a number of tenants who defend such actions do so pro se. Rule 753 poses a very real threat to a tenant who has successfully defended a forcible detainer action without an attorney. It is unfair, and I believe unconstitutional, to permit a default judgment to be taken on appeal in County Court without the requirement of notice to the opposing party.

I strongly suggest that another rule be added or that one of the existing rules be amended to require formal notice to the opposing party that an appeal from the Justice Court in a forcible detainer action has been perfected upon the filing of the transcript in County Court. The rule should expressly provide that notice be given once the case has been docketed in County Court, so that the appellee can be notified not only of the appeal, but also of the cause number of the case in County Court. In my own case, we would have been required to monitor the docketing of new causes in the County Clerk's office every day until the time for perfecting an appeal had expired. That certainly is unfair and should not be the law. The appellant should bear the burden of notifying the appellee of an appeal. Accordingly, I will very much appreciate it if serious consideration is given to the request that I make in this letter.

Mr. Soules, I will be more than happy to discuss this with you further either by telephone or in correspondence. Thank you very much for your consideration.

Yours truly,

Ken Coffman

KC/ysp

Dick 755

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BAY CITY, TEXAS 77414
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January 8, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Newell:

Enclosed are proposed changes to Rules 748 and 755 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

January 2, 1986

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice Committee

Dear Mike:

Enclosed are my proposed amendments to Rules 748 and 755, made necessary by the 1985 amendments of the Property Code.

Please add these proposed amendments to the agenda of the January meeting. I am prepared to report on these proposals at that meeting.

Sincerely,

Jeremy C. Wicker
Professor of Law

JCW/tm

Enclosures

cc: Ms. Evelyn Avent, State Bar Staff Liaison
Mr. Luther H. Soules, III
Justice James P. Wallace

00000609

Rule 748. Judgment and Writ

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for [~~restitution~~] possession of the premises, costs, and damages; and he shall award his writ of [~~restitution~~] 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 [~~restitution~~] possession shall issue until the expiration of five days from the time the judgment is signed, unless a possession bond has been filed under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

Comment: The amendment is necessary to conform Rule 748 to the 1985 amendments adding section 24.0061 to the Property Code.

Rule 755. Writ of [~~Restitution~~] Possession

The writ of [~~restitution~~] possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of [~~restitution~~] possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used for residential purposes only.

Comment: The amendment is necessary to conform Rule 755 to the 1985 amendment of section 24.007 of the Property Code.

TK –
Prepare transmittal ltr to
Newell Blakely – Study
Sub on Ev – SCR

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

November 20, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: TEX. REV. CIV. STAT. ANN.
art. 3737h, Sec. 1 (a).

Dear Luke and Mike:

I am enclosing a letter from Gary Beckworth of Longview, in regard to the above matters.

May I suggest that this matter be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Gary Beckworth
Attorney at Law
P. O. Box 894
Longview, Tx 75606

00000612

GARY BECKWORTH, P.C.
ATTORNEY AT LAW
505 NORTH GREEN STREET
P.O. BOX 894
LONGVIEW, TEXAS 75606
(214) 758-0561

November 18, 1985

Clerk, Supreme Court
Supreme Court Building
Austin, Texas 78711

RE: Evidence Rules

Dear Sir:

This letter is written to make comment about the repealer of Vernon's Ann. Civ. St. art. 3737h as per Acts 1985, 69th Leg., p.7218, ch. 959, eff. Sept. 1, 1985.

It appears that the repealer in the ammendment pursuant to Acts 1985, 69th Leg., P.4700-4702, ch.617, eff. Sept. 1, 1985, does not preserve for causes filed after September 1, 1985, the authority of Vernon's Ann. Civ. St. art. 3737h, Sec. 1 (a).

It is hoped that the committee of the Court dealing with the Texas Rules of Evidence might preserve more clearly the benefit of said Section 1, Sub-Section (a).

Thank you for your assistance.

Yours very truly,

Gary Beckworth

GARY BECKWORTH
GB/teg

TK -
Prepare transmittal ltr to
Newell Blakely - Study
Subcom Ltr - SC TK

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

November 20, 1985

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Re: TEX. REV. CIV. STAT. ANN.
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Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Gary Beckworth
Attorney at Law
P. O. Box 894
Longview, Tx 75606

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November 18, 1985

Clerk, Supreme Court
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Austin, Texas 78711

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It is hoped that the committee of the Court dealing with the Texas Rules of Evidence might preserve more clearly the benefit of said Section 1, Sub-Section (a).

Thank you for your assistance.

Yours very truly,

Gary Beckworth

GARY BECKWORTH
GB/teg

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CORPUS CHRISTI, TEXAS 78477-0129
512-888-9261

April 23, 1985

Mr. Tom B. Ramey, Jr.
P. O. Box 8012
Tyler, Texas 75711

RE: Adoption of F.R.A.P. 10
and F.R.A.P.11 in Texas

Dear Tom:

I have followed with interest the efforts to curb litigation costs and delay. Today I am responding to your invitation to submit suggestions that may aid in solving these problems.

The adoption of rules similar to F.R.A.P.10 and F.R.A.P.11 (copies enclosed) would save countless hours and dollars in those very common situations where court reporters fail to transcribe the statement of facts for timely filing in an appeal.

The federal system recognizes that courts-not lawyers-control court reporters. Clients there no longer pay for lawyer time expended in interviewing court reporters, preparing affidavits and filing motions for extension.

I have been forced to file as many as five motions for extension in one state case. I have had appellate courts invite writs of mandamus. The client could not understand the reason for the expense nor the delay, much less the uncertainty of an extension.

I am taking the liberty of sharing these thoughts not only with you as President of the State Bar of Texas, but as well with some members of the Committee on Proposed Uniform Rules of Appellate Procedure.

They are proposals that would seem appropriate for civil rules to be promulgated by the Supreme Court regardless of what the legislature may do with the criminal rules.

Cordially,

Frank

F. W. Baker

FWB:bv
6FWBaak

cc: Hon. Clarence A. Guittard
Hon. Sam Houston Clinton
Hon. James Wallace
Hon. Shirley Butts
Mr. Hubert Green
Mr. Luke Soules
Mr. Ed Coultas

which appellant was convicted; the date and terms of sentence.

Concise statement of the question or questions involved on the appeal, with a showing that such question or questions are not frivolous. Counsel shall set forth sufficient facts to give the essential background and the manner in which the question or questions arose in the trial court.

Certificate by counsel, or by appellant if acting pro se, that the appeal is not taken for delay.

Factual showing setting forth the following factors as to appellant with particularity:

nature and circumstances of offense charged,

weight of evidence,

family ties,

employment,

financial resources,

character and mental condition,

length of residence in the community,

record of conviction,

record of appearances or flight,

danger to any other person or the community,

such other matters as may be deemed pertinent.

A copy of the district court's order denying bail, containing the written reasons for denial, shall be appended to the application. If the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court shall be lodged with this Court. If the movant is unable to obtain a transcript of these proceedings, he shall state in an affidavit the reasons why he has not obtained a transcript.

If the transcript is not lodged with the motion, the movant shall also attach to this motion a certificate of the court reporter verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the estimated date of completion of the transcript.

The government shall file a written response to all motions for bail pending appeal within 7 days after service thereof.

Also, upon receipt of the application for bail, the Clerk shall request that the Clerk of the District Court obtain from the probation officer a copy of the presentence report, if one is available, and it shall be attached to the application for bail. The report shall not, however, be disclosed to the applicant. See Rule 32(c)(3) Fed.R.Crim.Proc.

THE RECORD ON APPEAL

FRAP 10.

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge an appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days

court of appeals such parts of the original record as any party shall designate.
(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

Loc. R. 11

11.1. Duties of Court Reporters—Extensions of Time. The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the Clerk of the Court:

acknowledge receipt of the order for the transcript,

the date of receipt of the order for the transcript,

whether adequate financial arrangements under CJA or otherwise, have been made,

the number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

the estimated date on which the transcript is to be completed,

a certificate that he or she expects to file the trial transcript with the District Court Clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by FRAP 11(b) shall be filed with the Clerk and shall specify in detail (a) the amount of work that has been accomplished on the transcript, (b) a list of all outstanding transcripts due to this and other courts, including the due dates of filing, and (c) verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

[I.O.P.—The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982 the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the Court.]

11.2. Duty of the Clerk. It is the responsibility of the Clerk of the District Court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the Clerk of the District Court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.

DOCKETING THE APPEAL; FILING OF THE RECORD

FRAP 12.

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) [Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.] [Abrogated]
(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

REVIEW OF DECISIONS OF THE TAX COURT

FRAP 13.

(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the United

92, 376a
492, 758, 109

TO Justice Hecht.

Texas Tech University

School of Law

April 30, 1984

Honorable Jack Pope, Chief Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, TX 78711

Re: Conflicts and oversights in 1984 amendments to the Texas Rules of Civil Procedure

Dear Justice Pope:

In going over the 1984 amendments, I have discovered several conflicts and oversights, other than the ones I had related to Justice Spears earlier this year.

1. Rule 72. The first sentence changed the phrase "the adverse party or his attorney of record" to "all parties or their attorneys of record." Shouldn't the phrase read: "all adverse parties or their attorneys of record"? This would be consistent with the remaining language of Rule 72 and with other rules which normally refer to service on the "adverse," "opposite" or "opposing" party.

2. Rule 92. The second paragraph was added, but it refers to a "plea of privilege." Obviously, this should be changed to "motion to transfer venue under Rule 86."

Aside - the phrase "plea of privilege" had perhaps one sole virtue. When it was used everyone knew this was an objection to venue under Rule 86, rather than a motion for a discretionary change of venue under Rule 257. Unfortunately, a motion to change venue under Rule 257 may also properly be referred to as a motion to transfer venue. See Rules 86(1), 87(2)(c), (3)(c), (5), 258, 259. And see Article 1995(4)(c)(2).

3. Rule 165a(3). In the second sentence the word "is" should be changed to "are."

4. Rules 239a and 306a. Prior to the 1984 amendments, the language of Rule 306d (repealed), which dealt with notification of appealable orders generally, and Rule 239a, which deals with notification of default judgments (also an appealable order) were worded slightly differently, but in substance

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Lubbock, Texas 79409-0001 / (806) 742-3791 Faculty 742-3785

were the same. Both rules provided: "Failure to comply with the provisions of this rule shall not affect the finality of the judgment or order."

New Rule 306a(4),(5), however, which superseded old Rule 306d, makes it possible for the finality of a judgment to be extended for up to ninety days. Rule 239a was not amended. In my opinion, this creates an anomoly in that, unless Rule 239a is to be ignored, it is possible to have the periods for a motion for new trial, perfecting an appeal, etc., to start running at a later date (if a party proves he did not receive notice of a judgment) for all appealable orders and judgments, except a default judgment. Unless this was so intended, Rule 239a should be amended to conform to Rule 306a(4),(5).

5. Rules 360(5), (8) and 363. New Rule 360(5) requires that, in addition to filing the petition for writ of error, a notice of appeal must be filed if a cost bond is not required. Rule 360(8) says, in effect, that in such circumstances the writ of error is perfected when the petition and a notice of appeal are filed. It had been my understanding, at least prior to the 1984 amendments, that where a cost bond was not required by law, an appellant in an appeal by writ of error to the court of appeals needed only to file the petition. Rule 363, which was not amended in 1984, supports this view. Thus the last sentence of Rule 363 conflicts with Rule 360(8).

Aside from this problem, the word "is" in the last line of Rule 360(8) should be changed to "are."

6. Rule 376a. Part (g) of the Supreme Court order relating to the preparation of the transcript needs to be amended. The last paragraph of part (g) should be deleted. It is obsolete in view of the 1984 repeal of Rule 390 and the 1981 and 1984 amendments of Rule 376. A party no longer needs the authority to apply to the clerk to have the transcript prepared and delivered to him, since Rule 376 makes it clear that the clerk has the duty to prepare and transmit the transcript to the court of appeals.

7. Rule 418. Amended Rule 414 incorporates all the provisions of Rule 418, as well as several other rules. These Rules (415-417) were repealed, but Rule 418 was not. Rule 418 should be repealed.

8. Rules 469(h) and 492. New Rule 469(h) requires the application for writ of error to state that a copy has been served on "each group of opposite parties or their counsel." Rule 492, however, requires that a copy of each instrument (including "applications") filed in the Supreme Court to be served on "the parties or their attorneys." Since two or more parties may belong to one group, only one copy would have to be served on them as a group under Rule 469(h), but under Rule 492, each party would have to be served with a copy. Are these two rules conflicting in their requirements or does Rule 492 apply to all filings in the Supreme Court except the application for writ of error?

9. Rules 758 and 109. Rule 109 was amended to delete the proviso (last sentence). Rule 758, which was not amended, states: "but the proviso of Rule 109, adapted to this situation, shall apply." Rule 758 needs to be amended to delete any reference to the now nonexistent proviso of Rule 109.

One final note: Section 8 of Article 2460a, the Small Claims Court Act, was not amended by the legislature along with the repeal of Article 2008, which

had allowed an interlocutory appeal from the trial court's ruling on a plea of privilege. Arguably, section 8 allows such an interlocutory appeal. On the other hand, the right to interlocutory appeal may be geared to or depend on a right in some other statute, such as now repealed Article 2008, since section 8 begins with the phrase "nothing in this Act prevents."

I hope my comments and suggestions have been helpful.

Respectfully yours,

Jeremy C. Wicker
Professor of Law

JCW:tm

in other respects shall conform to the rules laid down for typewritten transcripts.

(d) The caption of the transcript shall be in substantially the following form, to wit:

"The State of Texas,
County of _____

At a term of the _____ (County Court or _____ Judicial District Court) of _____ County, Texas, which began in said county on the _____ day of _____, 19__, and which terminated (or will terminate by operation of law) on the _____ day of _____, 19__, the Honorable _____ sitting as Judge of said court, the following proceedings were had, to wit:

A.B., Plaintiff,
v. No. _____
C.D., Defendant.

In the _____ Court of _____ County, Texas."

(e) There shall be an index on the first pages preceding the caption, giving the name and page of each proceeding, including the name and page of each instrument in writing and agreement, as it appears in the transcript. The index shall be double spaced. It shall not be alphabetical, but shall conform to the order in which the proceedings appear as transcribed.

(f) It shall conclude with a certificate under the seal of the court in substance as follows:

"The State of Texas,
County of _____

I, _____

Clerk of the _____ Court, in and for _____ County, State of Texas, do hereby certify that the above and foregoing are true and correct copies of (all the proceedings or all the proceedings directed by counsel to be included in the transcript, as the case may be) had in the case of _____ v. _____, No. _____, as the same appear from the originals now on file and of record in this office.

Given under my hand and seal of said Court at office in the City of _____, on the _____ day of _____, 19__.

_____

Clerk _____ Court, _____ County, Texas.

By _____ Deputy."

(g) The front cover page of the transcript shall contain a statement showing the style and number of the suit, the court in which the proceeding is pending, the names and mailing addresses of the attorneys in the case, and it shall be labeled in bold type "TRANSCRIPT." The following form will be sufficient for that purpose:

"TRANSCRIPT

No. _____
District Court No. _____

_____
Appellant__
v.
_____
Appellee__

_____ _____

Transcript from the _____ District Court of _____ County, at _____, Texas.

Hon. _____, Judge Presiding.

Attorney__ for Appellant__:
_____ Address: _____
Attorney__ for Appellee__:
_____ Address: _____"

The Clerk shall deliver the transcript to the party, or his counsel, who has applied for it, and shall in all cases indorse upon it before it finally leaves his hands as follows, to wit:

"Applied for by P. S. on the _____ day of _____, A.D. 19__, and delivered to P. S. on the _____ day of _____, A.D. 19__," and shall sign his name officially thereto. The same indorsement shall be made on certificates for affirmance of the judgment.

(h) In the event of a flagrant violation of this rule in the preparation of a transcript, the appellate court may require the Clerk of the trial court to amend the same or to prepare a new transcript in proper form at his own expense.

Entered this the 20th day of January, A.D. 1944.

_____
Chief Justice.

_____
Associate Justice.

_____
Associate Justice.

Change in form by amendment effective January 1, 1981: Paragraph (b) is changed to provide that judgments shall show the date on which they were *signed*, rather than "rendered" or "pronounced." *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978). The first sentence of paragraph (c) is changed to permit duplication of pages by methods other than typing and printing.

772

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January 9, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Newell:

Enclosed are proposed changes to Rules 741, 746, 772, 806, 807, 808, 810, and 811 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ Ltr

Texas Tech University

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Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice
Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

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Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

0C000625

Rule 772. Procedure

Delete "Art. 6101 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 23.001 of the Texas Property Code

Rule 806. Claim for Improvements

Delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.024 of the Texas Property Code

Rule 807. Judgment When Claim for Improvement is Made

In lines 2 and 3, delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.042 of the Texas Property Code

In line 7, delete "Articles 7397-7399, Revised Civil Statutes" and substitute:

sections 22.022 and 22.023 of the Texas Property Code

00000626

NELSON & WILLIAMSON
ATTORNEYS ABOGADOS
10 EAST ELIZABETH STREET
BROWNSVILLE, TEXAS 78520
TELEPHONE
(512) 546-7333

August 25, 1983

Mr. Michael A. Hatchell, Chairman
Committee on Administration of Justice
500 1st Place
P. O. Box 629
Tyler, Texas 75710

RE: COAJ; Rule 792

Dear Mike:

I attach the report of the subcommittee appointed to study Rule 792 and the attorney's correspondence that requested the revision. At the June 4, 1983 meeting there was discussion that:

1. Trespass to try title pleading requirements be done away with and,
2. If TTTT is retained, that the Abstract be filed at least thirty (30) days before trial.

I did not want the consideration of Rule 792 to fall through the cracks due to the summer inactivity.

In another vein, this summer I called my state representative, Rene Oliveira, to ascertain whether or not House Bill 1186, adopting a "Civil Code," had been vetoed by the governor. I was informed that it had. Rene, who is an attorney, then proceeded to tell me that not only the sponsor of the bill but many of the legislator's noses were bent out of shape by what they perceived to be "after the fact" and "behind the scene" maneuvering by the bar to have the bill vetoed. I explained the circumstances of the bill being introduced late in the session as unopposed, that the bill contained various conflicts with existing substantive law, and that further study was essential. That triggered his observation that the bar's efforts at informing itself and the legislators were dismal.

It is suggested that the chairman or a member of the Judicial Affairs Committee be appointed as either a member or liaison member of the COAJ.

As far as the Bar in general, I believe that Blake Tartt has the experience and expertise to insure that the Bar has outstanding legislative advisors for the next legislative session.

Sincerely yours,

NELSON & WILLIAMSON

John Williamson

JW:lw

Enclosures

cc: The Honorable Blake Tartt, President
The Honorable Rene O. Oliveira
Mrs. Evelyn A. Avent

NELSON, WILLIAMSON & YAÑEZ

A C NELSON
JOHN WILLIAMSON
LINDA REYNA YAÑEZ

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TELEPHONE
(512) 546-7333

June 2, 1983

Mr. Jack Eisenberg, Chairman
Committee of Administration of Justice
P. O. Box 4917
Austin, Texas 78785

RE: Rule 792

Dear Jack:

This letter is written as a report on the action of the subcommittee you appointed in response to a letter from a Texas attorney concerning Rule 792. This rule requires the opposite party in a trespass to try title action, upon request, to file an abstract of title within twenty days or within such further time as the court may grant. If he does not, he can give no evidence of his claim or title at trial. The attorney suggests that the the obtaining of an abstract of title in a trespass to try title action should done under the discovery rules which govern other civil cases.

The subcommittee noted that bringing the action as a declaratory judgment or simple trespass action, would have such an effect.

The attorney who requested the change was contacted. It seems that his real concern is that Rule 792 operates as an automatic dismissal of the opposite party's claim or title unless the abstract of title is filed within twenty days or an extension is obtained. In Hunt v. Heaton, 643 S.W.2d 677 (Tex.1982), the defendant in a trespass to try title action answered the petition by answering not guilty and demanded that the plaintiff file an abstract of the title he would rely on at trial. The plaintiff did not request an extension of time to file the abstract. Five years after the demand and 39 days before the trial, the plaintiff filed an abstract. The supreme court upheld the trial court's refusal to allow the plaintiff any evidence of his claim or title.

The concern is that in a trespass to try title action Rule 792 operates to cause an automatic dismissal of the opposite parity's claim or title unless the abstract of title is filed within twenty day or an extension is obtained.

The subcommittee believes that the harshness of Rule 792 can be eliminated if, prior to the beginning of the trial, there must be notice and a hearing. Then the court may order that no evidence of the claim or title of such opposite party be given at trial, due to the failure to file the abstract. The following amendment is suggested for consideration:

71 -738

Rule 792. Time To File Abstract

Such abstract of title shall be filed with the papers of the cause within [~~twenty~~] thirty days after service of the notice or within such further time as the court on good cause shown may grant; and in default thereof after notice and hearing prior to the beginning of the trial, the court may order that no evidence of the claim or title of such opposite party [~~shall~~] be given on trial.

The attorney who wrote the letter requesting the changes would welcome the opportunity to address the committee in person.

Sincerely yours,

John Williamson

JW:ps

cc: Evelyn Avent
Jeffery Jones
Orville C. Walker

DYCHE & WRIGHT
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815 WALKER AVENUE
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HOUSTON, TEXAS 77002

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CABLE DYCHWRIGHT HOU
TELEX 792164
TELECOPIER 224-3824
(DIRECT LINE AFTER HOURS)

KARL C. HOPPESS

January 27, 1983

Honorable Jack Pope, Chief Justice
Supreme Court of Texas
Supreme Court Building
Post Office Box 12248
Austin, Texas 78711

Re: Rule 792 - Abstracts of Title

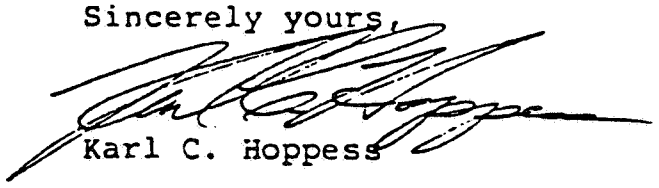
Dear Judge Pope:

Due to my active participation in the trial of land litigation matters, it has become apparent over the past years that in certain counties in Texas today the obtaining of an abstract of title is impossible unless prepared by the attorney himself. As an example, in Brazos County the Clerk no longer has the capability or the time to aid in the compiling of an abstract of title without the attorney having to personally pull all records, set up special dates, remove the records in the presence of the Clerk, make copies at his own location, and thereafter obtain the various indices of said documents and the appropriate certification, after having presented each of those documents and the recording legends to the Clerk. For this reason, although Rule 792, of course, expands the time for which an abstract can be filed in a trepass to try title case from twenty days to that which the Court finds reasonable, it appears to me that serious consideration should be given to the question of putting this discovery under the same rules as that related to other discovery. I am fully aware of the reason for Rule 792; however, in my opinion, the rule is more and more frequently used not for the purposes of discovery, but where the defense counsel is aware that the availability of the County Clerk's books and records are almost nonexistent and there are no abstract services available to plaintiff's counsel, especially if it involves issues of title of minerals, to harass and put undue pressure on plaintiff's counsel. This can be especially unjust and onerous when the defendant is a trespasser with little or no indicia of title. I am certainly in agreement that no one should be able to prosecute a trespass to try title action without proper facts and circumstances surrounding his right of title and that he should be prepared to prove that title to the exclusion

of all others. However, I feel that the urbanization of the State of Texas has created circumstances that are far removed from those that existed when Article 7376 was originally passed by the Texas Legislature and strong consideration should be given as to putting the plaintiffs and defendants on more equal footing regarding the discovery procedure in this type of action.

I congratulate you on your recent appointment as Chief Justice of the Court and extend to you best wishes from both myself and my father.

Sincerely yours,



Karl C. Hoppess

KCH/lsb

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January 9, 1986

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

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As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ 2

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

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Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

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Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
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00000634

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Delete "Art. 6101 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 23.001 of the Texas Property Code

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00000635

307

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LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

00000636

COAJ Ltr

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Enclosures

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Justice, Supreme Court of Texas

COAJ 2

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Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

00000640

Rule 808. These Rules Shall Not Govern When

Delete "Articles 7364-7401A, Revised Civil Statutes," and substitute:

sections 22.001-22.045 of the Texas Property Code

Rule 810. Requisites of Pleadings

Delete "Article 1975, Revised Civil Statutes," and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

Rule 811. Service by Publication in Actions Under Article 1975

In the caption delete "Article 1975" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

In line 1, delete "Article 1975, Revised Civil Statutes" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

810

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Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ 2c

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Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

0C300043

Rule 806. These Rules Shall Not Govern When

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sections 22.001-22.045 of the Texas Property Code

Rule 810. Requisites of Pleadings

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Rule 811. Service by Publication in Actions Under Article 1975

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811

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Enclosures

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Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

0C000646

Rule 806. These Rules Shall Not Govern When

Delete "Articles 7364-7401A, Revised Civil Statutes," and substitute:

sections 22.001-22.045 of the Texas Property Code

Rule 810. Requisites of Pleadings

Delete "Article 1995, Revised Civil Statutes," and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

Rule 811. Service by Publication in Actions Under Article 1995

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section 17.003 of the Texas Civil Practice and Remedies Code

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00000647

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WILLIAM A. BRANT, P. C.
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July 29, 1985

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

Dear Newell:

I may have overlooked, in the earlier assignments, referring to your committee the sticky subject of how depositions taken in one proceeding should be permitted to be used in other proceedings, and under what circumstances and safeguards. I would appreciate very much your committee doing that study, as we discussed today by telephone, and making the reports in writing on September 30, 1985, and orally on November 1 and 2, 1985, in open session.

As always, thank you for your interest.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat

00000648

UNIVERSITY OF HOUSTON LAW CENTER
HOUSTON, TEXAS 77004
713/749-1422

UNIVERSITY OF HOUSTON
LAW CENTER

February 18, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luther:

Herewith are two items for the agenda of the March 7-8, 1986, meeting of the Advisory Committee.

The first relates to art. 3737h, its amendment, repeal and replacement, all by the 1985 Legislature. The matter has been submitted to the members of the Evidence Subcommittee, Supreme Court Advisory Committee.

The second item is another attempt to solve the deposition problem dealt with both at the May 31, 1985 and November 1, 1985 meetings of the Advisory Committee. It involves Evidence Rules 801(e)(3) and 804(b)(1) and Civil Procedure Rule 207. Two alternatives labeled, respectively, "Package A--Depositions" and "Package B--Depositions" are attached. They have been submitted to the Evidence Subcommittee and to the Subcommittee on Pre-Trial and Discovery Rules 15-215a." See the final paragraph "Discussion" on each Package for summaries. It is suggested that the Committee first choose between the two packages and then make any desired improvements.

Yours truly,

Newell H. Blakely, Chairman
Evidence Subcommittee

cc: The Chief Justice and all
Justices, Supreme Court of Texas

All members of Supreme Court Advisory Committee

NHB:vcg

REGARDING TEX.REV.CIV.STAT.ANN. art. 3737h, "NECESSITY OF SERVICES AND REASONABLENESS OF CHARGES;" CIVIL PRACTICE AND REMEDIES CODE, sec. 18.001, "AFFIDAVIT CONCERNING COST AND NECESSITY OF SERVICES."

PROBLEM: Mr. Gary Beckworth, Attorney, Longview, on November 13, 1985, wrote to the Clerk, Supreme Court, stating:

> "This letter is written to make comment about the repealer of Vernon's Ann. Civ. St. art. 3737h as per Acts 1985, 69th Leg., p.7213, ch. 959, eff. Sept. 1, 1985.
>
> "It appears that the repealer in the amendment pursuant to Acts 1985, 69th Leg., p.4700-4702, ch.617, eff. Sept. 1, 1985, does not preserve for causes filed after September 1, 1985, the authority of Vernon's Ann. Civ. St. art. 3737h, Sec. 1(a).
>
> "It is hoped that the committee of the Court dealing with the Texas Rules of Evidence might preserve more clearly the benefit of said Section 1, Sub-Section (a)."

The Court referred the letter to the Advisory Committee.

RECOMMENDATION: The Advisory Committee recommends that the Supreme Court take no action in this regard because, as shown by the attached analysis, the legislature has taken care of Mr. Beckworth's concerns, and because 3737h and its successor, sec. 18.001, involve "sufficiency" and the Texas Rules of Evidence deal with "admissibility."

Reconciliation of certain acts of the 1985 Legislature relating to Tex.Rev.Civ.Stat.Ann. art 3737h, Necessity of Services and Reasonableness of Charges (Acts 1979, 66th Leg. p. 1778, ch. 721).

As a part of its continuing codification process, the 1985 Legislature enacted the new Civil Practices and Remedies Code (Acts 1985, 69th Leg. pp. 7043-7219, ch. 959). Section 18.001, Affidavit Concerning Cost and Necessity of Services, p. 7091, rewrote and replaced old art. 3737h. Art. 3737h is on the repealer list of ch. 959 at 7218.

New 18.001 made no substantive changes in 3737h. It was intended as a clearer rewrite. It went into effect September 1, 1985.

The 1985 Legislature also (Acts 1985, 69th Leg. pp. 4700-4702, ch. 617) amended old 3737h, making substantive changes. In particular, it changed notice time for the affidavit from 14 days to 30 days, notice time for the counter-affidavit from 10 days after receipt of affidavit, to 30 days after receipt but not less than 14 days prior to trial, and changed the qualifications of the counter-affiant. This amendment provided that it would take effect September 1, 1985 as to actions filed on or after that date. It provided that actions filed before that date would be governed by old 3737h, though tried after September 1, 1985.

Where did the 1985 Legislature leave things?

First, respecting cases filed September 1, 1985 and thereafter, and, of course, tried after September 1, 1985.

The new Government Code, Acts 1985, 69th Leg. pp. 3202-4090, chs. 479 and 480, and in particular section 311.031(c) and (d) at p. 3249, provides:

> "Section 311.031. Saving Provisions.
> (a). . .
> (b). . .
> (c) The repeal of a statute by a code does not affect an amendment, revision, or reenactment of the statute by the same legislature that enacted the code. The amendment, revision, or reenactment is preserved and given effect as part of the code provision that revised the statute so amended, revised, or reenacted.
> (d) If any provision of a code conflicts with a statute enacted by the same legislature that enacted the code, the statute controls. (V.A.C.S.Art. 5429b-2, Sec. 3.11.)"

This means that both 18.001 and the amendment to 3737h are in effect, that to the extent of conflict, the 3737h amendment controls (311.031(d).) Thus 18.001 is the basic applicable

language (311.031(c)), but must be read with the 3737h amendment superimposed (311.031(d).)

This in turn means that as to those cases, i.e., those filed on or after September 1, 1985, affidavit notice time is 30 days, counter-affidavit notice time is 30 days after receipt of affidavit, but not less than 14 days prior to trial, and that the counter-affiant must meet the higher qualifications required by the 3737h amendment.

Second, respecting cases filed before September 1, 1985 though tried after September 1, 1985.

The 1985 Legislature said: "An affidavit concerning the cost and necessity of services in an action filed before the effective date of this Act is governed by Chapter 721, Acts of the 66th Legislature, Regular Session, 1979 (Article 3737h, Vernon's Texas Civil Statutes), as it existed at the time the action was filed, and that law is continued in effect for that purpose." But, of course, the 1985 Legislature also said that 18.001 went into effect September 1, 1985.

Since there is no conflict in substance between 18.001 and old 3737h, one could read 311.031(c) as governing and 18.001 would be applicable to these cases. Or, one could say there is a substantive conflict, viz., regarding applicability dates. Under that interpretation, one could say that as to these cases only the language of old 3737h need be looked to.

Either way, one comes out the same. Whether under old 3737h unamended, or under new 18.001, notice dates and qualifications of counter-affiant are the same, i.e., 14 days for the affidavit, 10 days after receipt of affidavit to serve counter-affidavit, and the old information and belief for counter-affiant.

PACKAGE A - DEPOSITIONS

TEXAS RULES OF CIVIL PROCEDURE
Rule 207. Use of Depositions in Court Proceedings.

1. Use of Depositions. Depositions shall include the original or any certified copy thereof. Depositions are admissible in evidence subject to the Texas Rules of Evidence. Further, the Rules of Evidence shall be applied to each question and answer as though the witness were then present and testifying. A deposition taken in compliance with law shall have the status of a deposition whether offered in the proceeding in which taken or in another proceeding. Unavailability of deponent is not a prerequisite for admissibility. ~~[At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, insofar as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof.~~

~~2. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken, and, when a suit in a court of the United States or of this or any other state has been dismissed and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former suit may be used in the latter as if originally taken therefor.~~

~~3.~~ 2 Motion to Suppress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

TEXAS RULES OF EVIDENCE.
Rule 801. Definitions.
The following definitions apply under this article:
(a). . .
(e) Statements which are not hearsay. A statement is not hearsay if --
(1) . . .

(2) . . .

(3) Depositions. It is a deposition taken in compliance with law in the course of the same or another proceeding:

(i) if the party against whom the deposition is now offered, or his predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, or

(ii) if the party against whom the deposition is now offered has an interest similar to that of a party described in (i), and has had since becoming a party a reasonable opportunity to redepose deponent, and has failed to exercise that opportunity.

Unavailability of deponent is not a prerequisite to admissibility. ~~It is a deposition taken and offered in accordance with the Texas Rules of Civil Procedure.~~

Rule 804. Hearsay Exceptions; Declarant Unavailable.

(a). . .

(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness--

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, [~~or in a deposition taken in the course of the same or another proceeding~~] if the party against whom the testimony is now offered, or his predecessor in interest, [~~or a person with a similar interest~~] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Discussion of Package A

Package A eliminates distinctions between use of depositions in the same proceeding in which taken and use in different proceedings. There is no longer a need for procedure rule 207 to define "same" proceeding. Since unavailability of deponent is no longer a requisite, there is no longer a need for evidence rule 804(b)(1) to deal with depositions.

A party against whom a deposition is offered gets his protection from unfairness through the wording of 801(e)(3). The deposition is admissible against a person with a similar interest who was not a party when the deposition was taken if his interest was "represented." He can redepose if he cares to. But if he has no reasonable opportunity to redepose, the deposition is not admissible against him.

PACKAGE 15 -- DEPOSITIONS

TEXAS RULES OF CIVIL PROCEDURE.
Rule 207. Use of Depositions in Court Proceedings.

1. Use of Depositions in Same Proceeding.

a. Availability of Deponent as a Witness does not Preclude Admissibility of Deposition Taken and Used in the Same Proceeding. Depositions shall include the original or any certified copy thereof. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence [~~applied as though the witness were then present and testifying~~], may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying. Unavailability of deponent is not a requirement for admissibility.

b. Included Within Meaning of "Same Proceeding." Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken, and, when a suit has been brought in a court of the United States or of this or any other state [~~has been dismissed~~] and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken [~~and duly filed~~] in each [~~the former~~] suit may be used in the other suit(s) [~~latter~~] as if originally taken therefor.

c. If one becomes a party after the deposition is taken and has an interest similar to that of any party described in (a) or (b) above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose deponent, and has failed to exercise that opportunity.

2. Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Evidence. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying.

3. Motion to Suppress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and

irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

TEXAS RULES OF EVIDENCE
Rule 801. Definitions.
The following definitions apply under this article:
(a). . .
. . . .
(e) Statements which are not hearsay. A statement is not hearsay if --
(1). . .
(2). . .
(3) Depositions. It is a deposition [~~taken and offered in accordance with the Texas Rules of Civil Procedure~~] taken in the same proceeding, as same proceeding is defined in Rule 207, Texas Rules of Civil Procedure. Unavailability of deponent is not a requirement for admissibility.

Rule 804. HEARSAY EXCEPTIONS. DECLARANT UNAVAILABLE.
(a). . .
(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness --

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of [~~the same or~~] another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment. A deposition in some circumstances may be admissible without regard to unavailability of the deponent. See rule 801(e)(3), Texas Rules of Evidence, and Rule 207, Texas Rules of Civil Procedure.

Discussion of Package B

Package B is based on "Alternative #1" presented and discussed at the November 1-2, 1985 meeting. It melds in the wording suggested at that meeting and seeks to solve the late-on-the-scene party. It maintains the former distinction between depositions offered in the same proceeding and offered in a different proceeding. It makes clear the meaning of same proceeding.

UNIVERSITY OF HOUSTON LAW CENTER
HOUSTON, TEXAS 77004
713 749-1422

Evans reports 3737h0 handled by legislature and accordingly rejected.

UNIVERSITY OF HOUSTON
LAW CENTER

Janu

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Re: TEX.REV.CIV.STAT.ANN.
art. 3737h

Dear Luther:

I have your December 16, 1985 letter prompted by the letters from Mr. Gary Beckworth and Justice Wallace, all regarding Tex.Rev.Civ.Stat.Ann. art 3737h.

Mr. Beckwith is concerned that:

"It appears that the repealer in the amendment pursuant to Acts 1985, 69th Leg., P. 4700-4702, ch. 617, eff. Sept. 1, 1985, does not preserve for causes filed after September 1, 1985, the authority of Vernon's Ann. Civ. St. art. 3737h, Sec. 1 (a)."

I believe the legislature has taken care of his concern and that there is no need for action by the Advisory Committee or the Supreme Court. Please see the attached analysis.

I am sending copies of the analysis to our Evidence Subcommittee for criticism. Perhaps from response to that we can determine whether anything should be proposed for the March meeting of the Advisory Committee.

I might mention that 3737h came up at the 1984 meeting of the State Bar Committee on Rules of Evidence. That committee

decided that 3737h was best left to the legislature. 3737h involves "sufficiency" and the Texas Rules of Evidence deal with "admissibility." Those Rules have run from sufficiency problems.

Sincerely,

Newell H. Blakely, Chairman
Subcommittee on Evidence

cc: Justice James P. Wallace
Rules Member, Supreme Court of Texas

All members, Evidence Subcommittee, Supreme Court Advisory Committee:

Mr. Vester T. Hughes, Jr.
Mr. John M. O'Quinn
Mr. Tom Ragland
Mr. Garland Smith
Judge Bert H. Tunks
Mr. L.N.D. Wells, Jr.

NHB:vcg

Reconciliation of certain acts of the 1985 Legislature relating to Tex.Rev.Civ.Stat.Ann. art 3737h, Necessity of Services and Reasonableness of Charges (Acts 1979, 66th Leg. p. 1778, ch. 721).

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3737h

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December 16, 1985

Professor Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

Dear Newell:

Enclosed is a proposed change to Tex. Rev. Civ. Stat. Ann. art. 3737h, Sec. 1 (a) submitted by Gary Beckworth. Please draft, in proper form for Committee consideration appropriate change for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther Soules III

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

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