LHS III MASTER COPY

Meeting of the

Supreme Court Advisory Committee

September 12-13, 1986

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

UNIVERSITY OF HOUSTON LAW CENTER

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

All members, Supreme Court Advisory Committee

Justice James P. Wallace, Rules Member,
Supreme Court of Texas

FROM: Evidence Rules Subcommittee
Newell H. Blakely, Chairman NHB

DATE: September 3, 1986

RE: REPORT ON QUESTION OF POSSIBLE TRANSFER OF RULES 176 THROUGH 185, TEXAS RULES OF CIVIL PROCEDURE, TO THE RULES OF EVIDENCE

At the March 7-8, 1986 meeting of the Advisory Committee, it was requested that the Evidence Subcommittee consider whether Rules of Civil Procedure 176 through 185 should be repealed and incorporated in the Rules of Evidence.

At the March 7-8, 1986 meeting of the Advisory Committee, the Committee itself decided to recommend to the Court the repeal of Rule 184, Determination of Law of Other States, and of Rule 184a, Determination of the Laws of Foreign Countries, because those two rules already appear as Rules 202 and 203 in the Texas Rules of Evidence. It is assumed that respecting those two rules no action by the Evidence Subcommittee is called for.

With respect to the remaining rules under consideration by the Evidence Subcommittee, the Subcommittee recommends that no change be made. This attitude seems to stem largely from the belief that attorneys using these rules are accustomed to finding them in the Rules of Procedure, that if we leave things where they are now, it takes away all arguments based on the significance of change, and finally that there is no need for change.

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422

Sub C recommends "no change"

↓

Agreed Upon.

UNIVERSITY OF HOUSTON LAW CENTER

TO: Luther H. Soules, III, Cha
Supreme Court Advisory Con

All members, Supreme Court

Justice James P. Wallace,
Supreme Court of Texas

FROM: Evidence Rules Subcommitte
Newell H. Blakely, Chairma

DATE: September 3, 1986

RE: REPORT ON QUESTION OF PO
THROUGH 185, TEXAS RULE
RULES OF EVIDENCE

At the March 7-8, 1986 meeting of the Advisory Committee, it was requested that the Evidence Subcommittee consider whether Rules of Civil Procedure 176 through 185 should be repealed and incorporated in the Rules of Evidence.

At the March 7-8, 1986 meeting of the Advisory Committee, the Committee itself decided to recommend to the Court the repeal of Rule 184, Determination of Law of Other States, and of Rule 184a, Determination of the Laws of Foreign Countries, because those two rules already appear as Rules 202 and 203 in the Texas Rules of Evidence. It is assumed that respecting those two rules no action by the Evidence Subcommittee is called for.

With respect to the remaining rules under consideration by the Evidence Subcommittee, the Subcommittee recommends that no change be made. This attitude seems to stem largely from the belief that attorneys using these rules are accustomed to finding them in the Rules of Procedure, that if we leave things where they are now, it takes away all arguments based on the significance of change, and finally that there is no need for change.

The Subcommittee voted on the following propositions:

(a) That 176, 177, 177a, 178, 179 and 180 are purely procedural and should be left in the Rules of Civil Procedure. Vote result: 5 for status quo; 0 for change; 1 abstention; 1 not yet voting.

(b) That 185 involves sufficiency of evidence and pleading; that the Rules of Evidence deal with admissibility and have, by and large, avoided matters of sufficiency and pleading; that 185 be left in the Rules of Procedure. Vote result: 5 for status quo; 0 for change; 1 abstention; 1 not yet voting.

(c) That 181 and 182 can either be left alone or put into the Rules of Evidence. If the latter, a possibility would be to set them up as 610(d) and add to the title of 610 "Adverse Parties." Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

(d) That 182a could be left alone or could be made the last sentence in Rules of Evidence 601(b).
Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

(e) That 183 could be left alone or could be made the first sentence of Rules of Evidence 604.
Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

NB: Tom Ragland suggests that the Court recommend to publishers that they employ cross-referencing between the Procedure rules and the Evidence rules.

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

RULE 103 ~~OFFICER~~ WHO MAY SERVE

All process may be served by ~~the~~ any sheriff or ~~any~~ constable, or by any person ~~who is not a party and is~~ the not less than eighteen years of age ~~and is~~ who authorized appointed by ~~motion and~~ written court order. ~~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~~ person who is a party to or interested in the outcome of the suit shall serve any process ~~therein.~~, Service by registered or certified mail and citation by publication ~~[may]~~ shall, if requested, be made by the clerk of the court in which the case is pending.

In addition to the above,

COMMENT: Attorney Don Baker suggested that the district clerk's office be required to make service by mail, because many clerks' offices often decline to accomplish service by registered or certified mail and his proposed amendment is to remove from those clerks such discretion and to require the clerks to accomplish that service if requested.

Guillermo Vega, Jr., an attorney, and Edward S. Hubbard, attorney for the Texas Association of Civil Process Servers, suggested that Rule 103 be amended to allow such civil process servers to serve citations.

Move to amend Sub 3. with R. 106 (2)

RULE 103 ~~OFFICER~~ WHO MAY SERVE

All process may be served by [illegible] or by any person ~~who is not a~~ [illegible] eighteen years of age ~~and is~~ [illegible] ~~any county in which the party to b~~ [illegible] ~~mail, either of the county in whi~~ [illegible] ~~the county in which the party to~~ [illegible] ~~that~~ no ~~officer~~ who is a party to [illegible] of the suit shall serve any pr [illegible] registered or certified mail and c [illegible] shall, if requested, be made by the [illegible] the case is pending.

COMMENT: Attorney Don Baker [illegible] clerk's office be required to make [illegible] clerks' offices often decline [illegible] registered or certified mail and his proposed amendment is to remove from those clerks such discretion and to require the clerks to accomplish that service if requested.

Guillermo Vega, Jr., an attorney, and Edward S. Hubbard, attorney for the Texas Association of Civil Process Servers, suggested that Rule 103 be amended to allow such civil process servers to serve citations.

SUPREME COURT OF TEXAS ADVISORY COMMITTEE
AGENDA

September 12-13, 1986

1. 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.

2. Report of Judge Linda Thomas regarding the revision of Rules 8 and 10; Ray Hardy's letter regarding disposition of exhibits and Judge Frank Douthitt's proposal regarding 18a.

3. Discussion of Order of the District Court of Bexar County; Rule 165a.

4. Report of Sam Sparks (El Paso) regarding final form of Rules 103, 106, 107 and 145 and drafting of a rule permitting ruling on written motions if neither party asks for a hearing and permitting of telephone hearings if either party asks for a hearing. Sam Sparks also to report on Doak Bishop's input regarding Rule 188a.

5. Report of Professor J. Hadley Edgar on Rule 209.

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

7. Report of David Beck's subcommittee regarding Rules 277 - 295.

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

9. 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

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

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

12. Discussion of F.R.A.P. 10 proposed by Frank W. Baker

MINUTES OF THE

SUPREME COURT ADVISORY COMMITTEE MEETING

May 15, 16, 17, 1986

The Advisory Committee of the Supreme Court of Texas met on May 15, 1986, pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Professor Newell H. Blakely, Mr. Frank Branson, Honorable Solomon Casseb, Jr., Professor William V. Dorsaneo, III, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. John M. O'Quinn, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, and Honorable Allen D. Wood.

Upon motion by Harry Tindall, the minutes of the last meeting were unanimously approved.

In earlier discussions, the Committee voted unanimously to approve the changes suggested by Chairman Soules to Canon 3-C.

The Chairman then requested that Judge Casseb tender his opening remarks regarding the proposed Administrative Rules. Judge Casseb indicated that the draft that is now being circulated will be published in the June issue of the Texas Bar Journal and will be on the agenda for discussion at the State Bar Convention on June 18, 1986, in Houston.

Judge Casseb observed that there is a lot of opposition to the draft. Specific problems include the question of how to deal with cases already on the docket, courts that handle both criminal and civil cases, multi-county districts and allocations for instances where judges are on vacation. Judge Casseb has had written opposition to some commitments to reporting from district clerks.

Justice Wallace stated that he felt the Chief Justice intended that the Committee make sure that there was no conflict between the proposed rules and the current Rules of Civil Procedure.

Judge Casseb motioned that a subcommittee consisting of Chairman Soules, Mr. McMains, Professor Dorsaneo, and Professor Edgar be appointed to deal with the harmonization of the Administrative Rules with the Rules of Civil Procedure, and Mr. Lowe seconded the motion.

Mr. Soules requested that anyone else who would like to volunteer to be on this subcommittee, other than those in the motion, raise their hand. There were no other volunteers.

Mr. Beard indicated that he felt lawyers should not have to look in two different places and have additional requirements in the rules because of the possibility of mistakes being made and suggested that the Committee make reference and incorporate the Rules of Civil Procedure where there are already procedures.

Mr. Soules stated that the Committee had an opportunity, as a whole, to look at the Administrative Rules in full text, in session, together and that if the Committee preferred they be studied in subcommittee, that would be its perogative but it was his personal opinion that the Administrative Rules would not come before the Committee again.

By show of hands, the Committee voted that the meeting be adjourned and then re-convened at 1:00 p.m. and that, in the interim period of time, the subcommittee meet and study the Administrative Rules for conflict with the Rules of Civil Procedure. The philosophical aspects of the rules would then be discussed by the whole Committee. Two persons were opposed.

The subcommittee then convened, with members of the Committee not wishing to participate leaving the room.

The subcommittee decided to propose that the opening purpose paragraph of the Administrative Rules be numbered 1, and number the rest of the Rules consecutively after that.

Chairman Soules suggested that the subcommittee propose a Rule 11, that would state local rules shall not conflict with the Administrative Rules.

The subcommittee decided to propose that a rule allowing telephone conferences in lieu of hearings be encouraged.

Mr. McMains suggested that the Committee look at the attempt in the Administrative Rules to set timeframes, because of potential problems with scheduling of new and old cases.

The subcommittee identified certain conflicts between Administrative Rule 3-C and D and Rule 166 of the Rules of Civil Procedure. In particular, Rule 3-C4 conflicts with Rule 166-G. The 45-day provision conflicts with the 30-day provision in Rule 3-E concerning experts and other discovery under Rule 166-B.

There is a conflict between Rule of Civil Procedure 251 and Administrative Rule 4-H.

Mr. Tindall suggested that the language "domestic" "divorce" and "child custody" in Rule 4 be purged or modified.

The subcommittee decided to take up the issue of whether references to local rules should be omitted entirely from the Administrative Rules, particularly in Rule 4.

Professor Dorsaneo suggested cross-referencing Administrative Rule 5 with Rule of Civil Procedure 185.

The subcommittee agreed that the concept of a new "interruption docket" be discussed with the Committee.

The subcommittee saw no conflict with Administrative Rule 6 and Chairman Soules stated that the only place Administrative Rule 6 was mentioned was in Rule of Civil Procedure 18-A. Chairman Soules pointed out that in Rule of Civil Procedure 18-A, "district" should be changed to "region."

After discussion, the subcommittee decided that there were no conflicts between Administrative Rules 7 and 8 and the Rules of Civil Procedure.

The local rules section of Administrative Rule 9 was discussed.

After the whole Committee reconvened, the subcommittee reported on their findings.

It was agreed that the purpose paragraph be numbered 1 and that all other Rules then be numbered consecutively after that. The second sentence would say "It is intended that these rules be consistent with the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure shall govern in the event of conflict."

Chairman Soules assigned the question of where to insert a Rule regarding telephone hearings to Mr. Sam Sparks (El Paso); and deleting the reference to same from Rule 1 (purpose paragraph) of the Administrative Rules.

By show of hands, it was the consensus of the Committee that the phrases "within the periods of times listed" and "consistent with Texas Rules of Civil Procedure 1 and 2" be inserted within Administrative Rule 2. "Domestic actions" will be changed to "family law actions." It was suggested that a sentence also be added that states "That these time standards shall not apply to actions which are stayed, enjoined, abated or removed or in any other manner suspended from proceeding during the periods of any such suspension."

After considerable discussion, Chairman Soules asked how many were in favor of adding the language to Rule 3 that "cases pending would be deemed filed on the effective date of the rules" and that the "effective date of the rules be one year after they are promulgated by the Court to final form." By show of hands, 12 were in favor and 4 were opposed to the addition.

Mr. Tindall suggested that printed Rule 2 (what the Committee discussed as Rule 3) become Rule 6 and the rest of the Rules be numbered accordingly.

The language of Rule 3-C was changed to "within 30 days after the general appearance of the last defendant to appear." In C-3, the language would read "After the order was scheduled for the completion of discovery and preparation of the trial has been rendered."

After discussion, it was the general consensus that Rule 3-C should state "In the event additional persons become parties after the order for the schedule for the completion of discovery and preparation of trial has been rendered, then any party may, within 21 days from the day such additional persons make a general appearance, proposed changes in such schedule."

It was agreed that Rule 4 should read, in part, "As soon as reasonably practical after the time period for responding to a proposed plan has elapsed, the Court shall render and sign its written order, or if any additional parties are added, its amended order for completion and discovery, for preparation of trial and for trial setting. The clerk of the court shall immediately give notice by copy of the order to the parties or their attorneys of record by first class mail." It was the unanimous decision by the Committee that the Court should be required to deliver or mail an order.

Professor Edgar suggested changing the word "plan" in Rule 4 to "schedule." The Committee suggested that the wording change be adopted throughout the Administrative Rules.

Professor Edgar indicated that paragraph a in Rule 3 conflicts with Rule 245, dealing with the assignment of cases for trial generally, and that Rules 3, 4, and 5 should be inserted into the Rules of Civil Procedure. He suggested that the Court could abolish current Rule 245 and make Administrative Rules 3, 4 and ,5 Subdivisions A, B and C of new Rule 245. "A party may request a scheduling hearing, which the Court shall hold within 10 days of the request." and was numbered (5) under section C.

Rule 3e(2) conflicts with Rule 166-b(5)(b) It was agreed to change 166-b to 45 days and this one to 30.

Mr. Branson motioned to delete Subdivision 3h entirely as it conflicts with Rules of Civil Procedure 251, 252 and 254. Mr.

Lowe seconded it. Two members were opposed. After further extensive discussion, by show of hands, the vote was 7 to 2 to delete it. An alternative, as suggested by Professor Edgar, would be "All motions for continuance of the trial dates shall be in writing and shall contain a statement by counsel that a copy has been mailed or delivered to the client. The motion hall comply with the applicable Texas Rules of Civil Procedure."

Mr. Soules reported on the changes made by the subcommittee: changed "family law" into "title", delete the provisions to local rules in F and G so that all family law matters are controlled by rule 4 and not by variance of various local rules.

In Rule 4c(3), the words "child custody" were changed to "conservatorship" C-3.

Under Rule 5b(3) "entry of judgment" was changed to "defer signing of judgment."

Under Rule 5c(2) the word "entry" was changed to "signing."

A statute reference for 200-A in Administrative Rule 7 will require revision whenever it it codified.

If Administrative Rule 8 is adopted, there will be a necessity for a change in Rule of Civil Procedure 18(d).

It is on record that the subcommittee has a question as to whether or not 8e applies to all budgeting in all courts or with just the budgeting for the Administrative Region.

In Rule 9, in the third line from the bottom, the subcommittee recommended deletion of the phrase "to be in effect."

The subcommittee recommended the following language for Rule 9c: "The local administrative judge will submit the local rules adopted by their courts to the presiding judge of the administrative region for review, comment and approval before they are furnished to the Supreme Court for approval pursuant to Tex R. Civ. P. 3-A."

The subcommittee recommended that the word "local" be inserted in the title of Rule 10 before the word "rules."

The subcommittee recommended that an "i" subparagraph that states "Local rules shall not conflict with these rules." be added to Rule 10.

The Chairman then opened the floor for philosophical discussions concerning the proposed Administrative Rules. Mr. Tindall talked about the disposition rates and family law matters and discussion ensued.

Mr. Branson moved that the Committee vote to reject Dean Friessen's proposal in toto and Mr. Lowe seconded it. By show of hands, nine members voted to reject the rules, one voted to approve them and two members, including Chairman Soules, abstained from voting.

The Committee met at 8:45 a.m. on Saturday, May 16, 1986, and the following members were in attendance: Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Mr. David J. Beck, Professor Newell H. Blakely, Mr. Frank Branson, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace and Honorable Allen Wood.

The Chairman made opening remarks concerning the distress warrant rules and garnishment statutes and rules and ex parte receiverships and the Committee's rejection of the proposed Administrative Rules the day before. He also addressed the harmonization of the Criminal and Civil Appellate Rules of Texas. The appellate rules have been signed by both courts, have been promulgated, and will become effective on September 1, 1986.

Concerning Rule 18a, the Committee decided that the 215 series should be the span of sanctions. It was suggested that the standard should include "for the purpose of delay, without sufficient cause and resulting in delay", and that all three of those should be present. A vote was taken regarding the standard and the Committee voted in favor of same, with the exception of Judge Thomas, who voted against it. It was determined that the final rule should read "If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215-2(b)."

Sam Sparks (San Angelo) moved that 18a(h) not be recommended for adoption and Mr. Morris seconded. There was a unanimous vote that Sam Sparks' motion be turned down. After further discussion, Chairman Soules requested that the Committee go on and then come back to this rule.

After discussion, the Committee voted unanimously to reject 27a, b and c, recommended by the COAJ.

Professor Edgar moved to reject Rule 72 as presented by Jeremy Wicker. By show of hands it was unanimously rejected.

Mr. Beard moved that proposed Rule 99 be rejected. Chairman Soules changed it to read "When a petition is filed with the

clerk, the clerk shall promptly issue such citations as shall be requested by any party or its attorney. The clerk shall promptly deliver such citations to any persons designated by the requesting party or his attorney, or in the absence of such designation, the clerk shall deliver such citations according to the clerk's ordinary course of proceedings." On a show of hands, three members favored leaving "or his attorney" and six members were opposed. It was a unanimous view that the first sentence entitles a party to as many citations as that party wants to pay for against any given defendant. Rule 99 was then unanimously approved for recommendation for adoption as changed.

The Committee then discussed at length the proposals under Rule 103, 106, and 107. Mr. Sparks (El Paso) will take the comments of the Committee concerning these rules and will draft proposed rules in final form for the September meeting.

After a motion by Professor Edgar and a second by Mr. Sparks (El Paso), the Committee voted unanimously to reject Representative Patricia Hill's suggestion concerning Rule 107.

It was unanimously voted to delete the second sentence of Rule 142, and recommend for adoption the remainder of the Rule.

The Committee then considered a proposed change to Rule 145 by the Gulf Coast Legal Foundation. After discussion, the Committee unanimously voted to recommend for adoption Rule 145 after striking "or appeal" on the first line of the paragraph and in paragraph 1 under "procedure" of the first line striking "or appeal", leaving the word "and" and striking the rest of that sentence and inserting the language from the present rule that says after the word "and" the words "perform all other services required of him, in the same manner"; then stopping after "docket the action" and picking up the old rule "issue process and perform all other services required of him in the same manner as if security had been given" and deleting the taxing against the defendants. Sam Sparks (El Paso) will study how this rule dovetails into the justice courts and will rewrite the rule using the above recommendations for consideration in September.

The Committee voted unanimously to recommend for adoption the proposed change to Rule 162 and to redraft Rule 164, with "no order required" language in both Rules.

Mr. Morris moved that Rule 165a as proposed by Judge Nelson, be rejected, Mr. Sparks (San Angelo) seconded the motion and the Rule was unanimously rejected by show of hands.

Rule 166b was unanimously approved.

Mr. Sparks (El Paso) moved for rejection of the COAJ's recommendation regarding Rule 166f and Mr. McConnico seconded it. The proposal was unanimously rejected by show of hands.

Chairman Soules suggested that the Committee attempt to write a rule permitting ruling on written motions if neither party asks for a hearing and also permit telephone hearings if either party asks for a hearing. By a show of hands, eight members were in favor and one member was opposed.

Chairman Soules suggested that Mr. Sparks (El Paso) send proposed Rule 188-A to Doak Bishop for his input and guidance.

The Committee voted unanimously to approve the changes suggested by John Wright to Rule 201, after re-editing by Mr. Sparks (El Paso) and Mr. Tindall.

With reference to the requests of Charlie Haworth, Harris Morgan and Tom Ragland regarding to Rule 204(4), the Committee voted unanimously by show of hands that its previous action would stand.

The suggestions for changes to Rule 205 by Charles Matthews and George Hickman were unanimously recommended for adoption.

Professor Newell Blakely moved that Rule 207, as drawn up by him, be recommended for adoption and Mr. Branson seconded the motion. The Committee approved the recommendation for adoption of Rules of Evidence 801 and 804 and Rule of Civil Procedure 207, with "an interest similar" being changed to "a similar motive to develop the testimony by direct, cross or indirect examination", by show of hands, twelve to one.

After discussion, it was decided that Tom Ragland's suggestion for a new Rule 209 be incorporated into an order for the Supreme Court to hand down regarding disposition of deposition transcripts. Professor Edgar will draft a proposed order and will report to the Committee with his findings at a later date.

It was unanimously voted to recommend the adoption of the addition of the sentence "The burden of establishing good cause is upon the offeror of the evidence and good cause must be shown in the record" to Rule 215-5.

Rule 215-2 was unanimously rejected by show of hands.

The proposed amendments to Rules 239a and 306a(3) submitted by Professor Jeremy Wicker, Charles M. Jordan and I. Nelson Heggen were unanimously rejected.

The suggested changes to Rule 169 were rejected unanimously by show of hands.

By show of hands, the Committee voted unanimously to recommend adoption of Rule 167(3) after the insertion of the phrase "If objection is made to a request or to a response,

either party may...", deletion of the second sentence, and retainage of the third and final sentence.

It was voted by the Committee that, under Rule 167, (5) will become (3), (3) will become (4) and (4) will become (5) and that the language of (3) will be "The original of such request or response shall be maintained by the party receiving same and shall be available for copying and inspection by other parties to the suit. A party serving a request under this rule shall not file such a request or response with the clerk of the court unless the Court upon motion and for good cause permits the same to be filed." The title of (3) will be "Custody of Originals by Parties." After discussion, it was voted, ten to one, that the originals be kept by the originating attorney. It was unanimously decided that new (4) shall read "Order. If objection is made to a request or to a response, either party may file a motion and seek relief pursuant to Rules 166b or 215.

The Committee reconvened on May 17, 1986. Those persons in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Mr. David J. Beck, Professor Newell H. Blakely, Mr. Frank Branson, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, Honorable Allen Wood.

Chairman Soules turned the meeting over to Professor Edgar to enable him to report on his subcommittee's findings regarding proposed Rule 364-A. Professor Edgar stated that, after review, the subcommittee was of the opinion that a rule of this nature was desirable; that the philosophy of allowing the Court to, in certain cases, not require a supersedeas bond of the type now in effect was a desirable rule. Professor Edgar then opened the matter for discussion.

Mr. Branson opposed the Committee discussing proposed Rule 364-A at this time because he didn't think it appropriate considering the high percentage of members of the Committee who have involvement with the outcome of the Pennzoil v. Texaco litigation.

Chairman Soules, an attorney of record for Pennzoil, and Judge Woods withdrew from the discussion and left the room. Other committee members remained to further consider the proposed rule.

After considerable discussion, Mr. Adams moved that proposed Rule 364-A be rejected and Mr. Beard seconded. Mr. Beck and Mr. McMains abstained. Chairman Soules and Judge Woods remained out of the room. The motion passed, eight to four.

Chairman Soules returned to the room and resumed the chair.

Chairman Soules then directed comments to the Committee regarding Administrative Rules 3, 4, and 5, and their possible placement into the Rules of Civil Procedure should be addressed by the Committee.

After discussion, the Chairman asked the Committee if the Court would be better informed if public hearings were held around the State rather than the one hearing in Houston. The Committee recommends hearings around the State.

The Committee unanimously voted in favor of proposed Rule of Civil Procedure 8. Judge Thomas will rewrite the rule in clear language and present it to the Committee for final approval in September.

The Committee unanimously voted in favor of proposed Rule 10, subject to rewriting by Judge Thomas' committee in conformance with the Committee's comments.

It was moved by Mr. Sparks (El Paso) that proposed Rule 10-A be rejected, with a second from Mr. Beard. The Committee, by show of hands, unanimously rejected proposed Rule 10-A.

Mr. Beard moved to reject proposed Rule 10-B and Mr. Sparks (El Paso) seconded. By show of hands, the Committee voted unanimously to reject proposed Rule 10-B.

The Committee voted unanimously to adopt the proposed changes to Rule 3-A as stated on page 103 of the meeting booklet.

Mr. Branson moved and Judge Thomas seconded that Bruce Pauley's proposed amendment to Rule 13 be rejected. The Committee voted unanimously to reject same.

Rule 14c was rejected by a show of hands, eight to four.

Professor Blakely addressed the Committee regarding 3737-h. He suggested to the Committee that it recommend to the Supreme Court that the legislature has attended to Mr. Beckworth's concerns and take whatever action it feels necessary regarding that. His suggestion was seconded by Professor Edgar and the Committee unanimously voted to reject the suggestion by Mr. Beckworth because it feels the Legislature has handled the problem.

Proposed Rule 366a was rejected on a show of hands, eight to four.

Mr. Beard moved that the Committee recommend for adoption the amendments to Rules 503, 657 and 621-A, Mr. McConnico

seconded the motion, and the Committee voted unanimously to recommend same.

Mr. Beard moved that Jay Vogelson's proposed new Rule 37 be rejected and Professor Edgar seconded. By show of hands, the Committee unanimously rejected proposed new Rule 37.

John Pace's recommendations concerning Rules 621-A and 627 were rejected unanimously.

The Committee voted to change the time period in Rule 680 to a 14 day time period by show of hands, five to three. All other suggestions from Judge William Martin regarding Rule 680 were unanimously rejected. Rule 683 was unanimously rejected.

David Keltner's proposed change to Rule 685 was unanimously rejected.

Rule 696 was unanimously adopted.

The meeting of the Supreme Court Advisory Committee was adjourned at 12:30 on May 17, 1986. The Committee will next meet on September 12, 1986, from 8:30 a.m. to 5:30 p.m and on September 13, 1986, from 8:30 a.m. to 1:00 p.m.

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.

00000013

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

00000044

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

P.H/ba

00000015

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.

RAY SHIELDS
COURT REPORTER

LINDA BURLESON
COURT COORDINATOR

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT
ARCHER, CLAY AND
MONTAGUE COUNTIES

P. O. BOX 530
HENRIETTA, TX 76365—0530

AREA CODE 817
538-5913

May 21, 1986

Luther H. Soules, III
800 Milam Building, East Travis at Soledad
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee

Dear Luke:

Thanks for your list of the members of the above committee. I was in the State Bar Center at the same time as your meeting and ran into Frank Branson. He invited me to come in and talk to the Committee about my problem, but we were so busy with Pattern Jury Charges I, I never got in.

From looking at the Committee it's obvious that very few of the Committee members practice in a multi-county district court. Because of that, I want to make one more short comment about the two matters I have brought to the Committee's attention in the past. One has to do with recusal practice and the other with time table for filing the record in appellate courts. Both are problems in rural districts. Apparently, they are not such a problem in an urban district. I believe I know why.

182 RECUSAL PRACTICE

My original proposal was that the lawyer be required to swear to a Motion for Recusal setting forth with particularity the reasons he seeks to recuse a judge. That the rule be changed (and probably the statute) to permit the judge that the recusal is directed against to summarily deny it if it does not state a proper cause for removal.

In an urban area, there are many judges in the courthouse and a judge can simply get one of them to come hear the recusal motion. It creates no problem. In a rural area, we have to get a judge from somewhere else assigned. The recusal has to wait until that judge can be there and until the judge against whom the recusal is directed can be available in the county that the recusal is filed in. He may have to recess a jury trial in another county in order to meet the visiting judge's schedule, or make some other kind of docket change. Usually, the recusals that I see are actually made for the purposes of delay and that is obvious. If the lawyers had to swear to these, they wouldn't file them except when they were true. They would not then be summarily denied by the judge against whom they are directed.

A couple of years ago when my daughter was showing heifers, we had a show in Tucumcari, New Mexico followed by one in Cheyenne, Wyoming. Because a recusal that did not state proper grounds had been filed in a criminal case, set for jury trial the week following the calf shows, I had to make a trip from Tucumcari back to Henrietta when a visiting judge could be here so I could have the hearing on the recusal. I then went on to Cheyenne to be with my daughter showing heifers. If I had not done that, the case would not have gone to trial the week in question.

I am probably the only judge that ever had to make that kind of a trip because of a recusal practice, but it's ridiculous to have rules that permit lawyers to use recusals for continuances.

394
R 386

APPELLATE TIME TABLE

Luke, I am not going to go into any further detail about the rules themselves and the time table. From the transcript furnished me of the meeting, the Committee understands that. What they don't understand, is that the rules permit a lawyer to perfect an appeal and request the statement of facts as

little as 10 days prior to the time it's due in the Appellate Court. I don't know of any court reporter except those with a CAT who can get out a record in 10 days if he's got any business in his courthouse. It's a bigger problem in the country because if you have 30 minutes or an hour of dead time in the court, and you are in the city, the court reporter is always at his office and can simply go in and type during that time period.

In the country, my court reporter is with me in the other two counties and the office is in Clay County. If we are sitting idle for an hour in Montague, he cannot be working on that record.

There is no problem with the 60 days permitted if the lawyer has to notify the court reporter timely and there is no problem with the additional time period in the event of a motion for new trial. However, it just makes sense that a court reporter ought to have at least 30 days to get a statement of facts ready.

If the rule is not going to be changed, I think the appellate judges should quit going to the conferences and complaining about court reporter delay when the Supreme Court's own rules create some of the problem.

Luke, my feeling about these two matters is really not much different than a lot of other things. The Legislature very seldom thinks about those of us out here that have got miles and miles between courthouses. I guess those drafting the rules seldom do either. I don't know all the details of how your committee operates. However, I obviously have not been able to articulate the problem well by letter and probably haven't improved on it much with this letter. If the Committee ever takes testimony from individuals about these matters, I would certainly like to appear. Based upon the transcripts you have furnished me with respect to both of these matters, I do not think the problem that exists

for rural judges is being addressed. I know the rules should not be tailored just to fit the rural judges. However, they should not be drafted ignoring us either.

Luke, I appreciate your consideration of this matter and if I can do anything further to at least get the real issues discussed, I would appreciate hearing from you.

Sincerely,

Frank J. Douthitt

FJD:lb

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

August 19, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

RE: Report on Rule 165a

Dear Sam:

Enclosed are some documents showing the success of the Dismissal for Want of Prosecution procedures that have been pursued by Bexar County. In FYE August 31, 1985, the total cases in Bexar County increased by only 1,000 in the face of 26,338 new filings on top of a back log of 44,052 pending cases, for a virtual "zero growth." In the first 10 months of FYE August 31, 1986, i.e. through June 30, 1986, the total number of pending cases had been reduced from 45,038 to 37,291, i.e. by a factor of just over 17%. Seventy-one percent of the cases disposed of in June were 18 months or less in age, while 39% were over 18 months. While disposing of a heavy percentage of old cases, the newly filed cases are still getting attention as well. In recent years before the implementation of the Dismissal for Want of Prosecution procedures, our courts were reasonably holding their own through effective utilization of a well organized central docket. I do not advocate the central docket for all districts, but do bring this to your attention as to how the central docket can work to dispose not only of recently pending cases but also older cases that are the subjects of an absence of prosecution by the parties.

You may want this information in connection with your upcoming report.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII:gc
Enclosures

cc: Judge Raul Rivera
Judge Joe Kelly
Judge Solomon Casseb, Jr.

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

July 14, 1986

TO ALL MEMBERS OF THE SUPREME COURT ADVISORY COMMITTEE:

Enclosed for your information is a copy of:

(1) Order of the District Courts of Bexar County, Texas For Dismissal for Want of Prosecution of Ad Valorem Tax Cases Filed Prior to January 1, 1980, signed by Judge Raul Rivera on April 9, 1985;

(2) Joint Order of the District Courts of Bexar County, Texas, Concerning Dismissal for Want of Prosecution or Alternative Pretrial Procedure for Civil Cases Filed Prior to January 1, 1983, signed by each of the Civil District Court Judges.

I have included same for discussion on our September agenda under Rule 165a and request that Sam Sparks (El Paso) make a Subcommittee report critiquing this as a method to dispose of pending case backlog. Judge Solomon Casseb, Jr., should be consulted for input.

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

00000024

As Signed 4-9-

ORDER OF THE DISTRICT COURTS OF BEXAR COUNTY, TEXAS
FOR
DISMISSAL FOR WANT OF PROSECUTION OF AD VALOREM
TAX CASES FILED PRIOR TO JANUARY 1, 1980

Political subdivisions having ad valorem taxing authority over property situated in Bexar County, Texas, filed certain suits to collect delinquent taxes prior to January 1, 1980, of which approximately 5,000 remain pending as inactive cases and should be dismissed for Want of Prosecution for the following reasons:

1. Most of the cases were filed by either the City of San Antonio or the County of Bexar and all of the cases so filed pertaining to ad valorem taxes remaining delinquent and unpaid as of January 1, 1980, have been refiled and superseded in lawsuits reinitiated by separate filings on or after January 1, 1980, and no rights to collection of the subject taxes are diminished by dismissing these cases.

2. All other pending ad valorem tax cases filed prior to January 1, 1980, and not since refiled, have been inactive for over five (5) years with no indication from the pertinent taxing authorities of intent to pursue same. In any event, no rights to collection of the subject taxes are diminished by dismissing these cases because any such cases having merit and deserving pursuit can be refiled without payment of filing fees and without substantial risk of expiration of lengthy limitations periods generally applicable to such suits.

3. These numerous pending cases are unnecessarily burdensome to the District Courts and District Clerks and costly to the County to retain in that: (a) the papers must be kept retrievable as active files, (b) the pending dockets of the Courts appear statistically distorted, (c) the disposition of pending cases by the Courts appears statistically distorted, (d) the cost of maintaining these inactive pending cases has no offsetting benefit and should be avoided, and (e) microfilming these files upon dismissal and subsequent destruction of the paper files will free physical space critically needed by the District Clerk for storage of active litigation files.

It is accordingly ORDERED that:

The District Clerk shall give notice by publication on four separate occasions of dismissal for want of prosecution of all ad valorem tax suits filed prior to January 1, 1980, and shall further give written notice directly to all political subdivisions having ad valorem taxing authority over property of any kind situated in Bexar County, Texas, delivered or mailed to the highest official of each such political subdivision with instructions that such notice be forwarded to current attorneys for such subdivision.

Thirty (30) days after the last notice is given as above provided, all cases not individually set for immediate trial with notice of such setting given to the District Clerk by certified mail, return receipt requested, will be dismissed for want of prosecution by blanket order dismissing all pending ad valorem tax cases filed prior to January 1, 1980, excepting only those so set for trial with such notice to the District Clerk given by individual cause number.

At any time following the expiration of thirty (30) days after the dismissal, and compliance by the District Clerk with all necessary legal prerequisites,

the contents of the files of the cases may be micro-filmed and the paper files and contents may be destroyed.

SIGNED December ____, 1985.

RAUL RIVERA, Administrative Judge
District Courts of Bexar County,
Texas

00000026

JOINT ORDER OF THE DISTRICT COURTS OF THE JUDICIAL DISTRICTS OF BEXAR COUNTY, TEXAS, PURSUANT TO TEX. R. CIV. P. 165a AND 166 CONCERNING DISMISSAL FOR WANT OF PROSECUTION OR ALTERNATIVE PRETRIAL PROCEDURE FOR CIVIL CASES FILED PRIOR TO JANUARY 1, 1983

At joint conference of the District Judges of the several Judicial District Courts of Bexar County, Texas, Honorable David J. Garcia, District Clerk, at the request of the District Judges, reported that of the civil cases filed with the District Clerk of Bexar County, Texas at any time prior to January 1, 1983, there are currently 10,340 civil cases and an additional number of ad valorem tax cases all remaining pending and unresolved in these District Courts, as follows:

Year Filed	Number of Cases Pending
Prior to 1975	478
1975	167
1976	410
1977	442
1978	416
1979	1,067
1980	2,268
1981	2,399
1982	2,693

STATE OF TEXAS
COUNTY OF BEXAR
I, DAVID J GARCIA
DISTRICT CLERK OF BEXAR COUNTY
Texas, do hereby certify that the foregoing is a true and correct copy of the original record now in my lawful custody and possession, as appears of record in Vol. 5464 pages 706-710
witness my hand and seal of office
this 17th day of June 1983
DAVID J. GARCIA
District Clerk Bexar County, Texas
By Janet Cheshire Deputy

said report having been made pursuant to assessing need and establishing a plan for disposition of all pending pre-1983 civil

00000027

cases. District Clerk Garcia further reported that all District Courts are current on civil cases filed during and since 1983 since civil cases have been posted into computers and accordingly subject to more readily available information for judicial management. The Courts have determined jointly that the pre-1983 cases are proper cases for review as to dismissal for want of prosecution pursuant to Tex. R. Civ. P. 165a, and that any cases not dismissed for want of prosecution are proper cases either (a) where service is complete for immediate pretrial pursuant to Tex. R. Civ. P. 166 and disposition by trial or, (b) where service is incomplete, for immediate service pursuant to Tex. R. Civ. P. 106 or substitute service of process pursuant to Tex. R. Civ. P. 108a, 109, 109a, or 116, followed by prompt pretrial and trial.

It is, accordingly, ORDERED jointly by the 37th, 45th, 57th, 73rd, 131st, 150th, 166th, 224th, 225th, 226th, 285th, and 288th Judicial District Courts of Bexar County, Texas, as follows:

1. APPOINTMENT OF JUDGES PRESIDING: Honorable Solomon J. Casseb, Jr., 57th Judicial District Judge, Retired, and Honorable Eugene C. Williams, 131st Judicial District Judge, Retired, (the "Assigned Judges Presiding"), are assigned to sit in designated Judicial District Courtroom of Bexar County, Texas, (the "Courtroom") for the purposes of conducting hearings for dismissals for want of prosecution, ordering service or substitute service of process, entering pretrial orders, and conducting trials on the merits to conclusion, of all pre-1983 civil cases pending in all Judicial District Courts of Bexar County, Texas, with a goal towards disposition of same prior to May 31, 1986. The Assigned Judges Presiding shall for all purposes of this Order sit simultaneously and preside in all of these Judicial District Courts of Bexar County, Texas.

00000548 766

2. SCHEDULE TO CALL CASES: Beginning with the oldest cases first, and proceeding from those to the most recent cases, during the forthcoming ten month period ending July 31, 1986, all pending cases in all Judicial District Courts of Bexar County, Texas, filed prior to January 1, 1983, will be set in the Courtroom by any one or more of the Assigned Judges Presiding for hearing on the issue of dismissal for want of prosecution ("Dismissal Hearing") to be called fifteen (15) cases or more per hour every hour on the hour at 9:00 a.m., 10:00 a.m., 11:00 a.m., 2:00 p.m., 3:00 p.m., and 4:00 p.m., on every business day exclusive of legal holidays, and shall thereupon be dismissed for want of prosecution unless it is determined in the discretion of one of the Assigned Judges Presiding that there is good cause for cases, as individually considered, to be maintained on the docket of the Court pursuant to prompt pretrial and trial. All proceedings for dismissals for want of prosecution shall be conducted in accordance with Tex. R. Civ. P. 165a.

3. ABSENCE OF SERVICE OF CITATION: In event that one of the Assigned Judges Presiding should determine on showing by a party that a case should be maintained on the docket because it is reasonably possible for the plaintiff to perfect service of process, that Assigned Judge Presiding shall forthwith order that service of process be accomplished within a period not to exceed sixty (60) days and, where appropriate, shall enter an order permitting substitute service by any available means; if service is not perfected within the prescribed period, any Assigned Judge Presiding may, upon motion and for extreme good cause shown, extend the period for service, otherwise the case shall be dismissed for want of prosecution; if service is

00000029

perfected, immediately upon service of process the case shall become subject to the default judgment procedure set forth in paragraph 4 if no answer is filed or to the pretrial procedure set forth in paragraph 5 hereinbelow if answer is filed. When any citation is sought by publication the proceeding shall be governed by the provisions of Tex. R. Civ. P. 109 and an affidavit pursuant to that rule shall be filed at or prior to the Dismissal Hearing, by the party seeking to retain the case on the docket, his agent, or attorney, setting forth in detail the facts of diligence exercised in attempting to ascertain the residence or whereabouts of all necessary defendants or to obtain service of non-resident notice, sufficient to authorize the Court to approve the issuance by the Clerk of citation for service by publication, and sufficient further to negative the reasonableness of any other form of substitute service of citation pursuant to Tex. R. Civ. P. 106, 108, 108a. Absent sufficient showing at the Dismissal Hearing to reasonably assure that Rule 106 service can be promptly made or to support substitute service or service by publication or otherwise, cases in which defendants are not served shall be dismissed for want of prosecution. Parties pursuing substitute service are directed to timely comply with the provisions of 4.B. set forth below.

4. DEFAULT JUDGMENTS:

A. Wherever shown by a party to be proper pursuant to Tex. R. Civ. P. 239 and 241 the Assigned Judge Presiding shall render and sign proper forms of default judgments presented at the Dismissal Hearing; where Tex. R. Civ. P. 243 is applicable, proof of damages shall be made at the Dismissal Hearing whereupon the

Assigned Judge Presiding shall render and sign proper forms of judgments presented at the Dismissal Hearing; absent the presentment of a proper form of judgment and absent such proof where necessary the case shall be dismissed for want of prosecution at the Dismissal Hearing.

B. In addition to the provisions set forth above in 4.A., wherever any defendant has been cited by publication the plaintiff must secure, by order of an Assigned Judge Presiding, the appointment of an attorney ad litem pursuant to the provisions of Tex. R. Civ. P. 244 prior to the Dismissal Hearing and have the attorney ad litem present at the Dismissal Hearing to comply fully with Tex. R. Civ. P. 244, otherwise the case shall be dismissed for want of prosecution at the Dismissal Hearing; in this connection, all costs of court for reasonable attorneys fees allowed by the court to the attorney ad litem shall be taxed against and promptly paid by plaintiff and an attorney ad litem shall be issued a writ of execution therefor against any plaintiff who does not promptly make such payment.

5. PRETRIAL ORDER: When service of process has been completed in a case and answers are filed, and it is determined in the discretion of any of the Assigned Judges Presiding that said case should be maintained on the docket, the Presiding District Judge shall thereupon enter an order pursuant to Tex. R. Civ. P. 166 scheduling all pretrial matters and further setting the case for trial upon the merits within four months whether by trial to the Court or trial by jury. All proceedings in connection with the pretrial procedure shall be conducted pursuant to Tex. R. Civ. P. 166 and the Court shall, immediately following the Dismissal

Hearing, if the Court there concludes that the case should be maintained for trial, render and sign an order as follows:

(a) All time periods hereinafter set forth commence on the date, i.e., the date of the Dismissal Hearing or the date of service of citation and answer by defendants as certified by the District Clerk whichever is later.

(b) All dilatory pleas and all motions and exceptions relating to the case will be filed on or prior to the expiration of seven (7) days and immediately set by the party for hearing on or prior to the expiration of fourteen (14) days, otherwise the same shall be deemed waived.

(c) Plaintiff's Amended Original Petition, if any, shall be filed on or prior to the expiration of 21 days, Defendant's Amended Original Answer, if any, shall be filed on or prior to the expiration of 28 days. No amendment of pleadings will thereafter be permitted.

(d) If a jury trial is desired, a jury fee if not already paid will be paid on or prior to the expiration of 28 days otherwise, jury trial shall be deemed waived, and all requested special issues will be submitted by all parties, on or prior to the expiration of 28 days otherwise, the right to request special issues shall be deemed waived; in event the parties do not desire a jury trial, all issues that the parties will try will be succinctly stated and filed with the Court on or prior to the expiration of 28 days and any issues

not submitted will be deemed waived. Any supplemental pleadings of the parties, together with a statement by every party identifying the name, location, and telephone number of every person having knowledge of relevant facts, including experts, and identifying by name, address, telephone number, subject matter, and substance of opinion every witness who will or may be called at trial in whole or in part to express an opinion on any matter shall also be filed on or prior to the expiration of 28 days. Pleadings may not thereafter be supplemented and persons and expert witnesses not so identified may not testify at any trial.

(e) If a jury fee is paid, and special issues are requested, all requests for instructions and definitions shall be submitted on or prior to the expiration of 35 days, otherwise such requests shall be deemed waived.

(f) All discovery will be completed on or prior to the expiration of 70 days: In this connection, pursuant to the provisions of Tex. R. Civ. P. 215(3), the Assigned Judge Presiding shall order in all cases the harshest permissible sanctions against parties and attorneys in circumstances where discovery abuses occur which tend to delay trials or interfere with timely preparation for trials; default judgments against defendants and dismissals against plaintiffs are to be considered in all such cases and granted wherever supported by the circumstances.

00000033

VOL 5481 PAGE 709

(g) Trial on the merits shall commence on or prior to the expiration of 84 days.

(h) The time periods set forth in the order may be modified or extended by any Assigned Presiding District Judge only to prevent manifest injustice.

(i) Tex. R. Civ. P. 5 shall govern any deadlines falling on legal holidays.

(j) Failure to comply with any deadline will, in addition to the waivers hereinabove set forth, also be, in the discretion of any Assigned Judge Presiding, ground for immediate dismissal of the case for want of prosecution upon notice to the parties.

6. ORDERS AND JUDGMENTS IN COURTS WHERE FILED: All orders and judgments in the cases shall be rendered, signed, and entered in the Court where the case is filed but may be rendered and signed by an Assigned Presiding Judge in the Courtroom and thereafter delivered to the Clerk of the Court where filed for entry in that Court's minutes.

7. NOTICE OF JUDGMENT: Notice of Judgment shall be given by the Clerk where required pursuant to Tex. R. Civ. P. 165a(1), 239a, and 306a(3).

SIGNED and POSTED IN OPEN COURT effective October 1, 1985.

JOHN CORNYN, DISTRICT JUDGE
37TH Judicial District Court

00000034

VOL 5481 PAGE 709

CAROL R. HABERMAN, DISTRICT JUDGE
45TH Judicial District Court

JOHN YATES, DISTRICT JUDGE
57TH Judicial District Court

JAMES C. ONION, DISTRICT JUDGE
73RD Judicial District Court

ROSE SPECTOR, DISTRICT JUDGE
131ST Judicial District Court

FRED BIERY, DISTRICT JUDGE
150TH Judicial District Court

PETER MICHAEL CURRY, DISTRICT JUDGE
166TH Judicial District Court

CAROLYN SPEARS, DISTRICT JUDGE
224TH Judicial District Court

ALFONSO CHAPA, DISTRICT JUDGE
225TH Judicial District Court

DAVID PEEPLES, DISTRICT JUDGE
285TH Judicial District Court

RAUL RIVERA, DISTRICT JUDGE
288TH Judicial District Court

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

August 22, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

Dear Sam:

In light of the attached case do you believe that Rule 21c needs any review for possible amendment?

Very truly yours,

LUTHER H. SOULES III
Chairman

LHSIII:gc
Enclosure

00000036

their flood insurance policy expired on June 16, 1979.

On July 26, 1979, the Kitchings' house sustained substantial damages from a flood. Since their policy had not been renewed, the flood insurance company refused to cover the Kitchings' losses. The Kitchings then brought this lawsuit against Zamora for damages, contending that Zamora negligently failed to inform them about the impending expiration of their flood insurance. The jury found that Zamora was negligent in failing to notify the Kitchings about the impending expiration of their flood insurance. After determining that the Kitchings were negligent in failing to act on their own to renew their policy, the jury apportioned the comparative negligence of the parties at 25% for the Kitchings and 75% for Zamora. Based on the jury's finding of $20,704.75 in total damages, the trial court rendered judgment for the Kitchings for $15,528.26.

The court of appeals, however, reversed the judgment of the trial court and rendered judgment for Zamora. That court held that Zamora did not owe a duty to notify the Kitchings about the impending expiration of their insurance policy absent a statute, agreement, custom or course of dealing. We disagree. An insurance agent, who receives commissions from a customer's payment of insurance policy premiums, has a duty of reasonably attempting to keep that customer informed about the customer's insurance policy expiration date when the agent receives information pertaining to the expiration date that is intended for the customer.

Here, the jury found that Zamora's negligence, in failing to notify the Kitchings about the information he received pertaining to their flood insurance expiration date, proximately caused 75% of the Kitchings' damages resulting from their lack of flood insurance. In light of Zamora's duty to the Kitchings, the jury's findings must be given effect. Consequently, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

C. L. RAY
Justice

Opinion Delivered: June 26, 1985.

JEROME E. CHOJNACKI vs. THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT ET AL.

No. C-3943

Original Mandamus Proceeding.

Under the provisions of Rule 483, T.R.C.P. motion for leave to file petition for writ of mandamus is granted and without hearing oral argument the petition for writ of mandamus is conditionally granted. (Per Curiam Opinion.)

For Relator: Kirklin, Boudreaux and Joseph, Glen M. Boudreaux, Edward J. Howlett, II and Deborah H. Peveto, Houston, Texas.

For Respondents: Haynes and Fullenweider, Clinard J. Hanby, Houston, Texas.

PER CURIAM

This is an original proceeding in which Jerome E. Chojnacki seeks to have this court issue a writ of mandamus directing the court of appeals to rescind an order issued by it which granted the third motion of the real party in interest, AMI Systems, Inc., for an extension of time to file its statement of facts. Without hearing oral argument, we conditionally grant the mandamus. TEX. R. CIV. P. 483.

In August, 1984, the trial court rendered judgment non obstante verdicto for Mr. Chojnacki in a suit by AMI Systems, Inc. In October, the court of appeals granted AMI's first motion for extension of time to file its appellate brief and the statement of facts. On December 13, the court of appeals granted AMI's second motion for extension of time. That order set December 17 as the date for filing the statement of facts and January 16, 1985 as the date for filing AMI's appellate brief.

On January 16, AMI filed its third motion for extension of time to file the statement of facts, more than 15 days after the last day for filing.

In *B. D. Click Company, Inc., v. Safari Drilling Corporation*, 638 S. W. 2d 860, 862 (Tex. 1982), this court held that "an appellant's motion for extension of time to file the transcript and statement of facts must be filed within fifteen days of the last day for filing as prescribed by Rule 21c."

AMI cites the case of *Gibraltar Savings Association v. Hamilton Air Mart, Inc.* 662 S. W. 2d 632 (Tex. App.—Dallas 1983, no writ) in support of its argument that this court's opinion in *B. D. Click* applies only to initial motions for extension of time. We disapprove the holding in *Gibraltar Savings*.

Because the court of appeals' actions in granting AMI's untimely motion for extension of time directly conflicts with this court's holding in *B. D. Click*, we conditionally grant the relief prayed for. A writ of mandamus will not issue if the court of appeals abides by this decision.

Opinion Delivered: June 26, 1985.

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

June 27, 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: Rules 74 and 131
Texas Rules of Appellate Procedure

Dear Luke and Mike:

The Court requests that your committees consider amending Rules 74 and 131 of the Texas Rules of Appellate Procedure as follows:

Rule 74. Requisites of Briefs

Briefs shall be brief. In civil cases the brief shall consist of not more than 30 pages exclusive of the Table of Contents and Index of Authorities. The court may, upon motion, permit a longer brief. Briefs shall be filed ...

...

Rule 131. Requisites of Applications

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be

designated as "Petitioner" and "Respondent." Application for writ of error shall be as brief as possible shall consist of not more than 30 pages exclusive of the Table of Contents and the Index of Authorities. The court may upon motion permit a longer brief. The respondent should file ...

...

Sincerely yours,

James P. Wallace
Justice

JPW:fw

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

00000040

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.

5040

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 88 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

00000042

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
225-6345

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.

00000045

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).

00000048

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

00000050

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY DALLAS, TEXAS 75275

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.

R 87 →

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 Scott 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~~.

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 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.

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

LOGAN, LEAR, GOSSETT, HARRISON, REESE & WILSON
ATTORNEYS AT LAW
12 NORTH ABE
P. O. DRAWER 911
SAN ANGELO, TEXAS 76902-0911

TELEPHONE (915) 653-3291

RALPH LOGAN (1913-1983)
TOM LEAR
GREG GOSSETT
GEORGE W. HARRISON
MORRIS M. REESE, JR.
CLYDE WILSON
JONATHAN R. DAVIS

September 12, 1985

Jim
what do
you think?
Jon

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

00000059

#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, BUPLESON & 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.

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

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 Carcia 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

---

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

---

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

---

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

#5072.00:CPH:kah:1/17/86:#k-15

JUDICIAL AND SOCIAL POLICY: THE NEED FOR CHANGE

There comes a time in the evolution and development of the laws of every jurisdiction for changes to 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 judicial system and our society in Texas have arrived at that time for change in the Texas Rules regarding service of citation in civil cases.

Limited budgets and increases in the need for law enforcement activity are inherent in urban counties and rapidly growing counties. The population of Texas continues to grow at a rapid pace and the state now contains more than fifteen million inhabitants. (cite state records). This constant growth has contributed to limited county budgets and increased responsibilities of public peace officers over matters of public safety; but, more significantly the urbanization of Texas will be a lasting cause of limited budgets and increased public safety responsibilites.

It is the manditory 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). In certain instances Sheriffs and Constables are

required to attempt service of process before anyone else is allowed to attempt the service. Tex. R. Civ. Rule 103, Rule 106. The limited county budgets and increased public safety responsibilites cause understaffed Sheriffs and Constables Departments. It has been proven in the past that Sheriffs and Constables Departments can become so understaffed that they cannot meet the needs of the public. As a result, service of process cannot effectively be had. See Garcia v. Gutierrez, 697 S.W.2d 758 (Tex. app. - Corpus Christi 1985); Lawyers Civil Process v. State Ex. Rel. Vines, 690 S.W.2d 939 (Tex. App. - Dallas 1985). The courts in those cases give strong indications that 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 enter-

prise 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 due to the burdensome budgeting processes and taxpayer limits. See Garcia v. Guetierrez, 697 S.W.2d at 759.

The Federal Rules of Civil Procedure have for sometime allowed persons specially appointed for the purpose of service of process to serve process and a large number of the states also allow it. (**Footnote of Citations) There are no substantive complaints regarding the Federal or state systems which allow such process. Due process is met, access to the Courts is more efficient and judicial economy has been served. In Garcia and Lawyers Civil Process, Inc., the courts have stated that the arguments of judicial economy and efficiency are persuasive and have virtually declared that it would be in the best interest of our judicial system to allow private process serving similar to that allowed under the Federal rules.

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. (Cite legislative statute, if available). 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 all three branches of the Texas government have had a hand in the movement of the state to change the rule. One legislature has approved it. One 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.

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 chang 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] all 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 justiciable 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." Saxs 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 effected. Saxs 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 to 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 process 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.Sup. 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. Saxs 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.Sup. 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 manditory language of Rule 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, Inc. v. State Ex. Rel Hines, 690 S.W.2d 939 (Tex. App.- Dallas 1985). 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. * 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), found the pratical 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 persuasive. Though noting the strength of the argument, the Court

was forced to find that "unfortunately, however, no amount of pratical 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." Where the Courts lack the discretion to promise, regardless of the situation or the need of the Plaintiff for quick and efficient access to the rules, will lead envitably to impractical and 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 1980.

The Court in the Garcia case correctly isolated the only effective means for changing the current inequitable circumstances 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, rather, noting the pratical 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 alternatie of private service of process. As cited above, the political and practical considerations facing the legislature, Governor and Commissioner's Courts in 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 protecting the State's interest in avoiding frivolous claims and lawsuits. As the U.S. Supreme Court noted in Boddie v. Conneticut:

> "American society, of course 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."

Today there exists barrier to the effective access of Plaintiffs 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 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.

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

June 27, 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: Rules 74 and 131
Texas Rules of Appellate Procedure

Dear Luke and Mike:

The Court requests that your committees consider amending Rules 74 and 131 of the Texas Rules of Appellate Procedure as follows:

Rule 74. Requisites of Briefs

Briefs shall be brief. In civil cases the brief shall consist of not more than 30 pages exclusive of the Table of Contents and Index of Authorities. The court may, upon motion, permit a longer brief. Briefs shall be filed ...

...

Rule 131. Requisites of Applications

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be

designated as "Petitioner" and "Respondent." Application for writ of error shall be as brief as possible shall consist of not more than 30 pages exclusive of the Table of Contents and the Index of Authorities. The court may upon motion permit a longer brief. The respondent should file ...

Sincerely yours,

James P. Wallace
Justice

JPW:fw

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

Tina
To SCAC Seal C
Xc transmittal to Tom Alexander

June 24, 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 Rule Change
TEX. R. CIV. P. 165a and 330,

Dear Luke and Mike:

I am enclosing a letter and suggested rule changes from Mr. Tom Alexander of Houston, regarding 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. Tom Alexander
Alexander & Fogel
Five Post Oak Park, 24th Fl.
Houston, Texas 77027

00000087

ALEXANDER & FOGEL
Lawyers
Five Post Oak Park
24th Floor
Houston, Texas 77027
713/439-0000

June 18, 1986

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Wallace:

In an effort to promote speedy trials and eliminate cumbersome dismissal for want of prosecution, I am enclosing suggested rule changes for your consideration. I have sent a copy to each member of the Court.

With high regard I remain,

Yours truly,

ALEXANDER & FOGEL

Tom Alexander

Tom Alexander

TA:ca
Enclosure: 1

TX SpCt/Rule Change:30

TO: CHIEF JUSTICE JOHN L. HILL, JR. and THE SPEEDY TRIAL COMMITTEE:

SUGGESTED RULE CHANGES TO PROMOTE SPEEDY TRIALS AND ELIMINATE CUMBERSOME DISMISSAL FOR WANT OF PROSECUTION PROCEDURES.

NEED: RULE 165a, (D.W.O.P.) is not producing speedy trials. Instead it is producing unnecessary paper work, court appearances and judicial determinations without necessarily pushing the cases toward trial. Additionally, it is a potential snare for the party who, missing one or more of its requirements is exposed to dismissal without trial, usually after limitations have run, and exposing the lawyer to potential liability arising from dismissal of cases whose true merit may have been less than initially perceived. The unfortunate client and lawyer are then without remedy except from each other. This was not the initial intent of either.

REMEDY: Revoke Rule 165a and ammended Rule 330 and eliminate dismissal for want of prosecution except as follows.

1) Require each Court to set for trial, on that Court's next docket, each case which has been on file 2 years or in which the last new party joined has been in the case more than 1 year, which ever comes first.

2) Once set, no such case may be continued except under the strict application of Rules 251-254. With the additional requirements that:

a) Such continuance shall be granted only upon the Affidavit of the party or parties seeking the continuance;

b) If granted, the case is set, at the time the continuance is granted, for a date certain within 90 days (or at the next docket of the court if Rule 330 is applicable).

c) No continuance may be granted without a trial setting or a date certain set out in the Order of Continuance which must be approved by the parties and their lead counsel signifying their awareness of the foregoing requirements and their willingness to abide these rules and the new setting.

d) If continuance should be granted a second time for absense of counsel under Rule 253, it must be preferentially set for the next sitting time available 10 days after that counsel finishes the trial in which he is then engaged.

e) On any motion for continuance after the first for each side of the case, all parties and

lead counsel must appear in open court for the mandatory resetting and certify their availability and readiness for the date certain set by the Court, as a condition for the granting of a second continuance.

f) If not otherwise disposed of, one year after the first setting under.

1) the case shall be preferentially set, subject only to other cases with a statutory preference, and shall be tried or dismissed on that setting without continuance except pursuant to Rule 254 until a date certain 10 days after adjournment of the Legislative when the case shall be tried as set out in (d.) above.

g) The mandatory provisions of this Section shall apply to all cases filed after January 1, 1986; however each Trial Court is urged, in its discretion to apply these provisions to eliminate backlog as soon as possible in the effective administration of justice realizing that justice delayed is sometimes justice denied. When application of these provisions have reduced the backlog to the 3 year maximum, each Court is urged to reduce the maximum period further so as to produce justice in speedy disposition of disputes.

RATIONALE: These changes will eliminate the hazards and vagaries of the present lack of uniformity among the various Courts in applying Rule 165a and virtually eliminate the possibility of the loss of a client's rights without participation. This is a clear, self-enforcing procedure which insures knowledge and acknowledgment of rights and a day certain in Court. It will also help insure speedy trials and put an effective ceiling on delay at a maximum of 3 years without working hardship upon the rights of litigants.

If it works well, and I am convinced that it will, consideration can be given to shortening the time periods, reducing the ceiling of delay and produce even more speed in disposition of cases, still assuring the parties of their day in Court.

Respectfully submitted toward the Administration of justice,

TOM ALEXANDER
State Bar No. 01000000

TK - 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 ~~216~~ 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 166c.~~

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)

00000091

Respectfully submitted,

Charles A. Ainsworth
Name

4400 Thanksgiving Tower
Dallas, Texas 75201

Date August 28 1985

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.

Item to Sub C of Agenda

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

March 7, 1986

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Pevin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Proposed Amendments to Rules 184 & 184a

Dear Mike:

Enclosed are my proposed amendments to Rules 184 and 184a.

Rule 184 was amended, effective April 1, 1984, to contain the same language as Evidence Rule 202. Similarly, Rule 184a was amended to contain the same language as Evidence Rule 203. Evidence Rule 202 and 203, however, were amended, effective November 1, 1984. Since it is the intention that Rules 184 and 184a contain the identical language of Evidence Rules 202 and 203, respectively, Rules 184 and 184a need to be amended to conform to Evidence Rules 202 and 203.

Please add these proposed amendments to the agenda of the next meeting.

Respectively,

Jeremy C. Wicker
Professor of Law

JCW/nt
Enc.

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III ✓
Justice James P. Wallace

Rule 184. Determination of Law of Other States

[~~The judge upon the motion of either party shall take judicial notice of the common law, public statutes, rules, regulations, and ordinances and court decisions~~]. A court upon its own motion may, or upon the motion of a party may, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. [~~Any~~] A party requesting that judicial notice be taken of such matter shall furnish the [~~judge~~] court sufficient information to enable [~~him~~] it properly to comply with the request, and shall give [~~each adverse party~~] all parties such notice, if any, as the [~~judge~~] court may deem necessary, to enable [~~the adverse party~~] all parties fairly to prepare to meet the request. [~~The rulings of the judge on such matters shall be subject to review.~~] A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Comment: The change is necessary to conform Rule 184 to the amendment to Rule 202 of the Rules of Evidence, effective November 1, 1984.

Rule 184a. Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties [~~to the opposing party or counsel~~] copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties [~~to the opposing party or counsel~~] both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs and treatises. If the court considers sources other than those submitted by a party, it shall give [~~the~~] all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. [~~Its~~] The court's determination shall be subject to review [~~on appeal~~] as a ruling on a question of law.

Comment: The change is necessary to conform Rule 184a to the Amendment to Rule 203 of the Rules of Evidence, effective November 1, 1984.

UNIVERSITY OF HOUSTON
LAW CENTER
HOUSTON, TEXAS 77004
713-749-1422

R 202
Sup C
SCAC
& Agenda

UNIVERSITY OF HOUSTON
LAW CENTER

July 14, 1986

Hon. James P. Wallace, Justice
The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

On September 25, 1985, an attorney, Jack Gulledge, wrote to Chief Justice Hill (copy of letter enclosed) regarding article 3737h V.A.T.S. and rule 202 of the Texas Rules of Civil Procedure. On October 10, 1985 you replied for Chief Justice Hill to Mr. Gulledge (copy of letter enclosed), sending a copy of the reply to me for consideration by the State Bar Rules of Evidence Committee. You also sent copies to Mr. Luke Soules and Mr. Mike Gallagher, so that Mr. Gulledge's letter might be considered by the Supreme Court's advisory committee and by the Committee on Administration of Justice.

On April 4, 1986, the State Bar Rules of Evidence Committee considered whether 3737h should be made part of the Rules of Evidence and decided in the negative. I believe the primary reason for the decision was that the evidence rules are limited to "admissibility" questions and do not deal with "sufficiency" questions. Art. 3737h is a "sufficiency" rule. To open the evidence rules to sufficiency questions would certainly open a floodgate.

The Committee also considered whether to recommend legislative changes that would have a counter-affidavit under 3737h merely go to weight rather than to the admissibility of the initial affidavit. Again, the Committee decided in the negative.

As you know, the 1985 legislature paid much attention to 3737h. The statute was rewritten and made a part (sec. 18.001) of the new Civil Practice and Remedies Code. Further, the legislature amended 3737h to require that the counter-affiant be a "person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." Presumably this stiffening of the qualifications of the counter-affiant was intended to make the counter-affidavit, if filed, a serious contesting of the initial affidavit. No longer, if the amendment serves its purpose, will 3737h be an impotent procedure.

The Rules of Evidence Committee also decided that Mr. Gulledge's suggestion regarding rule 202 of the Rules of Civil Procedure is properly a matter for the Committee on Administration of Justice and the Supreme Court Advisory Committee rather than an evidence rules matter.

Respectfully yours,

Newell H. Blakely, Chairman
1985-86 Committee on Rules of Evidence

cc: Mr. Luther H. Soules, III Chairman
Supreme Court Advisory Committee
Soules & Cliffe
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Committee on Administration of Justice
7000 Allied Bank Plaza
1000 Louisiana St.
Houston, TX 77002

NHB:vcg

JACK GULLEDGE
ATTORNEY AT LAW
2404 S. BUCKNER BLVD.
DALLAS, TEXAS 75227
AREA CODE 214
388-7451

September 25, 1985

Mr. John Hill
Chief Justice
Supreme Court of Texas
Austin, Texas 78711

Re: Unnecessary costs of proof

Dear Justice Hill:

In your projected changes relating to litigation, please consider the following proposals.

First: place Article 3737h V.A.T.S. in the New Rules of Evidence and amend Subsection (b) thereof, so that a counter to an affidavit will merely go to the weight not the admissibility thereof. Time should be given for the party controverting the affidavit to obtain any necessary discovery in his controversion. As it stands at this time, affidavits that are submitted under Subsection 1(a) of 3737h are routinely controverted, thereby wasting time and materials that have to be subsequently duplicated by expensive deposition testimony or subpoenas duces tecum, for purposes of trial.

Second: Rule 202 of the Texas Rules of Civil Procedure should be amended to allow non-stenographic recording without necessity of getting a Court Order to dispense with stenographic transcription. Each law office dealing with these matters has trained personnel who can competently reduce the non-stenographic recording to a stenographic transcript without having to pay a court reporter to do so.

It is duplicitous and expensive to purchase video equipment or to hire video equipment for the purpose of depositions and also to pay for stenographic accompaniment at said deposition. The expense has doubled rather than reduced, in that instance.

The premise of these proposals is that the reliability of the proof is not subject to serious question. Further, it is this writer's opinion that if any lawyer be found to have intentionally attempted to deceive the court or other counsel or parties in the case then he should forthwith be disbarred.

This letter represents the viewpoint of the writer and the colleagues with whom in depth discussions have been had and does not purport to represent any formal organization in the Bar.

Thank you very much and with warm regards and due respect I am,

Yours truly,

Jack Gulledge

JG:lg

00000099

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 10, 1985

Mr. Jack Gulledge
Attorney at Law
2404 S. Buckner Blvd.
Dallas, Tx 75227

Dear Mr. Gulledge:

Your suggestions to Chief Justice Hill regarding Article 3737h being placed in the Rules of Evidence and an amendment to Rule 202 of the Texas Rules of Civil Procedure have been referred to Dean Newell Blakely, the Chairman of the Committee on the Rules of Evidence, Mr. Luke Soules, the Chairman of the Supreme Court Advisory Committee and Mr. Mike Gallagher, the Chairman of the Committee on Administration of Justice.

This is the procedure ordinarily followed by our Court in passing along all suggestions from members of the bench and bar as to improvements that could be made in the rules. Your suggestions will be assigned to an appropriate subcommittee and considered by each of the above named committees who will then make recommendations for consideration by the entire Court.

Thank you for your continued interest in our rules.

Sincerely,

Jim Wallace

James P. Wallace
Justice

JPW:fw
cc: Dean Newell Blakely
Mr. Luke Soules
Mr. Mike Gallagher

AFFILIATED REPORTERS
805 West 10th, Suite 301
Austin, Texas 78701
(512) 478-2752

R 206

June 5, 1986

Mr. Sam Sparks
GRAMBLING & MOUNCE
P.O. Drawer 1917
El Paso, Texas 79950-1917

Re: Supreme Court Advisory Committee

Dear Mr. Sparks,

I am writing in regard to your position as Committee Chairman over Rules 15 to 215. These rules include those pertaining to depositions which in turn control the activities of freelance court reporters. The reporting community needs your help in solving a problem which exists in our field.

Freelance court reporters have historically had a problem in determining who is responsible for the costs of depositions. The large majority of attorneys assume the responsibility of deposition costs and therefore pay the court reporters fees from their escrow accounts. The problem lies with a small minority of attorneys who have claimed, as agents for their clients, they are not responsible for these costs and suggest pursuing their clients for payment. This tact has been taken as a defense in court on many occasions but is always used after the completion and delivery of the deposition when the reporter has no real recourse. The reporters are contacted by the attorneys and often never have contact with the clients in order to discuss payment.

The concensus of most court reporters and attorneys is that the attorneys retain their services for oral and written depositions and therefore should be responsible for those fees. If there is a special situation required for payment, a written notification in advance would allow the reporter to deal with the responsible party directly.

We believe the solution would be an addition to the appropriate rule that states:

> " The costs of oral and written depositions shall be the responsibility of the attorneys in the case unless written notice is provided prior to the deposition as to who will be responsible for such costs. "

Rule 354(e) was recently added through the aid of Chief Justice Pope which provided clarification for the official reporters, but no rules exist as to the work product of the freelance reporter. The bad debt and carrying costs of these few attorneys are being borne by higher costs to the responsible legal community.

We hope that the committee can find a way to solve this inequity through the statues. Thank you for all the hard work and long hours that you and the entire committee have generously donated. Please call on me if I can be of assistance to you.

Sincerely,

Duke Weidmann

✓ cc. Chairman Luther H. Soules
Justice James P. Wallace
Texas Shorthand Reporters Association

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.

00000103

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

McGOWAN & McGOWAN, P. C.
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
(1894-1978)

BILL McGOWAN
WM J. McGOWAN II
BRADFORD 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,

Bradford L. Moore

00000105

JOHNSON & SWANSON

ATTORNEYS AND COUNSELORS

A Partnership Including Professional Corporations

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

Ms. Evelyn A. Avent
Executive Assistant
State Bar of Texas
Box 12487, Capitol Station
Austin, Texas 78711

216/204

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

00000106

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 NONE
J
K
L
M
N
O
P
Q
R

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parentnesis; underline proposed new wording; see example attached).

1 New Rule 216.
2
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.

10
11
12
13
14
15
16
17
18
19
20
21
etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

(see attached comment)

Dated April 9, 19 85

Respectfully submitted,

Charles R. Haworth Name

Charles R. Haworth

900 Jackson St., Dallas, TX Address

00000107

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: 512-257-5945
RESIDENCE: 512-895-3636

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: 512-367-5519

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

Texas Tech University

School of Law
Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

July 29, 1986

Mr. Luther H. Soules III
Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, TX 78205

In re Rules 205-09

Dear Luke:

I am attaching new Rule 209, the Supreme Court Order relating thereto, and the corresponding revisions to Rules 205-07.

Sincerely yours,

J. Hadley Edgar
Professor of Law

JHE/tm

Enclosure

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, 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 original deposition transcript by the officer with the statement of the reasons given by the witness for making such changes. The original deposition transcript 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 original deposition transcript 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 original deposition transcript 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 its rejection ~~of the deposition~~ in whole or in part.

Rule 206. Certification and Filing by Officer; Exhibits; Copies; Notice of Filing

1. Certification and Filing by Officer. The officer shall certify on the deposition transcript 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 transcript in the certification. Unless otherwise ordered by the court, he shall then securely seal the original deposition transcript in an envelope endorsed with the title of the action and marked "Deposition transcript 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.

2. Exhibits. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be

Rule 206. Certification and Filing by Officer; Notice of Filing

1. Certification and Filing by Officer. certify on the deposition transcript that the w sworn by him and that the deposition is a true testimony given by the witness. The officer sl amount of his charges for the preparation of deposition transcript in the certification. U ordered by the court, he shall then securely s deposition transcript in an envelope endorsed w the action and marked "Deposition transcript of of witness)" and shall promptly file it with t the action is pending or send it by registered to the clerk thereof for filing.

2. Exhibits. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be

used in the same manner as if annexed to the deposition transcript. Any party may move for an order that the original be annexed to and returned with the deposition transcript to the court, pending final disposition of the case.

3. Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

4. Notice of Filing. The person filing the deposition transcript shall give prompt notice of its filing to all parties.

5. Inspection of Filed Deposition Transcript. After it is filed, the deposition transcript shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition transcript may be opened by the clerk or justice at the request of the deponent or any party, unless otherwise ordered by the court.

Rule 207. Use of Deposition Transcript in Court Proceedings

1. Use of Deposition Transcript. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition transcript, 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 deposition transcripts previously

used in the same manner as if annexed to the deposition transcript. Any party may move for an order that the original be annexed to and returned with the deposition transcript to the court, pending final disposition of the case.

3. Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

4. Notice of Filing. The person filing the deposition transcript shall give prompt notice of its filing to all parties.

5. Inspection of Filed Deposition Transcript. After it is filed, the deposition transcript shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition transcript may be opened by the clerk or justice at the request of the deponent or any party, by the court.

ion Transcript in Court Proceedings

on Transcript. At the trial or upon the
n interlocutory proceeding, any part or
script, insofar as admissible under the
l as though the witness were then present
sed by any person for any purpose against
it or represented at the taking of the
asonable notice thereof.
f parties pursuant to these rules does
use deposition transcripts 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 deposition transcripts 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 transcript 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 transcript 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 transcript 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.

Rule 209. Retention and Disposition of Deposition Transcripts and Depositions upon Written Questions (New Rule)

The clerk of the court in which the deposition transcripts and depositions upon written questions are filed shall retain and dispose of the same as directed by the Supreme Court.

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 deposition transcripts 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 transcript 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 transcript 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 transcript or some part thereof is filed and a ruling obtained on the written objections made in time for the objecting party before the trial commence

Rule 209. Retention and Dispo

and Depositions upo

The clerk of the court ir

and depositions upon written c

dispose of the same as directe

Approved Duan

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF DEPOSITION TRANSCRIPTS AND DEPOSITIONS UPON WRITTEN QUESTIONS

In compliance with the provisions of Rule 209, the Supreme Court hereby directs that deposition transcripts and depositions upon written questions be retained and disposed of by the clerk of the court in which the same are filed upon the following basis.

except those in which citation is by publication,

In all cases in which judgment has been entered by the clerk for one hundred and eighty (180) days and either there is no perfection of appeal ~~as provided by Rule 356~~ or there is perfection of appeal and dismissal ordered or final judgment as to all parties has been rendered and mandate issued, so that the case is no longer pending or on appeal, the clerk may dispose of the same, unless otherwise directed by the trial court, by use of the following procedure. Cert copies destroy in 2 yrs

Notice the destroy

~~The clerk shall mail the deposition transcript or deposition upon written questions to the attorney asking the first deposition question. If the attorney cannot be located, the clerk shall send written notice to the attorney's last available mailing address. If there is no response requesting the document within thirty (30) days thereafter, the clerk may dispose of the same.~~

or the successor to that attorney.

or the attorney of the law firm

in representative capacity

or the successor to that attorney.

00000117

SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF DEPOSITION TRANSCRIPTS AND DEPOSITIONS UPON WRITTEN QUESTIONS

In compliance with the provisions of Rule 209, the Supreme Court hereby directs that deposition transcripts and depositions upon written questions be retained and disposed of by the clerk of the court in which the same are filed upon the following basis. except those in which citation is by publication,

In all cases in which judgment has been entered by the clerk for one hundred and eighty (180) days and either there is no perfection of appeal ~~as provided by Rule 356~~ or there is

~~[illegible]~~ smissal ordered or final judgment as

lered and mandate issued, so that the

on appeal, the clerk may dispose of

irected by the trial court, by use of

~~e deposition transcript~~ or deposition

~~the attorney asking the first~~

~~attorney~~ cannot be located, the

ice to the attorney's last available

no response requesting the document

~~after, the clerk may dispose of the~~

Hadley will recruite

Notice destr

the successor to that

ttorney.

~~Clerk of the Court~~

in representative

of the successor to that

attorney.

00000117

MICHAEL D. SCHATTMAN
DISTRICT JUDGE
348TH JUDICIAL DISTRICT OF TEXAS
TARRANT COUNTY COURT HOUSE
FORT WORTH, TEXAS 76196-0281
(817) 877-2715

July 30, 1986

Luther H. Soules, III
Soules, Cliff & Reed
800 Milam Building
San Antonio, Texas 78205

Re: Committee on Administration of Justice, SB07

Dear Luke:

In Tarrant County we are experimenting with a number of things to speed up voir dire, including juror information cards. Enclosed is a copy of one I have been using. It probably needs to be changed to include family law matters in questions 6 and 8. Do you think it would be desirable to have uniform cards of some kind used throughout the state? If so, is this something the committee should consider?

Very truly yours,

Michael D. Schattman

MDS/lw

xc

encl.

JUROR INFORMATION CARD ★ TARRANT COUNTY, TEXAS

PLEASE PRINT – USE PENCIL OR BLACK INK – PLEASE PRINT

1. a) Name: [illegible] Hospital Room
   b) Residence Address: [illegible]
   City: [illegible]
2. a) Date of Birth: March 22, 1957
   b) Place of Birth: Evansville – Indiana
3. How long have you resided in Tarrant County? 21 years
4. Current employment information or employment from which retired
   a) Employer's Name: Irving Community Hospital
   b) Employer's Address: Mid Arthur Irving
   c) Position: RN - Labor / Delivery
   d) Number of years with employer: 2 years
   e) Previous employer: Lima Hospital
   f) Position: RN
5. General information
   a) Registered to vote? Yes ✓ No ___
   b) Political affiliation, if any? none
   c) Religious preference, if any? Missouri Synod Lutheran
   d) Own home? Yes ___ No ✓
   e) Own car? Yes ✓ No ___
   f) Education completed (check if applicable)
      i) High School ✓
      ii) College ☐ Name Lawrence School of Degree: nurs - diploma
      iii) Graduate School ☐ Name: ___ Degree: ___
   g) Do you have any handicap, disease or defect that would render you unfit for jury service? If so, explain. no

DJ-3 – GPC-0429

6. Prior jury service:
   a) Have you served before on a jury? Yes ___ No ✓
   b) When? ___
   c) Where? ___
   d) Civil? Yes ___ No ___
      Criminal? Yes ___ No ___
      Both? Yes ___ No ___
7. Legal, investigative or medical training
   a) Do have any background or training in law, law enforcement, claim adjustment or accident investigation? Yes ___ No ✓
   b) If so, what? ___
   c) Do you have any background or training in medicine, nursing or treatment of injuries? Yes ✓ No ___
   d) If so, what? OR - mineral nursing
8. Have you ever been a complainant, witness or party in:
   a) Civil suit? Yes ___ No ✓ Type? ___
   b) Criminal prosecution? Yes ___ No ✓ Type? ___
9. Marital and family information
   a) Check one: Married ✓ Single ☐ Widowed ☐ Divorced ☐
   b) Spouse's name: Robert B Hagenbuch III
   c) Spouse's employer: Ford Motor USA
   d) Spouse's position: Drive Buyer
   e) Number of children: 2 Ages of children: 7 months !
10. Affirmation to the Court and Parties: The above information is true and
    Juror's Signature

JUROR INFORMATION CARD ★ TARRANT COUNTY, TEXAS

PLEASE PRINT – USE PENCIL OR BLACK INK – PLEASE PRINT

1. a) Name: Paula Jean Batts
   b) Residence Address: 2884 Kingsmarch Road #213
   City: Ft. Worth
2. a) Date of Birth: 04/05/60
   b) Place of Birth: Wichita Falls, TX
3. How long have you resided in Tarrant County? 16 years
4. Current employment information or employment from which retired
   a) Employer's Name: ___
   b) Employer's Address: ___
   c) Position: ___
   d) Number of years with employer: ___
   e) Previous employer: ___
   f) Position: ___
5. General information
   a) Registered to vote? Yes ✓ No ___
   b) Political affiliation, if any? Republican
   c) Religious preference, if any? Baptist
   d) Own home? Yes ___ No ✓
   e) Own car? Yes ✓ No ___
   f) Education completed (check if applicable)
      i) High School ☐
      ii) College ✓ Name T.C.U. Degree: PR/Advertising
      iii) Graduate School ☐ Name: ___ Degree: ___
   g) Do you have any handicap, disease or defect that would render you unfit for jury service? If so, explain. ___

DJ-3 – GPC-0429

6. Prior jury service:
   a) Have you served before on a jury? Yes ___ No ✓
   b) When? ___
   c) Where? ___
   d) Civil? Yes ___ No ___
      Criminal? Yes ___ No ___
      Both? Yes ___ No ___
7. Legal, investigative or medical training
   a) Do have any background or training in law, law enforcement, dama claim adjustment or accident investigation? Yes ___ No ✓
   b) If so, what? ___
   c) Do you have any background or training in medicine, nursing or the d treatment of injuries? Yes ___ No ✓
   d) If so, what? ___
8. Have you ever been a complainant, witness or party in:
   a) Civil suit? Yes ___ No ✓ Type? ___
   b) Criminal prosecution? Yes ___ No ✓ Type? ___
9. Marital and family information
   a) Check one: Married ✓ Single ☐ Widowed ☐ Divorced ☐
   b) Spouse's name: Kerry Gordon Batts
   c) Spouse's employer: KTV
   d) Spouse's position: Contract Engineer
   e) Number of children: 0 Ages of children: ___
10. Affirmation to the Court and Parties: The above information is true and cor
    Juror's Signature

JUROR INFORMATION CARD ★ TARRANT COUNTY, TEXAS

PLEASE PRINT – USE PENCIL OR BLACK INK – PLEASE PRINT

1. a) Name: JUDY McMULLEN
   b) Residence Address: PO BOX 631
   City: CROWLEY, TX 76036
2. a) Date of Birth: 6-6-53
   b) Place of Birth: BRIDGEPORT, TX
3. How long have you resided in Tarrant County? 14 yrs
4. Current employment information or employment from which retired
   a) Employer's Name: EMPIRE OF AMERICA
   b) Employer's Address: PO BOX 2930
   c) Position: CORPORATE SECRETARY
   d) Number of years with employer: 2mo.
   e) Previous employer: TANDY TELETYPES, INC.
   f) Position: EXECUTIVE SECRETARY
5. General information
   a) Registered to vote? Yes ✓ No ___
   b) Political affiliation, if any? ___
   c) Religious preference, if any? ___
   d) Own home? Yes ✓ No ___
   e) Own car? Yes ✓ No ___
   f) Education completed (check if applicable)
      i) High School ✓
      ii) College ☐ Name ___ Degree: ___
      iii) Graduate School ☐ Name: ___ Degree: ___
   g) Do you have any handicap, disease or defect that would render you unfit for jury service? If so, explain. NO

DJ-3 – GPC-0429

6. Prior jury service:
   a) Have you served before on a jury? Yes ___ No ✓
   b) When? ___
   c) Where? ___
   d) Civil? Yes ___ No ___
      Criminal? Yes ___ No ___
      Both? Yes ___ No ___
7. Legal, investigative or medical training
   a) Do have any background or training in law, law enforcement, damage claim adjustment or accident investigation? Yes ___ No ✓
   b) If so, what? ___
   c) Do you have any background or training in medicine, nursing or the diag treatment of injuries? Yes ___ No ✓
   d) If so, what? ___
8. Have you ever been a complainant, witness or party in:
   a) Civil suit? Yes ___ No ___ Type? ___
   b) Criminal prosecution? Yes ___ No ___ Type? ___
9. Marital and family information
   a) Check one: Married ☐ Single ☐ Widowed ☐ Divorced ✓
   b) Spouse's name: ___
   c) Spouse's employer: ___
   d) Spouse's position: ___
   e) Number of children: ___ Ages of children: 14 9 8
10. Affirmation to the Court and Parties: The above information is true and correct
    Juror's Signature

00000119

247a

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 neeced 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 maoe. 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 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)

Rule 247a (new). Trial Continuances

Motions for continuance or agreements to pass cases set for trial shall e 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)

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.
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed 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.
9
10
11
12
13
14
15
16
17
18
19
20
21
etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule.

00000126

pectfully submitted,

AREA CODE 512 220-2525

Judge Hutson, This letter arose at 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

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.

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. 2

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

Rules 296
306c

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

00000136

TK - send to R 296 Sub C SCAC

HUGHES & LUCE
1000 DALLAS BUILDING
DALLAS, TEXAS 75201

(214) 760-5500
TELECOPIER (214) 651-0561
TELEX 730836

1300 TWO LINCOLN CENTRE
DALLAS, TEXAS 75240
(214) 386-7000
TELECOPIER (214) 934-3226

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 <u>or order overruling motion for new trial</u> is signed <u>or the motion for new trial is overruled by operation of law</u>. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

COAJ ~~agst~~

recommends no

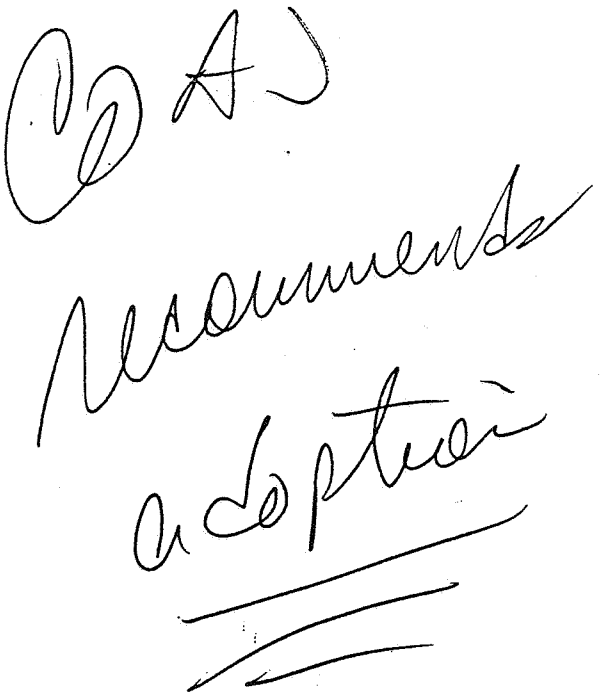
change

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~~.



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

00000141

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.

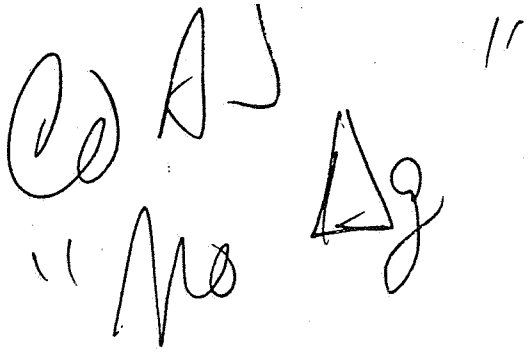
Comment: This proposed rule change negates the change last made in Rule 296 effective April 1, 1984. The reason for recommending a restoration of the former rule is that no purpose is served in requiring a party to request findings of fact and conclusions of law at a time before motions for new trial have been dealt with by the trial judge.

COATS "No Dg"

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.

CofA J - approved Dook
Bishop's not this.

9-12-86 Agenda
whereas Judge Pope
can attend and participate

FULBRIGHT & JAWORSKI

1301 McKinney Street
Houston, Texas 77010

Telephone: 713/651-5151
Telex: 76-2829

Houston
Washington, D.C.
Austin
San Antonio
Dallas
London
Zurich

May 12, 1986

Re: Supreme Court Advisory Committee

Mr. Luther H. Soules, III
Soules & Reed
800 Milam Bldg.
East Travis at Soledad
San Antonio, Texas 78205

Dear Lou:

Enclosed herewith please find the report of our sub-committee with respect to Rules 277, 278 (formerly 279), 279, 286 and 295.

Very truly yours,

David J. Beck

DJB/st
Enclosures
cc: Honorable James P. Wallace
Justice, Supreme Court
Supreme Court Building
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Mr. Franklin Jones, Jr.
Jones, Jones, Baldwin, Curry
& Roth, Inc.
201 W. Houston Street
Marshall, Texas 75670

Professor J. H. Edgar, Jr.
School of Law
Texas Tech University
Lubbock, Texas 79409

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

Rule 277. [*Special Issues*] Questions to the Jury

In all jury cases the court [*may*] shall, ~~whenever feasible,~~ submit [*said*] the cause upon broad-form questions ~~; however, for good cause [special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues controlling the disposition of the case that are raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties,]~~ the court ~~may submit the [same on] cause upon a general charge, upon broad-form questions [accompanied by limiting instructions], or questions containing a combination of elements, or upon questions in a checklist form. Only if required by the substantive law, such as workers' compensation, is the submission of separate questions [submitted]~~. ~~In submitting any case,~~ the court shall submit such ~~[charge as is]~~ instructions and definitions as shall be proper to enable the jury to render a verdict.

[*It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.*] ~~]~~ Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather

Many questions be submitted narrowly or by checklist

to the extent feasible

Rule 277. [*Special Issues*] Questions to the Jury

In all jury cases the court [*may*] shall, ~~whenever feasible,~~ submit [*said*] the ... upon broad-form questions.

~~However, for go~~ ... ~~issues without request of~~
~~either party, an~~ ... ~~ither party, shall submit~~
~~the cause upon~~ ... ~~lling the disposition of~~
~~the case that a~~ ... ~~itten pleadings and the~~
~~evidence in the~~ ... ~~r good cause subject to~~
~~review or on agre~~ ... ~~] The court may submit~~
the ~~[*same on*]~~ ca ... charge. ~~upon broad form~~
~~questions accompan~~ ... ~~ructions, or questions~~
~~containing a comb~~ ... ~~r upon questions in a~~
~~checklist form. O~~ ... ~~substantive law, such~~
~~as workers' comp~~ ... ~~mission of separate~~
~~questions submitted~~ permitted ... ~~ase~~, The court shall
submit such ... definitions as shall
be proper to enable ... dict.

Adopted 18 for 1 against

[*It shall* ... *in the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a* ~~*combination of elements or issues.*~~] Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather

than by inclusion in the question.

[In submitting the case, the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict and in such instances the charge shall not be subject to the objection that it is a general charge.

The court may submit special issues in a negligence case in a manner that allows a listing of the claimed acts or omissions of any party to an accident, event or occurrence that are raised by the pleadings and the evidence with appropriate spaces for answers as to each act or omission which is listed. The court may submit a single question, which may be conditioned upon an answer that an act or omission occurred, inquiring whether a party was negligent, with a listing of the several acts of omissions corresponding to those listed in the preceding question and with appropriate spaces for each answer. Conditioned upon an affirmative finding of negligence as to one or more acts or omissions, a further question may inquire whether the corresponding specific acts of omissions (listing them) inquired about in the preceeding questions were proximate causes of the accident, event, or occurrence that is the basis of the suit. Similar forms of questions may be used in other cases.]

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

In any case in which the jury is required to apportion the loss among the parties, [*issues are raised concerning the negligence of more than one party*] the court shall submit [*an issue*] a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurance or injury in question is attributable to each of the [*parties*] persons found to [*have been negligent, and*] have been culpable. The court shall also instruct the jury to answer the damage [*issues*] question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

The court may submit [*an issue*] a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. ~~For example, the court may, in a workers' compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled.~~

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is ~~properly~~ a part of an ~~explanatory~~ proper instruction or definition.

In any case in which the jury is required to apportion the loss among the parties, [*issues are raised concerning the negligence of more than one party*] the court shall submit [*an issue*] a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the [*parties*] persons found to [*have been negligent, and*] have been culpable. The court shall also instruct the jury to answer the damage [*issues*] question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

Delete Explanatory

question

dis hat one or

the ecessarily

exi mpensation

~~cas~~ ~~ployee was~~

~~per~~

irectly on

the effect of

the not be

objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is ~~properly~~ a part of an ~~explanatory~~ proper instruction or definition.

SEE NEXT PAGE FOR
POST-IT NOTE COMMENTS

9/10

Rule 278 (Formerly Rule 279). Submission of Questions, Definitions and Instructions

The court shall submit the ~~issues~~ questions, ~~in~~ the form provided by Rule 277, which are raised by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to ~~any affirmative~~ submission ~~of any question on that party's behalf where the same is~~ raised only by a general denial and not ~~by an~~ affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. ~~Various phases of different shades of the same question, definition, or instruction shall not be submitted.~~ Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or ~~explanation~~ instruction shall not be deemed a ground for

Rule 278 (Formerly Rule 279). Subm

Definitions and Instructions

The court shall submit the ~~instruction, and deficiencies~~ in the form provided by Rule 277, which a pleadings and the evidence, and, exc title, statutory partition proceedi proceedings in which the pleadings a statutes or procedural rules, a party ~~any affirmative~~ submission ~~of any~~ ~~behalf where the same is~~ raised only not raised by an affirmative written pleading herein shall change the burden of proo been under a general denial. ~~Various shades of the same question, definition, not be submitted.~~ Failure to submit a q deemed a ground for reversal of the submission, in substantially correct requested in writing and tendered by the the judgment; provided however, that objec shall suffice in such respect if the qu upon by the opposing party. Failure to su ~~explanatory~~ instruction shall not be d

5030B

reversal of the judgment unless a substantially correct definition or ~~explanatory~~ instruction has been requested in writing and tendered by the party complaining of the judgment.

Rule 279. [*Submission of Issues*] Omitted Questions and Review

[*When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory*

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.]

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested ~~shall be deemed as~~ are waived. When a ground of recovery or [*of*] defense, consists of more than one element, if one or more of [*the issues*] such elements necessary to sustain such ground of recovery or [*of*] defense, and necessarily referable thereto, are submitted to and [*answered*] found by the jury, and one or more of such elements are omitted from the charge, without [*such*] request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may, after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted [*issue or issues*] element or elements in support of the judgment. [*, but*] If no such written findings are made, such omitted [*issue or issues*] element or elements shall be [*as*] deemed found by the ~~Court~~ in such manner as to support the ~~judgment~~.

instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or *has been requested in writing and* *plaining of the judgment.*]

independent grounds of recovery or of established under the evidence and no itted or requested ~~shall be deemed as~~ f recovery or [*of*] defense, consists , if one or more of [*the issues*] such sustain such ground of recovery or [*of*] ly referable thereto, are submitted to y the jury, and one or more of such om the charge, without [*such*] request is factually sufficient evidence to n, the trial court, at the request of notice and hearing and at any time ndered, make and file written findings *or issues*] element or elements in [*,but*] If no such written findings sue or *issues*] element or elements by the ~~Court~~ in such manner as to

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

~~If a contention is made that a submission, or broad form questions, a general charge, a question containing a combination of elements, or a limiting instruction following a broad form question~~ or submitted or submitted or submitted contains an element that is lacking in legal or factual sufficiency of the evidence, it shall not form the basis for a new trial or reversal unless the complainant can show that the same ~~was calculated to and probably~~ did result in ~~an improper verdict~~.

A claim that the evidence was legally or factually insufficient to warrant the submission of any [*issue*] question may be made for the first time after verdict, regardless of whether the submission of such [*issue*] question was requested by the [*complaining party*] complainant.

Defeated 10 to 9

If a contention is made that a ~~submission, or broad form questions, a general charge, a question containing a combination of elements, or a limiting instruction following a broad form question~~ contains an element that is lacking in legal or factual sufficiency of the evidence, it shall not form the basis for a new trial or reversal u ant can show that the same ~~was calculated~~ result in ~~an improper verdict~~.

A claim that the evidence was insufficient to warrant the submissi question may be made for the first regardless of whether the submission of was requested by the [*complaining party*] c

Rule 286. Jury May Receive Further Instructions

After having retired, the jury may receive further instructions *[of]* from the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their presiding jurors state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the *[change]* charge. Additional argument may be allowed in the discretion of the Court.

Unan Recommended

MOTION
Δ explanation to "instr"
and "issue" to "question"
Eg R 294, 301, 324c

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

Rule 295. Correction of ~~the~~ ~~Defective~~ Verdict

If the purported verdict ~~is informal or~~ defective, the Court may direct it to be reformed [*at the Bar*]. If it is not responsive to the [*issue*] questions contained in the court's charge, or the answers to the questions are in conflict, the court shall [*call the jury's attention thereto in writing and send them back for further deliberation*] ~~explain~~ in writing ~~to the jury~~ in open court the nature of the unresponsiveness, or the conflicts, provide the jury such additional instructions as may be ~~proper~~, and retire the jury for further deliberations. ~~Should the jury again return a non-responsive or inconsistent verdict, the Court may again instruct the jury in the same manner and retire them for further deliberations or declare a mistrial~~.

Rule 295. Correction of ~~[the]~~ [defective] verdict

If the purported verdict ~~is~~ [defective] the Court may direct it to be reformed [*at t*] incomplete, not responsive to the [*issue*] questions or charge, or the answers to the questions court shall [*call the jury's attention send them back for further deliberation*] ~~the jury~~ instruct the jury in open court the nature of t the conflicts and provide the jury such add may be ~~[illegible]~~, and retire the deliberations. ~~Should the jury again r or inconsistent verdict, the Court may ac in the same manner and retire them for fu declare a mistrial~~.

Adopted 11

12 to 4 to delete "informal"

Clean approved as modified

11 + 1 delete last words

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

TELEPHONE
(512) 224-9144

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

August 27, 1986

Mr. David J. Beck
Fulbright & Jaworski
800 Bank of Southwest Building
Houston, Texas 77002

RE: May 12, 1986, Draft of
Proposed Rules 277, 278 (formerly 279),
279, 286, and 195

Dear David:

I have the following observations about this series of Rules as proposed.

Rule 277:

"Limiting instructions" is not a defined term and I do not see where the term "limiting" needs special mention in the Rule. Further, "good cause" should not be a requirement for submission of a "proper" instruction whether a "limiting" or any other sort. To me, the last sentence in the first paragraph: "In submitting any case, the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict" is adequate to cover whatever kind of instructions may be appropriate whether the instruction be "limiting" or otherwise. I suggest that the words "upon broad form questions accompanied by limiting instructions," be deleted beginning in the ninth and tenth lines.

In the second sentence what does "separate question" mean? Is a broad question a question? A separate question? If we mean "separate and distinct" questions why not use the old words? Isn't it the old concept we seek to permit on good cause?

Focusing again on the last sentence of the first paragraph, I have several questions. The courts have talked about "proper" instructions and, in language which is not found in the proposal

or the present rule, the courts have talked about instructions that "assist the jury (jurors?)." Should the term "proper" be regarded as the term that requires an instruction to (1) be substantially correct in form and in substance, i.e., in substantial conformity with the procedural Rules as a matter of form and in substantial conformity with the applicable law as a matter of substance and (2) be supported by the evidence or reasonable inferences therefrom? Is the term "enable the jury to render a verdict" generally read to mean "assist the jury to render a verdict"? Should the word "enable" be replaced with the word "assist" since the latter is the word that the courts seem to utilize? If the concept of "proper" and "assist" are distinct, should the last line read "be proper and enable (assist) the jury to render a verdict"? It seems to me that our experiences with broad issues are now to the point where we can say that any instruction that is correct in form and in substance and supported by the evidence is "proper" and accordingly qualifies under the first requisite. Having qualified with the first requisite for submission to the jury, that same instruction then shall be given to the jury if it "assists" the jury to render a verdict. What is meant by "assist the jury to render a verdict"? To me, that means an instruction that causes the jury to follow the applicable law rather than what might be "common meaning" where "common meaning" does not really give the submitting party the full benefit of a full submission of that party's cause of action or defense. For example, in Deceptive Trade Practices Act cases, "deceptive" does not have "common meaning" because in common meaning, that term infers an element of intent to deceive, whereas really all that DTPA requires may be a representation, however innocently, that goods have qualities that they do not have. Plaintiff may not get the full submission of its case if the word "deceptive" were submitted to the jury without an instruction and the jury were left to rely solely on common meaning. To "enable the jury to render a verdict" on the applicable law in a DTPA case an instruction or definition is required. It seems to me that the term "enable" is more restrictive than the word "assist." The word "enable" to me infers that absent an instruction, the jury probably would not be able to render a verdict on the evidence and the applicable law. The word "assist" to me infers that submitting an instruction would be helpful to the jury to render a verdict on the evidence and the applicable law. Since the word "necessary" was eliminated and the word "proper" substituted in Rule 277 in 1973, "assist" may be more descriptive of the actual practice. A party is not entitled to an instruction merely because it would be "helpful" to the jury. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984). So, somewhere between "necessary" and "helpful" is the current test and the courts' use of the word "assist" may have developed meaning in that context. Cf. First State Bank &

Trust Co. of Edinburgh v. George, 519 S.W.2d 198, 207 (Tex. Civ. App. -- Corpus Christi, 1975 writ ref'd n.r.e.). Should the words "on the evidence and the applicable law" be added after the word "verdict" in the final sentence?

The term "questions containing a combination of elements" appears in line 12 of proposed Rule 277. How does that differ from a "broad-form question" (line 2)? Why must "good cause" be shown in order to combine elements? "Good cause" should be a requisite only for general charge, checklist, or cluster issues.

Where does the proposed Rule permit "for good cause" a submission in the old "cluster" issue form, i.e., "separate and distinct"; or do we intend to entirely preclude that form of submission?

Rule 278:

Does Rule 277 permit for good cause the submission of a case in the old "cluster" issue form? If so, the concept of "deemed findings" needs to be maintained. Turner, Collie & Braden v. Brookhollow, Inc., 642 S.W.2d 160, 165 (Tex. 1982) . Unless that is the case, the concept of "deemed findings or elements" probably does not need to be maintained at all and has not been a concept of broad issue submission even in the past where the issue submitted was "controlling" even though "defective.". Allen v. American National, Inc., 380 S.W.2d 604 (Tex. 1964). In broad "controlling" issues, if an element is "necessarily referable" to the question asked, but that element is not specifically addressed in the question, the question has been answered anyway and the jury finding includes all that is "necessarily referable." Island Recreational Development Co. v. Republic of Texas Savings Association, 710 S.W.2d 551 (Tex. 1986). In the past, where granulated issues were submitted, there was no jury finding where an issue was omitted but was "necessarily referable" and the absent finding had to be supplied somehow. The practice was that the trial court would either supply the omission by express finding or there would be a deemed finding in support of the trial court's judgment. "Broad issues" are now conceived to embrace all of the several matters of a theory, indeed of a "case," e.g., Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374 (Tex. 1985), and are not to be "picked apart" for absences or omissions of verbose granulated elements that would make a single question unintelligible and force a return to the cluster issue practice in order to have intelligibly sized question. The committee as a whole needs to express its view as to whether or not omissions of elements in broad issues are to be regarded as included in or subsumed by the broad issue and, accordingly, addressed by the jury's answer; or,

whether, on the other hand, we are to return to the "pick apart" process previously used so as to burden the broad issue practice with the former cluster issue problems transferred to instructions. See Lemos, supra, 680 S.W.2d at 801. I believe that all elements necessarily referable to a submitted broad question are within the jury's answer and that good attorneys will certainly present evidence and argue in closing arguments in such a way as to be certain that the jury understands all that is included. If the lawyers trying the case fail to recognize elements during the trial, that can be remedied in aggregious cases by the granting of a new trial by the trial judge. However, in support of the broad issue practice, a judge will not be able to take harbor under a "deemed element concept or instruction by reviewing a broad issue or instruction, picking it apart, and entering a judgment contrary to the jury verdict where the jury verdict is supported by some evidence on all elements legally required whether or not expressly mentioned. Such a "deemed element" concept, it seems to me, would engraft onto the broad issue practice the hypertechnical problems that we had under the granulated issue practice. There is no change in "no evidence" or "insufficient evidence" review; if a cause of action legally requires an element, whether expressly mentioned or not in a question, and there is no evidence or insufficient evidence of that element, there is no either legal or factual insufficiency of evidence to support a judgment. Because elements may be broadly combined in "controlling" issues, however, it may be more difficult to identify a particular element for review.

The next question I have about Rule 278 is more fundamental and more problematical to me. It seems to me that the burden to get instructions on broad issues is a different problem or burden than it was to get instructions to granulated issues. I am not comfortable that we have adequately addressed the transition. In the past, issues had to be requested in substantially correct form by the party relying on those issues, but instructions had to be requested in writing in substantially correct form by a party complaining of the judgment. It seems to me that we need to make adjustments in Rule 278 so that an objection to the wording or omission of wording in an instruction that is submitted would be adequate to preserve error in the submitted instruction. On the other hand, where an instruction is omitted or refused entirely, a party should have to make a request in substantially correct form. How much that would change the law is debatable anyway in light of Yellow Cab and Baggage Co. v. Green, 277 S.W.2d 92, 93 (Tex. 1955), excerpts attached. If that case is the law, why not say so in the Rule?

In the full paragraph on page 7, second sentence, I would leave this sentence just as it is in the current Rule to take care of the situation where cases are submitted in granulated issues, if that is possible, even on good cause shown. If that is not possible for good cause shown then, then I would omit the sentence entirely. See Turner and Allen, supra.

Rule 279

For the reasons stated above and my remarks about Rule 277, I do not believe that the concept of "deemed findings on omitted elements" should be engrafted on the broad issue practice. Note, this only happens when no party objects or requests or otherwise preserves error in the charge. If the error concerning the omission is addressed by a party, then error is preserved and there cannot be a "deemed finding on an omitted element." Where neither party preserves error in a charge, the jury's finding on the broad issue should stand as to everything necessarily referable to that issue. The trial judge should be able to submit a broad issue case, where there is no objection to or preservation of error in the broad issue, and feel confident that all matters necessarily referable to that broad issue are being addressed by the jury, since both parties have full opportunity to present all evidence on anything necessarily referable to that question to the jury and to argue all elements necessarily referable to that question prior to the time that the jury goes to the jury room to answer the question. Under these circumstances, the jury's answer should control and the broad issue practice should not burden instructions with technicalities of former "cluster" issues practice regarding "deemed findings." This goes for the last sentence of that paragraph as well, i.e., the last sentence on page 7. Lemos v. Montez, supra, prescribes "proliferation of instructions" and mandates "simplicity in jury damages."

In the first paragraph on page 8, I would omit the words "If a contention... sufficiency of the evidence, it" and replace that language with the words "Error in the charge." I believe that the single sentence paragraph should read "Errors in the charge shall not form the basis for a new trial or reversal unless the complainant can show that the same was calculated to and probably did result in an improper verdict."

Conclusion

My comments essentially address three problems.

1. There should not be distinction made between a "limiting" instruction and any other kind of instruction insofar as the procedural language of the Rule is concerned. Seeking

instructions, entitlement to instructions, and preservation of error in connection with instructions, are all the same.

2. Matters "necessarily referable" to other matters that have been submitted to the jury should be regarded as determined by the jury's answer to a broad issue. Matters "not necessarily referable" are omitted grounds and are not within the scope of any answer of the jury because none of the matter even in a broad sense has been addressed by the jury.

3. Preservation of error on instructions that are submitted should perhaps be treated differently from preservation of error on instructions that have been wholly omitted so that oral objections and requests for amendment by either party would be sufficient to preserve error in submitted instructions whereas in an omitted instruction any party complaining about that would have to submit a written request in substantially correct form. This would somewhat conform preservation of error on instructions to the current practice of preservation of error in issues at least insofar as complaining about what is being submitted as opposed to complaining about a total omission. I would not favor having the instruction practice burdened by the "party relying on" concept to differentiate between oral complaints and amendments and written request requirements, but that may be another possible consideration.

As you know, from discussions with the Subcommittee, and particularly with Hadley Edgar and Rusty McMains, these items are matters that have concerned me and which I have been addressing in recent weeks in hopes that the product that we do produce in Rules 277 and 278 (formerly 279) will continue the reform of jury issue submission in the true sense of "simplification." I do not favor any retreat to the technical burdens of the prior cluster issue practice.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosures
cc/w/encl: Chief Justice Jack Pope
Justice Wallace
Professor William Dorsaneo
Franklin Jones
J. Hadley Edgar
Harold W. Nix
Russell McMains
W. James Kronzer
Harry M. Reasoner
Frank L. Branson
Steve McConnico

Mel LEMOS, Petitioner,

v.

Alfred R. MONTEZ et al., Respondents.

No. C-2620.

Supreme Court of Texas.

Nov. 14, 1984.

Rehearing Denied Dec. 19, 1984.

Suit was instituted for injuries sustained when truck owned by defendant backed into an automobile in which plaintiff was a passenger. After jury answered special issues in favor of defendant, the 117th District Court, Nueces County, Jack R. Blackmon, J., entered a take nothing judgment, and plaintiff appealed. The Court of Appeals, Kennedy, J., 659 S.W.2d 145, affirmed, and appeal was taken. The Supreme Court, Pope, C.J., held that: (1) including the option of "neither" in broad negligence-proximate cause special issue, which had effect of submitting a special issue on unavoidable accident, was not proper, and (2) appending to definition of unavoidable accident the words, "The mere happening of a collision of motor vehicles is not evidence of negligence," was error.

Reversed and remanded.

1. Trial ⇐350.5(3), 352.4(7)

Including the option "neither" in broad negligence-proximate cause special issue, which had effect of submitting special issue on unavoidable accident, was not proper whether there was evidence of unavoidable accident or not in personal injury action, in that such an inquiry raises a condemned inferential rebuttal issue; moreover, unavoidable accident was not raised by evidence in case.

2. Trial ⇐352.1(7)

A proper way to submit broad negligence-proximate cause special issue when there is evidence that neither driver proximately caused accident would be to include correct definition of "unavoidable accident" and ask whose negligence, if any, proximately caused the collision.

3. Automobiles ⇐246(57)

Charge appending to the definition of unavoidable accident the words, "The mere happening of a collision of motor vehicles is not evidence of negligence," was error in personal injury action.

Bonilla, Read, Bonilla & Berlanga, Inc., Edwards, McMains & Constant, Russell H. McMains, Corpus Christi, for petitioner.

Kleberg, Dyer, Redford & Weil, Douglas E. Chaves and Joseph C. Rodriguez, Corpus Christi, for respondents.

POPE, Chief Justice.

The questions presented for review are whether the trial court erred in submitting an unavoidable accident issue to the jury in this traffic accident case and in giving an instruction that the happening of a collision is not evidence of negligence. Mel Lemos sued Alfred R. Montez and Seven-Up Bottling Company of Corpus Christi for damages arising when Montez backed a Seven-Up truck into Lemos' Volkswagen. The trial court rendered a judgment on the verdict that plaintiff Lemos take nothing, and the court of appeals affirmed the judgment. 659 S.W.2d 145. We reverse the judgments of the courts below and remand the cause for trial.

On the afternoon of December 27, 1979, plaintiff Mel Lemos was a passenger in his Volkswagen that was being driven by Ignacio Arrellano. The Lemos vehicle was proceeding in an easterly direction in the right hand lane of Leopard Street in Corpus Christi. It was following a six-wheel Seven-Up truck driven by Alfred Montez. The Seven-Up truck turned to the right, that is to the south, on Mexico Street, and Arrellano followed in the Volkswagen, making the same turn to the right on Mexico. There were no other moving vehicles going either direction on Mexico Street south of Leopard.

After turning south on Mexico, the Volkswagen proceeded some thirty or thirty-five feet and stopped on the traveled part of Mexico Street. These facts are not disputed. There is dispute, though not material, about the movement of the Seven-Up truck. Lemos testified that the Volkswagen stopped because the Seven-Up truck began backing northward on Mexico toward the Volkswagen. Lemos said that the red rear light of the truck was flashing, and the truck backed into and struck the Lemos Volkswagen directly in front, damaging the Volkswagen and injuring him.

Defendant Montez recalled the facts differently. He said he turned right from Leopard Street onto Mexico Street, but instead of driving straight down Mexico Street, he kept turning the truck to the right to enter a service station on the southwest corner of Leopard and Mexico, where he was going to purchase gasoline. He said that he did not drive the truck close enough to the pump, so he backed the Seven-Up truck in an easterly direction out of the service station property and into Mexico Street. He intended to drive back into the station to position the truck closer to the pump. He testified that while backing, there was an area behind the large Seven-Up truck which he could not see in his rear view mirrors. Montez explained that he heard the sound of the Volkswagen horn and slammed on the brakes, but the vehicles collided. He testified that he did not see the Volkswagen until after the accident.

The undisputed evidence is that Montez was backing the truck blindly in whatever direction it was moving. Montez' excuse for the collision was that four or five cars parked in the service station property along Leopard Street obscured his vision. Those cars, however, were north of the Seven-Up truck, not east of it. They could not possibly have obscured Montez' vision in the direction in which he was backing the truck.

By adding the option of "neither" to the broad negligence—proximate cause special issue, the trial court in effect submitted a special issue on unavoidable accident. Plaintiff Lemos objected that it was an inferential rebuttal issue and that there was no evidence of unavoidable accident. The trial court also overruled Lemos' objection to the instruction that the happening of a collision is not evidence of negligence. The instruction and special issue submitted to the jury, and its response, were as follows:

> The mere happening of a collision of motor vehicles is not evidence of negligence. An occurrence may be an unavoidable accident, that is, an event not proximately caused by the negligence of any party to it.
>
> * * * * * *
>
> Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision of December 27, 1979 made the basis of this suit?
>
> Answer with one of the following:
> (a) Alfred R. Montez
> (b) Ignacio Nat Arrellano
> (c) Both
> (d) Neither
>
> Answer: (d) Neither

Since 1973, the use of broad issues in the trial of cases has been approved. Rule 277, Tex.R.Civ.P., specifically authorizes broad submissions. In *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex.1974), this court expressly approved broad negligence issues. We have permitted the submissions of negligence and proximate cause issues in a single issue. *Members Mutual Insurance Co. v. Muckelroy*, 523 S.W.2d 77 (Tex. Civ.App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). We later approved the *Muckelroy* submission in *Scott v. Atchison, Topeka & Santa Fe Ry. Co.*, 572 S.W.2d 273 (Tex.1978). The *Muckelroy* charge did not, however, include in its alternative jury answers the blank for an answer of "Neither."

In the subsequent case of *Pate v. Southern Pacific Transportation Co.*, 567 S.W.2d 805 (Tex.Civ.App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), the court in-

cluded among its inquiries, after the broad issue, spaces for answers as to the negligence of each party, followed by a blank space to indicate "No one." On appeal, the attack upon the judgment was addressed only to the broad form of the issue, but not to the alternative answer. The court of appeals correctly approved the submission. Because there was no objection or point on appeal that complained of what might be termed an unavoidable accident issue, the court of appeals did not address it.

Prior to our decision in *Yarborough v. Berner*, 467 S.W.2d 188 (Tex.1971), a plaintiff was required to submit an issue and to obtain a finding that negated unavoidable accident. We held in *Yarborough* that the special issue inquiring about unavoidable accident should not be submitted because it was an inferential rebuttal issue that required the plaintiff to prove the nonexistence of an affirmative defense. We also said that the issue had produced confusion, was a trap for the jury, sometimes created conflicts in jury answers, and was one of the issues that defeated a simple submission of issues to juries. Since 1971, the rule has been that an issue asking a jury about unavoidable accident is improper. Rule 277, Tex.R.Civ.P., expressly prohibits the submission of inferential rebuttal issues.

In this case, the trial court has submitted, in new form, an issue that compels the plaintiff to negate unavoidable accident. To prevail, plaintiff Lemos had to negate a finding of "Neither." A finding of "Neither" equals unavoidable accident which is defined as "an event not proximately caused by the negligence of any party to it." The inquiry is a return to the condemned inferential rebuttal issue.

[1, 2] The choices that should have been submitted to the jury in this case are subdivisions (a) and (b) of the issue, that is, whether defendant Montez' negligence proximately caused the collision and (b) whether Arrellano's negligence proximately caused the collision. The jury can find that the negligence of either, neither, or both caused the accident by their answers to subdivisions (a) and (b). Subdivisions (c) "Both" and (d) "Neither" are not proper whether there is evidence of unavoidable accident or not. A proper way to submit the issue when there is evidence that neither driver proximately caused the accident would be to include the correct definition of "unavoidable accident" and ask:

> Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision of December 27, 1979 made the basis of this suit?
>
> | | Yes | No |
> |---|---|---|
> | (a) Alfred R. Montez | _____ | _____ |
> | (b) Ignacio Nat Arrellano | _____ | _____ |

The inquiry about "Neither" should not have been submitted for another reason. Unavoidable accident was not raised by the evidence in this case and the court erred in giving the instruction. The argument of defendants Montez and Seven-Up was that Montez' view toward Leopard Street, that is to the north, was obstructed by parked cars. The operative facts about the collision show that when Montez began to back into Mexico Street he was looking or should have been looking to his rear, which was toward the east. His lookout or view, according to his own testimony, was in the direction toward which he was blindly backing, that is, to the east toward Mexico Street. If, while backing, Montez was looking in the wrong direction toward Leopard Street, he was not keeping a proper lookout as a matter of law. The parked cars toward the north had nothing to do with Montez' view toward the east. This is not a fact situation for an instruction concerning unavoidable accident and, on remand, upon similar facts, the instruction should not be given. This case concerned only negligence. *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379 (1952); *Hicks v. Brown*, 136 Tex. 399, 151 S.W.2d 790 (1941).

Plaintiff Lemos also objected to the court's charge that appended to the correct definition of unavoidable accident the words, "[T]he mere happening of a collision

of motor vehicles is not evidence of negligence." The correct definition of unavoidable accident has been settled since our decision in *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379, 385 (1952). The definition used in *Bailey* is carried forward in our Pattern Jury Charges. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 3.03 (1969). This court has not indicated to the bench and bar that the definition should be embellished with the addendum.

[3] The extra instruction is also wrong. *Res ipsa loquitur* cases exemplify situations in which negligence can be inferred from the happening itself. Backing blindly into a vehicle that is lawfully headed in the right direction can be some evidence of negligence. A collision between an unoccupied vehicle that rolls down an inclined driveway into another vehicle or a child may be evidence that brakes were defective or not set. The court of appeals cites as authority for its approval of the trial court's instruction *Molina v. Payless Foods, Inc.*, 615 S.W.2d 944, 947 (Tex.Civ. App.—Houston [1st Dist.] 1981, no writ). The instruction in *Molina*, unlike the one in this case, was, "the mere occurrence of an accident does not necessarily imply negligence." There is a material difference between an instruction that the happening "is not" negligence and an instruction that the happening "does not necessarily imply" negligence. The jury does not need either instruction. This court has treated addenda to the charge as impermissible comments that tilt or nudge the jury one way or the other. *Acord v. General Motors Corp.*, 669 S.W.2d 111 (Tex.1984); *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449 (Tex.1978); *see Irick v. Andrew*, 545 S.W.2d 557 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); *Levermann v. Cartall*, 393 S.W.2d 931 (Tex. Civ.App.—San Antonio 1965, writ ref'd n.r. e.).

Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. Submission of Special Issues Act, ch. 59, § 1, 1913 Tex.Gen.Laws 113. The new procedure required the use of special issues that would be submitted separately and distinctly.

In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex.R. Civ.P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission.

This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

We reverse the judgments of the courts below and remand the cause to the trial court.

employer. The only reasonable conclusion that he could have drawn from the facts and circumstances presented by the record was that his heart attack was directly related to the pulling on the bar in the effort to free the portion of the electrode that was stuck. The only excuses advanced by plaintiff for the late filing were that he expected to go back to work, and that the doctor never did tell him that his heart attack was job related.

Taking as true only the evidence here presented which is favorable to plaintiff, we hold that plaintiff's action in delaying the filing of his claim until April 12, 1972, a period of two years and three and one-half months following the injury, does not meet the standard of ordinary prudence. This appears as a matter of law. The facts testified to by plaintiff conclusively show that he sustained an injury and suffered from a condition which should and would have led any reasonably prudent person under the same or similar circumstances to protect his rights to compensation by timely filing his claim for compensation. Good cause for the filing thereof does not exist, and plaintiff did not meet the burden required of him. Defendant's motion for judgment non obstante veredicto should have been sustained. Defendant's points 1, 2 and 3 are sustained.

Special Issue 14, wherein the jury found that "the lack of such medical evidence" caused plaintiff to delay the filing of the claim is not supported by any evidence. The "lack of such medical evidence" cannot, as a matter of law, constitute good cause for plaintiff's delay in filing his claim until April 12, 1972. Accordingly, defendant's points 6 and 9 are sustained.

In view of the foregoing, it is not necessary that we pass on defendant's remaining points of error. The judgment of the trial court is reversed and judgment is here rendered that W. E. Allen, plaintiff, take nothing by his suit against Texas Employers' Insurance Association, defendant.

Reversed and rendered.

FIRST STATE BANK & TRUST COMPANY OF EDINBURG, Texas, Appellant,

v.

Mike E. GEORGE et al., Appellees.

No. 892.

Court of Civil Appeals of Texas, Corpus Christi.

Dec. 31, 1974.

Rehearing Denied Feb. 13, 1975.

Collecting bank, as holder of checks on which payment was stopped, brought action against drawers. The 92nd District Court, Hidalgo County, J. R. Alamia, J., entered judgment in favor of drawers, and collecting bank appealed. The Court of Civil Appeals, Bissett, J., held that bank had actual notice of check kiting by payee and thus failed to carry burden of establishing that it took checks in good faith and without any notice of defenses; that bank was not a holder in due course, and thus bank took checks subject to all defenses that drawers would have had, including that of check kiting and want or failure of consideration; that bank must promptly exercise its right to charge back a check once it has learned of stop payment order; and that court reporter's affidavit stating that there was a mistake in original statement of facts which was filed in appellate court would not be considered by appellate court as correcting the original statement of facts.

Judgment affirmed.

1. Bills and Notes ⇨365(1)

If bank is found to be holder in due course, then to that extent it takes instrument free of all defenses of any party to the instrument with whom it has not dealt. V.T.C.A., Bus. & C. § 3.305(b).

2. Bills and Notes ⇨327

Bank, in order to fall within category of holder in due course, must take instru-

ment for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. V.T.C.A., Bus. & C. § 3.305(b).

3. Bills and Notes ⇐337

Test of good faith, defined in Commercial Code as "honesty in fact in the conduct or transaction concerned," is not diligence or negligence. V.T.C.A., Bus. & C. § 1.201(19).

4. Bills and Notes ⇐337

For purposes of determining whether bank is in good faith and is thus eligible to be a holder in due course, it is immaterial that bank may have had notice of such facts as would put reasonably prudent person on inquiry which would lead to discovery unless bank had actual knowledge of facts and circumstances that would amount to bad faith. V.T.C.A., Bus. & C. §§ 1.201(19), 3.305(b).

5. Bills and Notes ⇐335

Where collecting bank knew of facts and circumstances surrounding transactions, where bank provided credit on checks which payee deposited prior to presenting them to drawee, and where there was close relationship between bank officers and payee, who was former bank director, bank had actual notice of check kiting by payee and thus failed to carry burden of establishing that it took checks in good faith and without any notice of defenses. V.T.C.A., Bus. & C. §§ 1.201(19, 25), 3.305(b).

6. Bills and Notes ⇐452(1, 3)

Where bank failed to carry burden of establishing that it took checks in good faith without any notice of a defense to them, it was not a holder in due course, and consequently it took checks subject to all defenses that drawers would have had, including that of check kiting and want or failure of consideration. V.T.C.A., Bus. & C. §§ 1.201(19, 25), 3.306.

7. Banks and Banking ⇐21

"Check kiting" means writing a check against a bank account where funds are insufficient to cover it and hoping that before it is deposited the necessary funds will have been deposited.

See publication Words and Phrases for other judicial constructions and definitions.

8. Trial ⇐349(2)

Trial court did not abuse its discretion in submitting special issue asking jury if "the deposits or any of them" made by customer on specified date were for specific purpose of covering specific checks drawn by customer, despite contention that since three deposits were made on such specified date, jury was required to find whether specific one of the deposits was made for purpose of covering checks issued to specified payees, and that an answer to the special issue as submitted did not answer an ultimate issue in the cause. Rules of Civil Procedure, rule 277.

9. Appeal and Error ⇐216(2)

Litigant who finds any fault with failure of court to supply substantially correct definition or explanatory instruction in the charge must request and tender in writing the omitted correct definition or explanatory instruction as a predicate for appellate review. Rules of Civil Procedure, rule 279.

10. Appeal and Error ⇐216(2)

In action by collecting bank, as holder of checks on which payment was stopped, against drawers, bank's failure to present written request to trial court for submission of substantially correct definition or explanatory instruction as to what constitutes a loan at law was a waiver of its right to complain on appeal about lack of such definition or explanatory instruction. Rules of Civil Procedure, rule 279.

11. Appeal and Error ⇐614

Where, inter alia, instrument denominated "Plaintiff's Special Exceptions to

Court's Charge" did not have official signature of judge endorsed thereon as required, where instrument was inserted in binder which contained statement of facts immediately following page 608 and was numbered pages 611 to 616, where statement of facts was signed by trial judge as per his certificate which appeared on page 609, and where court reporter's certificate was found on page 610 and stated that "the foregoing is true and correct to the best of my knowledge," the instrument could not be considered as part of the statement of facts, and appellant could not complain of alleged defects in the charge. Rules of Civil Procedure, rule 272.

12. Banks and Banking ⇐126

Commercial Code does not allow bank to charge back a check at any time after it has learned of stop payment order but rather requires the bank to promptly exercise its right to charge back once such fact is known. V.T.C.A., Bus. & C. §§ 4.212, 4.212(e).

13. Trial ⇐215

Only function of explanatory instruction in charge to jury is to aid and assist jury in answering the issues submitted. Rules of Civil Procedure, rule 277.

14. Trial ⇐215, 219

Trial court must, in its charge to jury, give definitions of legal and other technical terms; nothing else, however interesting or relevant to the case in general, which does not aid the jury in answering the issue is required. Rules of Civil Procedure, rule 277.

15. Trial ⇐215

Trial court has considerably more discretion in submitting explanatory instructions than it has in submitting special issues. Rules of Civil Procedure, rule 277.

16. Trial ⇐215

Trial court did not abuse its discretion in refusing to submit requested special instructions, where such instructions did not refer to any particular issue or term used in the charge, they could only be considered by jury as applying to case as a whole, they were not necessary to assist jury in properly answering any issue, and none of the special issues which were submitted contained any legal or technical terms. Rules of Civil Procedure, rule 277.

17. Banks and Banking ⇐126

Once bank received notice that check had been dishonored, waiting 29 days before exercising right to charge back was not a prompt exercise of that right. V.T.C.A., Bus. & C. §§ 4.212, 4.212(e).

18. Appeal and Error ⇐688(2)

Objection to jury argument was not properly before appellate court, where jury argument was not included within pages of record which trial judge certified to be the statement of facts of the case.

19. Appeal and Error ⇐1003(9)

In action by collecting bank, as holder of checks on which payment was stopped, against drawers, jury finding that bank did not receive checks for deposit in good faith was not so contrary to the evidence and admissions as to demonstrate any bias or prejudice on the part of the jury.

20. Appeal and Error ⇐1003(9)

In action by collecting bank, as holder of checks on which payment was stopped, against drawers, jury finding that drawers did not have knowledge that checks which they drew were obtained by payee in exchange for payee's kited checks was not so contrary to the evidence and admissions as to demonstrate any bias or prejudice on the part of the jury.

On Rehearing

21. Appeal and Error ⇐653(3)

Appellate court cannot consider correction to statement of facts after it has been filed in appellate court unless and un-

til the same has been agreed to by the parties or proved by the trial judge. Rules of Civil Procedure, rules 375, 377.

22. Appeal and Error ⇐648

Court reporter does not have authority to alter, change or correct the original statement of facts in any manner whatsoever after the same has been agreed to by the parties or approved by the trial judge and filed in the appellate court. Rules of Civil Procedures, rules 375, 377.

23. Appeal and Error ⇐648

Affidavit from court reporter asserting a mistake in original statement of facts which had been filed in the appellate court would not be considered by the appellate court as correcting the original statement of facts, where appellate court had nothing before it from either the parties themselves or from the trial judge asserting that a mistake had been made in the original statement of facts. Rules of Civil Procedure, rules 375, 377.

Mitchell O. Sawyer, Kelley, Looney, Alexander & Hiester, Edinburg, for appellant.

O. C. Hamilton, Jr., Ewers, Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis, McAllen, for appellees.

OPINION

BISSETT, Justice.

This is a suit to recover $57,971.47 because payment was stopped on six checks. The First State Bank & Trust Company of Edinburg, Texas, hereinafter called "Bank", instituted suit against Mike E. George and wife, Letha K. George, hereinafter called "Georges", to recover damages for six checks signed by the Georges, payable to the order of Joe Davis and deposited in accounts owned by Davis, upon which payment was subsequently stopped. Trial was to a jury, which returned a verdict in favor of the Georges. Judgment was entered on the jury's verdict. The Bank has appealed.

During the early part of October, 1968, Joe Davis, who was a director of the Bank from the mid 1950's until January, 1969, approached the Georges for money and received six checks from them in the total amount of $151,000.00. The checks, which were drawn on the First National Bank of McAllen, were deposited by Davis in two accounts in the Bank, as follows:

$27,000.00, deposited 10/14/68 in Davis Gin Company account;

$28,000.00, deposited 10/15/68 in Santa Cruz Cattle Co. account;

$26,000.00, deposited 10/15/68 in Santa Cruz Cattle Co. account;

$22,000.00, deposited 10/16/68 in Davis Gin Company account;

$25,000.00, deposited 10/16/68 in Santa Cruz Cattle Co. account;

$23,000.00, deposited 10/17/68 in Santa Cruz Cattle Co. account.

Contemporaneously with the issuance of the aforesaid checks to Davis by the Georges, Davis issued his checks to them in the corresponding total of $151,000.00.

Credit was given immediately by the Bank to Davis on the Georges' checks, even before they had been presented to the First National Bank of McAllen, the payee bank. On October 15, 1968, Mr. Bascum Spiller, President of the First National Bank of McAllen, informed the Georges that he had called the Edinburg Bank, appellant herein, regarding certain checks signed by Joe Davis and payable to the Georges, which were insufficient in that Davis did not have enough money in his accounts to cover said checks. The Georges stopped payment on the $27,000.00, $28,000.00, and $26,000.00 checks on October 21, 1968, and on the $22,000.00, $25,-

000.00 and $23,000.00 checks on October 22, 1968. The checks were later charged back by the Bank to the respective accounts of Davis.

Sometime after the Bank had been notified that payment had been stopped on the six checks, Mr. Tom East borrowed $150,000.00 from the Bank. He loaned Davis $150,000.00 so that he could take care of the overdrafts at the Bank. Davis deposited $150,000.00 in the Santa Cruz Cattle Co. account on October 24, 1968, and on the same day also deposited $13,000.00 and $4,000.00 in that account. After charging back the six checks and other checks not here involved, the Bank's records showed that the accounts in which the Georges' checks were deposited were still overdrawn in the amount of $57,971.47. Suit was instituted against the Georges for recovery of that sum of money on the theory that by advancing money against the checks drawn by the Georges prior to notice of their dishonor as a collecting bank, the Bank became a holder in due course of said checks, and was therefore entitled, as a matter of law, to recover the $57,971.47. The Georges, in their answer, in addition to a general denial, alleged that at the time the checks were deposited by Davis in the Bank and before any withdrawals were made against the money in the accounts that the bank had actual notice that payment had been stopped on the checks, and that the checks were in fact paid to the Bank when Davis borrowed $150,000.00 and deposited that sum of money in the Bank for the specific purpose of taking care of the overdrawn accounts.

The jury, in response to special issues, found that at the time the checks in question were deposited, the Bank did not receive the same in good faith; that the Bank had notice of a claim or defense to them on the part of the Georges; that the Bank received full payment or satisfaction on the checks; that Davis was kiting checks during the month of October, 1968; that Davis obtained the Georges' checks in exchange for kited checks; that the Bank had knowledge that the checks in question were exchanged for kited checks at the time said checks were deposited; that Mike George did not have knowledge that such checks obtained by Joe Davis were in exchange for the kited checks; and that it was understood between the Bank and Davis that the deposits or any of them made by Davis on October 24, 1968 were for the specific purpose of covering the Mike George checks in question.

The Bank, in its point of error No. 1, asserts that the trial court erred in failing to grant its motion for judgment non obstante veredicto in connection with the $27,000.00 check, because the undisputed evidence revealed that the bank was a holder of such check, that it did not receive notice of the stop payment order until after the check had been deposited in the bank and the funds disbursed to Davis, or made available for his immediate use, and because the undisputed evidence further established that it did not recoup any of the funds represented by such check from Davis.

In points nos. 5, 6, 7, and 8, the contentions are made: that the trial court erred in submitting Special Issue 5 because it failed to inform the jury that a bona fide loan transaction would not be included within the definition of "check kiting" (Point 5); that it erred in submitting Special Issues 6 and 7 because such issues were predicated upon an affirmative answer to Special Issue 5, and constituted error for the same reason urged against the submission of Special Issue 5 (Point 6); that it erred in submitting Special Issue 9 and because it inquired into whether any of a group of deposits were made for the purpose of paying the Georges' checks, and did not inquire as to whether any particular one of the deposits were for such purpose (Point 7); and that it erred in submitting Special Issue No. 10 for the reason that the issue did not inquire about a factual matter, but inquired of the jury as to a legal conclusion (Point 8).

Since points 1, 5, 6, 7, and 8 are each directed only to the $27,000.00 check, which was dated and deposited on October 14, 1968, we will limit our discussion to that check only insofar as those points are concerned. In the discussion that follows, we deem it necessary to set out Special Issues 5, 9 and 10.

[1, 2] If a bank is found to be a holder in due course, then to that extent it takes the instrument free of all defenses of any party to the instrument with whom it has not dealt. Tex.Bus. & Comm.Code Ann. § 3.305(b) (1968), V.T.C.A. A bank, in order to fall within the category of holder in due course, must take the instrument for value; in good faith; and without notice that it is overdue, or has been dishonored, or of any defense against or claim to it on the part of any person.

[3, 4] Good faith is defined in Tex.Bus. & Comm.Code Ann. § 1.201(19) (1968) to mean "honesty in fact in the conduct or transaction concerned". The test is not diligence or negligence; and it is immaterial that the bank may have had notice of such facts as would put a reasonably prudent person on inquiry which would lead to discovery, unless the bank had actual knowledge of facts and circumstances, that would amount to bad faith. Riley v. First State Bank, Spearman, 469 S.W.2d 812 (Tex.Civ.App.—Amarillo 1971, writ ref'd n. r. e.); Richardson Company v. First Nat. Bank in Dallas, 504 S.W.2d 812 (Tex.Civ.App.—Tyler 1974, writ ref'd n. r. e.). In the instant case, there was testimony that Mr. Shrader should have known that Davis was kiting checks at the time in question, and that by looking at the accounts involved, any banker could see that check kiting was going on during October, 1968.

[5, 6] As to the question of notice, Tex.Bus. & Comm.Code Ann. § 1.201(25) (1968) is controlling and states:

"(25) A person has 'notice' of a fact when

(A) he has actual knowledge of it; or

(B) he has received a notice or notification of it; or

(C) *from all the facts and circumstances known to him at the time in question he had reason to know that it exists.*" (Emphasis added.)

The Bank's knowledge of the facts and circumstances surrounding the transactions, the special treatment it gave Davis, one of its then directors, the fact that it provided immediate credit on the checks which Davis deposited to his accounts, and the close relationship between certain bank officers and Davis, collectively, establish that the bank had actual notice of the check kiting by Davis. The Bank failed to carry the burden of establishing that it took the check in good faith and without any notice of a defense to the same. It was not a holder in due course. As a result, it took the check subject to all defenses that the Georges would have had, including that of check kiting and want or failure of consideration. Tex.Bus. & Comm.Code Ann. § 3.306 (1968).

As already noted, the Georges stopped payment on the check on October 21, 1968. Their action was made known to the Bank on that day. The deposit of $150,000.00, which Davis said was made possible by a loan from Mr. East, was made on October 24, 1968. The actual bookkeeping entry by the Bank which reflected the charge back was not made until November 18, 1968. During that interval numerous checks were paid out of the account to third parties. After the charge back, the Davis Santa Cruz Cattle Co. account had a deficit of $72,507.39. The account was made current by an entry on November 18, 1968 for $72,507.39, which relieved the overdraft condition of that particular account.

The purpose of the loan made by Mr. East to Davis, and the understanding between the Bank and Davis relating to the $150,000.00 deposit, are each established by the testimony of Davis, which is summa-

rized, as follows: the purpose of the loan was to take care of the six checks; there was a discussion between East, Shrader (an officer of the Bank) and Davis relating to the checks; Shrader, at the instance of and with the permission of Davis, actually made the deposit into the Santa Cruz Cattle Co. account; it was the understanding of Davis that the $150,000.00, together with additional deposits of $13,000.00 and $4,000.00 would take care of the situation.

The jury's findings that the Bank did not receive the check in good faith, that it had notice of a claim or defense to it on the part of the Georges, and that it had received full payment thereon are each supported by the record. See Citizens State Bank v. Western Union Telegraph Co., 172 F.2d 950 (5th Cir.). Point 1 cannot be sustained.

[7] Special Issue 5, together with its accompanying instruction, reads as follows:

"SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that during the month of October, 1968, Joe Davis was kiting checks?

To 'kite' checks means to write a check against a bank account where the funds are insufficient to cover them hoping that before they are presented the necessary funds will be deposited.

Answer 'We do' or 'We do not' ".

The jury answered: "We do". The definition of check kiting given in connection with Special Issue No. 5 was sufficient. Sutro Bros. & Co. v. Indemnity Insurance Co. of North America, D.C., 264 F.Supp. 273 (1967); Citizens State Bank v. Western Union Telegraph Co., 172 F.2d 950 (5th Cir. 1949). Points 5 and 6 cannot be sustained.

[8] Special Issue 9 was submitted in the following form:

"SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that it was understood between the First State Bank and Trust Company of Edinburg, Texas, and Joe Davis that the deposits or any of them made by Joe Davis on October 24, 1968 were for the specific purpose of covering the Mike George checks in question?

Answer 'We do' or 'We do not' ".

The jury answered: "We do".

In addition to the deposit of the proceeds of the East loan ($150,000.00) in the Santa Cruz Cattle Co. account on October 24, 1968, Davis, on the same day, deposited the sums of $13,000.00 and $4,000.00. The Bank contends that since three deposits were made in varying amounts, it would be necessary for the jury to find whether a specific one of the deposits made was for the purpose of covering the George checks, and a simple answer that one or more of such deposits was for such purpose did not answer an ultimate issue in this cause. We do not agree. Rule 277, Texas Rules of Civil Procedure, as amended in 1973, reads, in part:

"It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues. . . . "

Special Issue No. 9 inquired if the deposits, *"or any of them"*, were made for the specific purpose of covering the Georges' checks. The $150,000.00 item was one of those deposits. Even though Special Issue No. 9 does not specifically refer to the $150,000.00 deposit, it was sufficiently referred to and described by the

words "the deposits or any of them made by Joe Davis on October 24, 1968" and by the phrase "for the specific purpose of covering the Mike George checks in question". There is no question but that there is substantial evidence that it was understood by both the Bank and Davis that the $150,000.00 deposit, which he made on October 24, 1968, was for the specific purpose of covering the six checks, and could not be diverted in any manner which would defeat the special purpose for which the deposit was made. See City State Bank in Wellington v. National Bank of Commerce of Altus, Okl., 261 S.W.2d 749 (Tex.Civ.App.—Fort Worth 1953, writ ref'd n. r. e.); Martin v. First State Bank, Memphis, Texas, 490 S.W.2d 208 (Tex.Civ.App.—Amarillo 1973, no writ). The trial court was within its discretion in submitting the issue in the form that it was submitted. No abuse of discretion is shown. Point 7 cannot be sustained.

[9, 10] Special Issue 10, as submitted, reads:

"SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that by November 21, 1968 the overdrawn condition of the Santa Cruz Cattle Company account was eliminated by a loan or loans which the Bank made to Joe Davis?

Answer 'We do' or 'We do not' ".

The jury answered: "We do". It is argued that it was error to submit the issue for the reason that it did not inquire about a factual matter, but instead, inquired of the jury as to a legal conclusion, without any instruction by the trial court as to what constitutes a loan at law. Be that as it may, the Bank waived its right to complain about the lack of an explanatory instruction or definition of a "loan" in the trial court's charge. Rule 279, T.R.C.P., provides in part:

". . . Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment *unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.*" (Emphasis added.)

A litigant who finds any fault with the failure of the court to supply a substantially correct definition or explanatory instruction in the charge must request and tender in writing the omitted correct definition or explanatory instruction as a predicate for any appellate review. Yellow Cab and Baggage Company v. Green, 154 Tex. 330, 277 S.W.2d 92 (1955); Hodges, Special Issue Submission in Texas, § 72, pp. 180–181. Since the Bank did not present a written request to the trial court for the submission of a substantially correct definition or explanatory instruction, no predicate has been laid for the consideration of the point (No. 8) in this appeal. Point 8 cannot be sustained.

Moreover, points Nos. 5, 6, 7, and 8 must be overruled for the reason that the Bank's objections to the submission of Special Issues 5, 6, 7, 9 and 10 were not properly preserved for appellate review.

[11] Rule 272, T.R.C.P., provides, in part:

". . . The requirement that the objections to the court's charge shall be in writing will be sufficiently complied with if such objections are dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, before the reading of the court's charge to the jury, *and are subsequently transcribed and the court's ruling and official signature endorsed thereon and filed with the clerk in time to be included in the transcript.* . . . "
(Emphasis added.)

The transcript which was filed in this case does not contain any objections to the court's charge. Apparently, counsel for the Bank, at the close of the evidence, dictated objections to the charge because in

the statement of facts, which was not approved by the attorneys for the parties, there is an instrument denominated "Plaintiff's Special Exceptions to the Court's Charge". While it recites that the "exception and objections" are overruled, the instrument does not have the official signature of the judge endorsed thereon as required, nor is there any showing that the objections were dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, as required by Rule 272. The instrument is inserted in the binder which contains the statement of facts immediately following page 608, and is numbered pages 611 to 616. The statement of facts was signed by the trial judge, as per his certificate which appears on page 609. The court reporter's certificate is found on page 610. Each certificate states that "the foregoing is true and correct to the best of my knowledge". It is obvious that pages 611 to 616, even though they are contained in the bound volume of the statement of facts, are not covered by the certificate of the trial judge. The instrument is not properly before us. It cannot be considered as being part of the statement of facts.

Under the circumstances, the Bank cannot complain of the alleged defects in the charge. The instrument was not signed by the judge and does not have his official endorsement thereon. There has been no compliance with Rule 272. In the absence of a compliance with this Rule, the Bank's objections were not properly preserved for appellate review and this point cannot be considered by us. Long v. Smith, 466 S.W.2d 32 (Tex.Civ.App.—Corpus Christi 1971, writ ref'd n. r. e.); Cody v. Mahone, 497 S.W.2d 382 (Tex.Civ.App.—San Antonio 1973, writ ref'd n. r. e.); Charter Oak Fire Insurance Company v. Perez, 446 S.W.2d 580 (Tex.Civ.App.—Houston [1st Dist] 1969, writ ref'd n. r. e.).

Accordingly, the Bank's points of error Nos. 1, 5, 6, 7 and 8 are all overruled.

The Bank, in its Points of Error Nos. 2 and 3 complains that the trial court erred in refusing to submit its requested Special Instructions Nos. 1 and 2 to the jury. The requested Special Instructions read as follows:

"Special Instruction No. 1

You are instructed as a matter of law that the bank was not required to charge back any of the checks at any particular time, or at all, and that any failure to charge back a check, or to charge the check in a particular manner, does not affect the bank's right of action against the defendants.

Special Instruction No. 2

You are instructed that any credit given by a bank to a customer depositing an item is provisional and contingent upon that then being paid."

[12] The Bank contends that under Tex.Bus. & Comm.Code Ann.Bus. & C., § 4.212(e) [1] (1968), it has no duty to charge back the item at any particular time, and that the evidence introduced conveyed to the jury the impression that the bank was in error in not charging the item back earlier and without such instruction the jury would proceed under an incorrect theory of law. We disagree. We do not believe that requested Special Instruction No. 1 states the rule correctly. The correct rule is set out in Comment 3 to § 4.212, Tex. Bus. & Comm.Code Ann. (1968), as follows:

"3. The right of charge-back or refund exist if a collecting bank has made a provisional settlement for an item with its customer but terminates if and when a settlement received by the bank for the item is or becomes final. *If the bank fails to receive such final settlement the right of charge-back or refund must be*

1. "(e) A failure to charge-back or claim refund does not affect other rights of the bank against the customer or any other party."

exercised promptly after the bank learns the facts. The right exists (if so promptly exercised) whether or not the bank is able to return the item." (Emphasis added.)

Subsection (e) of § 4.212 of the Tex.Bus. & Comm.Code Ann. (1968) does not provide that the bank can charge back an item *at any time* after it has learned of facts, such as a stop payment order as the Bank here contends, but means that once the fact is known, the bank must promptly exercise its right to charge back. In addition, such instruction is not necessary to aid the jury in their factual determinations. Rule 277, T.R.C.P., provides, in part:

". . . In submitting special issues the court shall submit *such explanatory instructions* and such *definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues*, and in such instances the charge shall not be subject to the objection that it is a general charge." (Emphasis added.)

[13–15] The only function of an explanatory instruction in the charge is to aid and assist the jury in answering the issues submitted. Hodges, Special Issue Submission in Texas, § 10, pp. 29–30 (1959); McDonald, Texas Civil Practice, Vol. 3, § 12.14.2; Deviney v. McLendon, 496 S.W.2d 161 (Tex.Civ.App.—Beaumont 1973, writ ref'd n. r. e.); Levermann v. Cartall, 393 S.W.2d 931 (Tex.Civ.App.—San Antonio 1965, writ ref'd n. r. e.). The only requirement to be observed is that the trial court must give definitions of legal and other technical terms. Nothing else, however interesting, or, indeed, however relevant to the case in general, which does not aid the jury in answering the issue, is required. Hodges, Special Issue Submission in Texas, § 8, page 25 (1959). The trial court has considerably more discretion in submitting instructions in this area than it has in submitting special issues. Boaz v. White's Auto Stores, 141 Tex. 366, 172 S.W.2d 481 (1943); Levermann v. Cartall, supra.

[16] Requested Special Instructions 1 and 2 do not refer to any particular issue or term used in the charge; they could only be considered by the jury as applying to the case as a whole; they were not necessary to assist the jury in properly answering any issue. None of the special issues which were submitted contained any legal or technical terms. Points of Error Nos. 2 and 3 are overruled.

[17] The Bank, in Point of Error No. 4, contends that the trial court erred in allowing the Georges to offer in evidence, over timely objection, their exhibit 18, because the computation contained therein was based on an erroneous legal principle which required the Bank to immediately charge back the $27,000.00 check. Exhibit 18 is a "corrected bank statement" prepared by Mr. Wolford, a Certified Public Accountant; using bank records that were already in evidence. The only difference in the bank statement prepared by the Bank and exhibit 18 is that the balance in the account shown in the exhibit was computed as of the day when the Bank received notice from the Georges that the check would not be paid (October 21, 1968), while the balance reflected in the Bank's own statement was computed as of the date that the Bank actually charged the dishonored checks back to the account (November 18, 1968).

The record discloses that the Bank was notified on October 21, 1968 that payment had been stopped on the $27,000.00 check. The check was returned, and was marked "payment stopped, refer to maker". The record further discloses that the $27,000.00 check was not charged back by the Bank until November 18, 1968, a period of approximately twenty-nine (29) days. During this interval, checks issued to third parties were paid out of the account, even though the Bank was on notice that the check was not going to be honored by the

Georges. Once a bank has received notice that a check has been dishonored, it must exercise its right of charge back promptly. Waiting 29 days before exercising the right to charge back is not a prompt exercise of that right. Exhibit 18 was not based on an erroneous legal principle. The trial court did not err in admitting it into evidence. Point of Error No. 4 is overruled.

[18] In Point of Error No. 9, complaint is made of the failure by the trial court to sustain the Bank's objection to the jury argument by the attorney for the Georges in connection with his argument that the checks should have been charged back at a time other than the time that they were actually charged back. The Bank says that such argument was contrary to law. We do not agree. Furthermore, the jury argument by counsel for the Georges is set out on pages 637 to 666 of the statement of facts. It is not included within the pages which the trial judge certified to be the statement of facts in this case. The jury argument is not properly before us. Point of Error No. 9 is overruled.

[19, 20] In Point of Error No. 10, it is asserted that the trial court erred in refusing to grant a new trial because the jury finding that the Bank did not receive the $27,000.00 check for deposit in good faith (Special Issue 1-a), and the finding that *Mike George* did not have knowledge "that such checks were obtained by Joe Davis in exchange for Joe Davis' kited checks" (Special Issue 8), were so contrary to the undisputed evidence and admissions in the case as to demonstrate that the jury was motivated by bias and prejudice which permeated its answers to each and all of the eleven special issues which were submitted to the jury. We have already held there was ample evidence which supports the jury's findings that the bank did not receive the $27,000.00 check in good faith and without notice. Mike George did not testify. There was no evidence introduced as to what Mike George knew or did not know. There is no admission in the record that Mike George had such knowledge. The jury correctly found that the preponderance of the evidence was that Mike George did not have such knowledge. We have reviewed all of the evidence. We hold that the answer by the jury to the Special Issues 1a and 8 are not so contrary to the evidence and admissions as to demonstrate any bias or prejudice on the part of the jury. Industrial Fabricating Co. v. Christopher, 220 S.W.2d 281 (Tex.Civ.App. —Galveston 1949, writ ref'd n. r. e.). Point of Error No. 10 is overruled.

The judgment of the trial court is affirmed.

OPINION ON MOTION FOR REHEARING

The First State Bank & Trust Company of Edinburg, plaintiff-appellant, in its motion for rehearing, contends that the original statement of facts was inadvertently misnumbered by the court reporter. An affidavit from the court reporter who prepared the statement of facts has been submitted by appellant. It reads, in part, as follows:

". . . I hereby certify that the statement of facts in the above entitled and numbered cause started at Page One (1) of the first bound volume and included all pages thereafter, in both volumes One (1) and Two (2), through Page 710-b of the second volume. That the Judge's certificate certifying the correctness of the statement of facts correctly appears as the next to the last page of the statement of facts, Page 710-a, and that it is certifying the correctness of all pages in the statement of facts through Page 710. That by mistake, the Judge's certificate is numbered Page 609 and the Reporter's certificate is numbered Page 610 in the original statement of facts. I have crossed out those numbers 609 and 610 in

the copies of the statement of facts and written in the numbers 710–a and 710–b in their place, respectively, on the copies, but, apparently, did not do so on the original statement of facts. This change should be made to reflect the correct page numbers of 710–a for the Judge's certificate and 710–b for the Reporter's certificate."

Appellant argues that the affidavit affords a basis for the correction of the original statement of facts, and that the certificate of the trial judge thereon, was, in fact, a certificate that covered the entire record, including the objections to the court's charge and the jury argument. We do not agree. The posture of the statement of facts, fully detailed in the opinion, is not changed by the affidavit.

[21–23] A Court of Civil Appeals cannot consider a correction to a statement of facts after it has been filed in the appellate court unless and until the same has been agreed to by the parties or approved by the trial judge. Rules 375, 377, T.R.C.P. A court reporter does not have the authority to alter, change or correct the original statement of facts in any manner whatsoever after the same has been agreed to by the parties or approved by the tiral judge and filed in the appellate court. Only the parties themselves by joint agreement, or the trial judge, in the event of disagreement, have such authority. The affidavit here presented will not be considered as correcting the original statement of facts. There is still nothing before us from either the parties themselves or from the trial judge which states that the objections to the charge and the jury argument, in the form and content set out in pages numbered 611 to 710 in the original statement of facts, were approved by the trial judge as being part of the record which was filed in this Court.

We have carefully considered all of the remaining complaints urged in the motion for rehearing. They are without merit.

The motion for rehearing is overruled.

Beverly J. Olive SIMPSON, Appellant,

v.

TEXAS EMPLOYERS INSURANCE ASSOCIATION, Appellee.

No. 17571.

Court of Civil Appeals of Texas, Fort Worth.

Jan. 17, 1975.

Rehearing Denied Feb. 28, 1975.

Attorneys who represented employee's widow in suit at common law to establish liability and damages against third person sought an attorneys' fee out of amount to which the Texas Employers' Insurance Association was subrogated. The District Court, Tarrant County, Harold Craik, J., denied any attorneys' fee, and attorneys appealed. The Court of Civil Appeals, Massey, C. J., held that 1973 amendment to workmen's compensation statute providing for payment of fee to claimant's attorney out of the Texas Employers' Insurance Association's part of recovery from third person, being prospective only, was without application to occurrence within period of September 1, 1973 to September 11, 1973, when third-party case, inclusive of the Association's subrogation interest, went to trial and was settled during course of trial.

Affirmed.

Spurlock, J., did not participate.

1. Workmen's Compensation ⇐58

September 1, 1973 amendment to workmen's compensation statute providing for payment of fee to claimant's attorney out of the Texas Employers' Insurance Association's part of recovery from third person, being prospective only, was without application to occurrences within period of September 1, 1973 to September 11, 1973 when third-party case, inclusive of the Association's subrogation interest, went to trial and was settled during course of trial. Vernon's Ann.Civ.St. art. 8307, § 6a.

TURNER, COLLIE & BRADEN, INC., Petitioner,

v.

BROOKHOLLOW, INC., et al., Respondents.

No. C-738.

Supreme Court of Texas.

July 21, 1982.

Rehearing Denied Dec. 8, 1982.

Contractor, which constructed sewer line for subdivision, brought action against developer after it refused to pay contractor for its work. Developer brought in engineer as third-party defendant and sought to recover damages against it on cross-claim for negligent performance of engineering services under its contract to design and supervise construction of sewer line. The 129th District Court, Harris County, Thomas J. Stovall, Jr., J., awarded contractor the amount of unpaid retainage and an additional amount, awarded developer indemnity from engineer and an additional amount on cross-claim, and engineer appealed. The Court of Civil Appeals, Warren, J., 624 S.W.2d 203, reversed portion of judgment awarding damages on cross-claim and remanded that part of the cause for a new trial, and affirmed the remaining parts of the judgment, and developer and engineer brought error. The Supreme Court, Ray, J., held that: (1) trial court would be deemed to have found that engineer substantially complied with contract, and, thus, court had not erred in submitting remedial measure of damages to jury rather than difference-in-value measure; (2) submission of special issue, which inquired in to remedial measure of damages and in which it was assumed that defects could be remedied only by total replacement of the line, was improper; (3) award of $298,472.67 against engineer on cross-claim could not be treated as having been arrived at by making a deemed finding based on difference-in-value measure of damages; (4) it was required that there be reversal of entire judgment and remand of entire case for new trial, rather than partial remand; (5) report, which evaluated alternatives for getting sewer service to subdivision, was admissible for limited purpose of showing that developer acted reasonably in abandoning line; and (6) report was adequately authenticated.

Affirmed in part; reversed in part; and entire cause remanded for new trial.

1. Damages ⇐123

"Difference-in-value" measure of damages, like the remedial measure, must be reduced by any unpaid portion of the contract price; such measure of damage can apply to an engineer, as well as to a contractor.

2. Damages ⇐121, 123

Remedial measure of damages applies whenever breaching party has substantially complied with terms of contract, and difference-in-value measure applies when contractor has not substantially complied with the contract terms.

3. Appeal and Error ⇐930(3)

When trial court omits one of a cluster of issues necessary to support a ground of recovery, without objection or request, and there is evidence to support a finding thereon, trial court will be deemed to have found the issue in such a manner as to support its judgment. Vernon's Ann.Rules Civ.Proc., Rule 279.

4. Appeal and Error ⇐930(3)
Damages ⇐221(2)

In action in which cross-claim had been asserted against engineer for negligent performance of engineering services under its contract to design and supervise construction of sewer line, in which, though engineer had not proven its substantial compliance with contract as matter of law, there had been some evidence of substantial compliance and in which there had been no objection to omission of an issue on substantial compliance and one had not been requested, trial court would be deemed to have found that engineer substantially com-

plied with contract, and, thus, court had not erred in submitting remedial measure of damages to jury rather than difference-in-value measure. Vernon's Ann.Rules Civ. Proc., Rule 279.

5. Damages ⇐221(5)

In action in which cross-claim was asserted against engineer for negligent performance of engineering services under its contract to design and supervise construction of sewer line and in which it was not proven as matter of law that the line could not be repaired, submission of special issue, which inquired into the remedial measure of damages and in which it was assumed that the defects could be remedied only by total replacement of the line, was improper; submission of the issue would have been proper if it had merely inquired into the cost of remedying the defect or if it had been predicated on a jury finding that the line could not be repaired for less than cost of total replacement.

6. Appeal and Error ⇐930(3)

In action in which cross-claim was asserted against engineer for negligent performance of engineering services under its contract to design and supervise construction of sewer line, trial court's $298,472.67 award against engineer could not be treated as having been arrived at by making a deemed finding based on difference-in-value measure of damages; there could be no deemed finding where engineer had objected to omission of an issue based on "difference-in-value measure." Vernon's Ann. Rules Civ.Proc., Rule 279.

7. Appeal and Error ⇐1173(1)

Generally, when one party appeals from a judgment, a reversal as to him will not justify a reversal as to the other nonappealing parties, but such rule does not apply where respective rights of appealing and nonappealing parties are so interwoven or dependent on each other as to require a reversal of the entire judgment.

8. Appeal and Error ⇐1172(1)

In action in which engineer's liability to developer on both cross-claim and claim for indemnity and developer's liability to contractor on sewer construction contract turned on jury finding that engineer's negligent performance of its contract to design and supervise construction of the line was sole proximate cause of sewer's defects and in which an improper submission of measure of damages required a remand at least as to the cross-claim, it was required that there be a reversal of entire judgment and remand of entire case for new trial, in view of fact that parties' rights were interwoven and dependent on each other and that there was a possibility of inconsistent results if there were only a partial remand. Vernon's Ann.Rules Civ.Proc., Rule 434.

9. Evidence ⇐355(1)

In action arising out of allegedly defective construction of sewer system, a report, which evaluated several alternatives for getting sewer service to subdivision, including sliplining of the defective sewer line, was admissible for limited purpose of showing that developer acted reasonably in abandoning the line, and, thus, had met its duty to mitigate damages; the report, admitted for such a limited purpose, would not have been hearsay.

10. Damages ⇐123

Plaintiff in breach of contract action can only recover such damages as he could not have prevented with reasonable exertions and expense.

11. Appeal and Error ⇐930(2)

Appellate court must assume that a jury has properly followed trial court's instructions.

12. Evidence ⇐314(1)

Evidence of out-of-court statement is hearsay only if it is being introduced to prove truth of matter asserted in the statement.

13. Evidence ⇐377

In action arising out of allegedly defective construction of sewer system, a report, which evaluated alternatives for getting sewer service to subdivision and which was sought to be admitted for limited purpose of showing that developer met its duty to

mitigate damages, the report was adequately authenticated where developer's executive vice-president testified that, on engineer's recommendation, they had sought out another engineering firm to study the problem, that a firm had been retained to investigate situation and recommend best way to provide subdivision with sewer service and that the report had been received from such firm and relied on by developer in deciding to abandon defective sewer line.

Fulbright & Jaworski, Frank G. Jones and Roger Townsend, Houston, for petitioner.

Johnson, Swanson & Barbee, Charles R. Haworth and Charles W. Cunningham, Dallas, for respondents.

RAY, Justice.

This case concerns claims for breach of contract and negligent performance of a contract. It presents, primarily, questions involving the proper measure of damages and the admissibility of certain evidence. Brookhollow, Inc. contracted with Turner, Collie & Braden, Inc. (TCB) for TCB to design and supervise the construction of a sewer line. Brookhollow contracted with Whitelak, Inc. for the actual construction of the line. The completed sewer leaked and Brookhollow refused to pay Whitelak for its work. Whitelak sued Brookhollow who in turn brought in TCB as a third-party defendant. Among other things, the trial court's judgment awarded Brookhollow money damages against TCB on its cross-claim for negligent performance of the engineering services. The court of appeals affirmed a part of the judgment, but reversed and remanded to the trial court the part concerning TCB's liability on Brookhollow's cross-claim. 624 S.W.2d 203. We affirm the court of appeals' reversal of the trial court's judgment against TCB on Brookhollow's cross-claim for negligent performance; we reverse the remainder of the court of appeals' judgment and remand the entire cause to the trial court for a new trial.

I. The Facts

On January 3, 1972, Brookhollow of Houston, Inc. purchased 454 acres of land in Houston, Texas, for use as a housing development. The tract lay partly in the West Harris County Municipal Utility District No. 1 (MUD 1) and partly in the Harris County Municipal Utility District No. 25 (MUD 25). By agreement with Brookhollow, both MUDs were to own the sewage and sanitary facilities located in their respective districts. Brookhollow entered into a contract with the engineering firm of Turner, Collie & Braden, Inc. (TCB) for TCB to design the development's sewer and drainage facilities. MUD 1 and MUD 25 also contracted for TCB to design the proposed sewage facilities. In addition to designing the sewer line, TCB agreed to supervise its construction.

In December of 1972, TCB submitted to Brookhollow plans and specifications for a gravity flow sewer line, buried twenty to twenty-eight feet in depth, which is below the area water table. Brookhollow then contracted with Whitelak, Inc. for construction of the line in accordance with TCB's plans.

After Whitelak's completion of the sewer but before Brookhollow's final acceptance, numerous leaks and cracks were discovered. Whitelak undertook to repair the line, but its repairs were halted when an abutting landowner alleged the line encroached on his property. Whitelak could not resume repairs until several months later, when the boundary dispute was settled. Shortly thereafter, Whitelak abandoned its repair efforts and demanded that Brookhollow pay for the cost of the extra work. Because of the defects in the sewer line, Brookhollow refused to pay both the balance owing on the original construction and the cost of the extra work. Whitelak contended that it had substantially performed the contract and that the defects were caused by TCB's refusal to allow it to use a construction technique known as Special Section 5. Special Section 5 entails encasing the pipe in timber and then compacting shale and other

material around it. This technique is often used when sewers are buried in sand below the water line. TCB denied liability for the cracks and attributed at least some of the defects to the fact that a portion of the line was left open to the elements during the protracted boundary dispute.

TCB took the position that the cracked pipe could be used if it were sliplined; this would involve lining the concrete pipe with plastic pipe of slightly less diameter. Brookhollow retained another engineering firm, Lockwood, Andrews and Newnam (LAN), to examine the line and make a recommendation as to the most desirable course of action. LAN presented Brookhollow with a written report in which it recommended abandonment of the defective line. Brookhollow followed LAN's advice and constructed a new pump-operated line at a shallower depth. Only thirty-five feet of the original line is now in use.

Whitelak sued Brookhollow, MUD 1 and MUD 25 (hereinafter collectively referred to as "Brookhollow") for breach of contract, asking recovery for the balance owing on the original construction contract ($78,-764.99), the cost of the extra work it performed in repairing the line ($184,595.27), interest on those amounts and reasonable attorney's fees. Brookhollow counterclaimed against Whitelak alleging breach of contract, breach of implied warranty and negligence in the construction of the line. Brookhollow sought indemnity from TCB for any amounts it might be found to owe Whitelak. In addition to this claim for indemnity, Brookhollow brought a cross-claim against TCB, alleging breach of contract, breach of implied warranty and negligence in supervising the construction of the line. TCB counterclaimed against Brookhollow for the balance owing on its engineering contract.

At trial, after all parties rested, Whitelak moved for a directed verdict. The trial court granted the motion and rendered an interlocutory judgment awarding Whitelak $36,115.86 (the undisputed amount of unpaid retainage) against Brookhollow. The remainder of the case was submitted to the jury, which found, among other things, that TCB's conduct was the sole cause of the trunk sewer's failure. On the basis of the jury findings, the trial court awarded Whitelak an additional $227,244.40 against Brookhollow. Brookhollow was awarded indemnity of $184,595.27 against TCB, the amount of Brookhollow's liability to Whitelak, less $78,764.99, the amount owed by Brookhollow for the original construction. The trial court awarded Brookhollow an additional $298,472.67 on its cross-claim against TCB.

The court of appeals found harmful error in the trial court's admission of the LAN report into evidence and in the amount of damages the trial court awarded against TCB. Accordingly, it reversed that part of the trial court's judgment which awarded Brookhollow damages on its cross-claim against TCB and remanded that part of the cause to the trial court for a new trial; it affirmed the remaining parts of the judgment. We granted applications for writ of error from both Brookhollow and TCB.

II. Damages

The trial court submitted the following Special Issue No. 6:

> What amount of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the owners [Brookhollow] for the damages, if any, which they have suffered and probably will suffer in the future as a result of the failure of the trunk sewer to be in operating condition?
>
> a) The reasonable and necessary expenses incurred in investigating the causes of the failure of the trunk sewer? $34,265.72
>
> b) The reasonable and necessary expenses incurred in securing temporary sewage-removal services by the use of sewage pumping trucks? $ 7,892.10
>
> c) The reasonable and necessary expenses incurred in designing and constructing a temporary lift station and force main? $85,060.45
>
> d) The reasonable and necessary engineering expenses incurred in designing a permanent force main? $11,376.06
>
> e) The present value of the reasonable and necessary expenses that probably will be incurred in the future in constructing a permanent force main? $80,000.00

f) The present value of the reasonable and necessary expenses that will be incurred in the future in paying for the additional energy costs, if any, attributable to the operation of (a) the temporary force main and lift station that was built as a temporary replacement for the trunk sewer, and (b) the permanent force main & lift station that probably will be built as a permanent replacement for the trunk sewer? $17,650.80*

*This figure is ten percent of the amount in question. That amount being $176,508.00. [Notation made by the jury.]

These figures total $236,245.13. Disregarding these findings, the trial court rendered judgment in favor of Brookhollow and against TCB for $298,472.67. The court of appeals held that the trial court erred in entering judgment for this amount because it was not conclusively proved and the jury findings do not support such an award. The court of appeals also held that it could not render judgment based on the jury verdict because Special Issue No. 6 inquired into an improper measure of damages.

In *Graves v. Allert & Fuess,* 104 Tex. 614, 142 S.W. 869 (1912), this Court set down the rule that for breach of a construction contract, if the contractor has substantially performed, the owner can recover the cost of completion less the unpaid balance on the contract price. We will refer to this as the remedial measure of damages.

[1] A different measure of damages was applied in *Hutson v. Chambless,* 157 Tex. 193, 300 S.W.2d 943 (1957), which concerned an action for defective performance of a construction contract. In *Hutson,* the contractor had deviated from the plans and it was alleged that these deviations could be corrected only by tearing down and reconstructing a large part of the house. The Court quoted with approval the following language from *White v. Mitchell,* 123 Wash. 630, 213 P. 10 (1923):

> Where it is necessary, in order to make the building comply with the contract, that the structure, in whole or in material part, must be changed, or there will be damage to parts of the building, or the expense of such repair will be great, then it cannot be said that there has been a substantial performance of the contract. *Generally, where there has not been such substantial performance, the measure of the owner's damage is the difference between the value of the building as constructed and its value had it been constructed in accordance with the contract.* Such a recovery would be just to both parties. It is manifest that to measure the owner's damage by the cost necessary to make the building conform to the contract would often be an injustice, because in many instances such cost would amount to almost as much as the original contract price. (Emphasis added).

See also, Cooper Concrete Company v. Hendricks, 386 S.W.2d 221, 223 (Tex.Civ.App.—Dallas 1965, no writ); *County of Tarrant v. Butcher & Sweeney Construction Co.,* 443 S.W.2d 302, 307 (Tex.Civ.App.—Eastland 1969, writ ref'd n.r.e.). We will refer to this as the "difference-in-value" measure. The "difference-in-value" measure, like the remedial measure, must be reduced by any unpaid portion of the contract price. We see no reason why these two rules should not apply to an engineer such as TCB, as well as to a contractor.

[2] From the above authority, it is apparent that the remedial measure applies whenever the breaching party has substantially complied with the terms of the contract. Conversely, the difference-in-value measure applies when the contractor has not substantially complied with the contract terms. The Commission of Appeals in *Atkinson v. Jackson Bros.,* 270 S.W. 848, 851 (Tex.Comm'n App.1925, holding approved) wrote:

> To constitute substantial compliance the contractor must have in good faith intended to comply with the contract, and shall have substantially done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot, without difficulty, be accomplished by remedying them. Such performance permits only such omissions

or deviation from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, and are remediable without doing material damage to other parts of the building in tearing down and reconstructing.

[3, 4] Brookhollow contends that Special Issue No. 6 was a proper submission of the remedial measure. There was, however, no jury finding that TCB substantially complied with the contract and, after reviewing the record, we cannot say that substantial compliance was conclusively proved. When the trial court omits one of a cluster of issues necessary to support a ground of recovery, without an objection or request, and there is evidence to support a finding thereon, the trial court will be deemed to have found the issue in such a manner as to support its judgment. Tex.R.Civ.Pro. 279. Although we cannot say TCB proved its substantial compliance as a matter of law, we do find some evidence of substantial compliance. There was no objection to the omission of an issue on substantial compliance and one was not requested. Therefore, under Rule 279, the trial court is deemed to have found that TCB substantially complied with the contract. Because of this deemed finding, the trial court did not commit error in submitting the remedial measure of damages rather than the difference-in-value measure.

[5] While Special Issue No. 6 inquired into the remedial measure of damages, we hold that it was improperly submitted. Subparts (c), (d), (e) and (f) of the issue inquired into the cost of a new sewer. In submitting the issue in this manner, the trial court assumed that the defects could be remedied only by total replacement of the line. TCB objected to the issue on several grounds, one of which was that the issue properly should have been predicated on a jury finding that the line could not be repaired. We agree with TCB. The issue would have been proper had it simply inquired into the cost of remedying the defect. Also, Special Issue No. 6, as submitted, would have been proper had it been predicated on a jury finding that the line could not be repaired for less than the cost of total replacement. Without this threshold finding, Special Issue No. 6 does not inquire into the cost of remedying the defect; it merely inquires into the cost of a new sewer, which may or may not be the cost of remedying the defect.

Because TCB objected to the omission of an issue inquiring whether the line could be repaired, the trial court cannot be deemed to have made such a finding. Neither can we say that Brookhollow proved as a matter of law that the line could not be repaired. TCB adduced evidence that the entire line could be put in working order for $40,000 by sliplining. Although sliplining would reduce the interior diameter of the pipe by four inches, TCB's expert witness testified that the smoother surface of the plastic pipe would reduce friction and enable the sliplined sewer to serve the development as well as an unsliplined concrete sewer of larger diameter. The expert also testified that sliplining would stabilize the concrete pipe and make it less susceptible to cracking.

[6] As noted above, the trial court rendered judgment in favor of Brookhollow and against TCB for $298,472.67. We do not know how the trial court arrived at this figure. It was not the amount of damages found by the jury. Our review of the record convinces us that the court of appeals was correct in holding that this damages figure was not conclusively proved. Brookhollow argues that the trial court arrived at this figure by making a deemed finding based on the difference-in-value measure of damages. We disagree. TCB objected to the omission of an issue based on the difference-in-value measure. Therefore, under Tex.R.Civ.Pro. 279, there can be no deemed finding.

Accordingly, the trial court incorrectly rendered judgment against TCB for $298,472.67. Because Special Issue No. 6 incorrectly states the remedial measure of damages, we cannot render judgment based on the jury verdict.

III. The Propriety of a Partial Remand

Because of our holding that Special Issue No. 6 was an improper submission of the measure of damages, we must remand for a new trial at least as to Brookhollow's cross-claim against TCB. However, if we remand only as to Brookhollow's cross-claim against TCB, we would leave intact Whitelak's recovery against Brookhollow and Brookhollow's recovery of indemnity against TCB. TCB contends that the various claims for damages are so intertwined that one cannot be severed from the others and retried alone. We agree.

[7] Brookhollow did not appeal the judgment in favor of Whitelak. As a general rule, when one party appeals from a judgment, a reversal as to him will not justify a reversal as to other nonappealing parties. This rule does not, however, apply where the respective rights of the appealing and nonappealing parties are so interwoven or dependent on each other as to require a reversal of the entire judgment. *Lockhart v. A.W. Snyder & Co.*, 139 Tex. 411, 163 S.W.2d 385, 392 (1942). In such a case, the court must reverse the entire judgment in order to provide the appellant with full and effective relief. *Saigh v. Monteith*, 147 Tex. 341, 215 S.W.2d 610, 613 (1948). *See also, Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 941 v. Whitfield Transportation, Inc.*, 154 Tex. 91, 273 S.W.2d 857 (1954); *Kansas University Endowment Association v. King*, 162 Tex. 599, 350 S.W.2d 11 (1961).

[8] TCB's liability to Brookhollow on both the cross-claim and the claim for indemnity and Brookhollow's liability to Whitelak on the construction contract turn on the jury finding that TCB's negligent performance was the sole proximate cause of the sewer's defects. If we remand only as to Brookhollow's cross-claim against TCB, the result of the second trial could be inconsistent with the result of the first trial. For example, the jury in the second trial could find that Whitelak, and not TCB, was the sole proximate cause of the defects. In such a case, TCB, for the same alleged breach, would be exonerated in the second trial but held liable for indemnity in the first. A similar result could obtain if we remand as to both Brookhollow's cross-claim and its claim for indemnity, but not as to Whitelak's claim against Brookhollow. Again, the jury in the second trial could find that Whitelak was the sole cause of the defects. As a result, Brookhollow would be held liable to Whitelak in the first trial but would be denied indemnity in the second trial. The possibility of such inconsistent results is intolerable and for this reason the entire judgment must be reversed and the entire cause remanded for a new trial.

In support of the court of appeals remand of only its cross-claim, Brookhollow argues that there is no danger of inconsistent results because the doctrine of collateral estoppel would prevent a retrial of TCB's liability. Brookhollow argues, in effect, that the issue of damages can be severed and retried alone. Tex.R.Civ.Pro. 434 provides, among other things, that—

> if it appear to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, *provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.* (Emphasis added).

TCB contested the issue of its liability on the Brookhollow cross-claim by assigning "no-evidence" and "insufficiency" points in both its appellant's brief and its motion for rehearing. Thus, Rule 434 prevents the court of appeals from remanding only on the issue of damages.

IV. The Admissibility of the LAN Report

[9] Brookhollow complains of the court of appeals' holding that the LAN report was hearsay and inadmissible, even for a limited purpose. So the trial court may have guidance in the proper treatment of the report, we hold that it was admissible for the limited purpose for which it was offered.

The report is a forty-page document in which Lockwood, Andrews & Newnam evaluated several different alternatives for getting sewer service to the Brookhollow development. Several of these alternatives involved partial or complete sliplining of the defective sewer line, which had been TCB's recommendation. LAN concluded, however, that Brookhollow's best alternative, in terms of cost and reliability, would be to abandon the defective line and construct a new one. Brookhollow followed this recommendation. The report in no way touched on the cause of the sewer's defects.

[10] It is well established that the plaintiff in a breach of contract action can only recover "such damages as he could not have prevented with reasonable exertions and expense." *Walker v. Salt Flat Water Co.*, 128 Tex. 140, 96 S.W.2d 231, 232 (Tex.1936). At trial, Brookhollow introduced the LAN report for the limited purpose of showing that it had acted reasonably in abandoning the line—i.e., that it had met its duty to mitigate damages. TCB objected on grounds the report was hearsay and had not been authenticated. The trial court instructed the jury that evidence introduced for a limited purpose could not be considered for any other purpose.

[11] The court of appeals quoted from *McAfee v. Travis Gas Corporation*, 137 Tex. 314, 153 S.W.2d 442 (1941):

> Where the question is whether a party has acted prudently, wisely or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay.

See also, Texas Employers' Insurance Association v. McDonald, 238 S.W.2d 817, 820 (Tex.Civ.App.—Austin 1951, writ ref'd). Notwithstanding this rule, the court of appeals held the LAN report inadmissible, stating that "[e]ven though the court admitted [it] for a limited purpose, it encompassed many facets of the case which were in issue and on which appellant was entitled to cross-examine." The court of appeals seemed to imply by this that the jury disregarded its limiting instruction and considered the LAN report for purposes other than to determine whether Brookhollow acted reasonably to mitigate damages. An appellate court must assume that a jury properly followed the trial court's instructions.

[12] The LAN report, admitted for the limited purpose of showing that Brookhollow met its duty to mitigate damages, is not hearsay. Evidence of an out-of-court statement is hearsay only if it is being introduced to prove the truth of the matter asserted in the statement. *Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 337 (Tex.1963). In this case, there was no need for the jury to inquire into the truthfulness of the LAN report; it had only to determine Brookhollow's reasonableness in relying on the report.

[13] We also hold that the LAN report was adequately authenticated in light of the limited purpose for which it was admitted. Thomas Martin, Brookhollow's executive vice-president, testified that on TCB's recommendation, they sought out another engineering firm to study the problem. After considering various Houston firms, Brookhollow retained LAN to investigate the situation and recommend the best way to provide the subdivision with sewer service. The admitted report was the one received from LAN and relied on by Brookhollow in making its decision to abandon the line.

Because of our judgment remanding the entire cause to the trial court, we need not consider Brookhollow's and TCB's other points of error.

We affirm the court of appeals' reversal of the trial court's judgment against TCB on Brookhollow's cross-claim for negligent performance; we reverse the remainder of the court of appeals' judgment and remand the entire cause to the trial court for a new trial.

tive right, when challenged in an appropriate judicial proceeding, to have its validity established, and the continuing uncertainty removed, which would result from the untrammeled right of the challenging party, from whatever cause, to bring its validity (except for changed conditions) again in issue. * * *"

From that premise Alcoa et al. argue that laches and delay do not apply to field-wide proration orders in that, they say, the Court holds that Standard had the "untrammeled right" to attack the order on any grounds and at any time they saw fit. We do not agree with that argument. Standard's principal contention in that cause was that having moved for a non-suit it was entitled as a matter of law to a dismissal of the entire suit without prejudice. The Court held, however, that the Commission having prayed that these orders be sustained, it was entitled to a judicial determination of their validity to set at rest any uncertainty in that respect. The Court is not saying, as we construe its language, that Standard after long delay does have the untrammeled right to put in issue the validity of the proration formula absent changed conditions.

[6] Alcoa et al. contend that there is no evidence to show that any well owner on any small tract in this field has failed to obtain already from his allotted production the entire cost of his drilling and maintenance operations, together with some profit, and therefore it would be wholly unfair and unjust to permit a continuation of drainage from their properties which has up to the present time and will in the future result in a total loss to them of gas and condensate to the value of several million dollars. Even this argument, persuasive as it is, does not convince us that this Court should interfere with the administration by the Railroad Commission of the production from this field where small tract drilling has been conducted and large sums expended in reliance on the formula that had been in force without objection for a period of four years.

[7] There are many reasons why stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole state rests to a large extent on the oil and gas business.

For the reasons above expressed we uphold the Railroad Commission's order of April 24, 1961. The judgments of the trial court and the Court of Civil Appeals are reversed and judgment here rendered that respondents take nothing.

Ruby M. ALLEN, Petitioner,

v.

AMERICAN NATIONAL INSURANCE COMPANY, Respondent.

No. A-9818.

Supreme Court of Texas.

June 3, 1964.

Rehearing Denied July 15, 1964.

Action on life policy insuring plaintiff's husband. The 74th District Court, McLennan County, D. Y. McDaniel, J., entered judgment for plaintiff and insurer appealed. The Waco Court of Civil Appeals, Tenth Supreme Judicial District, 370 S.W.2d 140, reversed and remanded and

error was brought. The Supreme Court, Norvell, J., held that inclusion of quoted phrase in special issue as to whether insured knew "or should have known" that negative answer to question inquiring about heart disease was false was improper, where insurer contended that insured had given false answer, but where no objection was lodged until after Court of Civil Appeals had ordered remand, defect was waived and could not be raised in Court of Civil Appeals or Supreme Court.

Judgments of trial court and Court of Civil Appeals reversed and judgment rendered that plaintiff take nothing.

1. Trial ⇐365(1)

Findings of jury in action on fire policy, wherein insurer pleaded defense that policy was procured by fraudulent representations, established no basis for either waiver or estoppel against insurer.

2. Appeal and Error ⇐218(2)
Trial ⇐352(4)

Inclusion of quoted phrase in special issue as to whether insured knew "or should have known" that negative answer to question inquiring about heart disease was false was improper, in suit on life policy wherein insurer contended that insured had given false answer, but where no objection was lodged until after Court of Civil Appeals had ordered remand, defect was waived and could not be raised in Court of Civil Appeals or Supreme Court. Rules of Civil Procedure, rules 274, 279.

3. Trial ⇐366

Failure to object to defective submission of controlling issue constituting component element of ground of recovery or defense waives defect. Rules of Civil Procedure, rule 274.

4. Appeal and Error ⇐934(2)

In case of omission of controlling issue which is one of cluster of issues embodying theory of recovery or defense, it will be implied that omitted issue was found in support of judgment. Rules of Civil Procedure, rule 279.

5. Appeal and Error ⇐218(2)
Trial ⇐366

Waiver which arises from failure to object to issue is equally binding upon both litigants and contention that issue was defective in wording and contents cannot, because of failure to object, be thereafter raised either in Court of Civil Appeals or Supreme Court, and waiver rule is operative regardless of action of trial court in awarding judgment or refusing to award judgment upon asserted ground of recovery or defense of which issue in question is in itself a ground of recovery or defense or constitutes component element thereof.

6. Insurance ⇐292.5

Misrepresentations of insured who, in applying for life policy, intentionally gave false answer to question inquiring about heart disease were material to risk precluding recovery upon policy after death of insured from massive myocardial infarction.

Dunnam, Dunnam & Dunnam, Waco, for petitioner.

Beard, Kultgen & Beard, Waco, for respondent.

NORVELL, Justice.

Ernest Jody Allen suffered a massive myocardial infarction on July 1, 1962 which resulted in death. His widow brought this suit against American National Insurance Company to recover upon an insurance policy. After a jury trial, the District Court awarded Mrs. Allen a judgment for $7,600, being the face amount of the policy ($5,000) plus a statutory penalty and attorney's fees. This judgment was reversed by the Court of Civil Appeals. 370 S.W.2d 140.

Mrs. Allen's application for writ of error was granted. Because of this action, the insurance company's application praying for a rendition of judgment in its favor, was also granted so as to bring the entire case before us. Because of the dual positions occupied by the parties here, their trial court designations will be used.

We have decided that under the jury findings relating to the pleaded defense that the policy of insurance was procured by fraudulent representations, judgment should have been rendered for the defendant.

Procedural problems are raised by the record. The opinion of the Court of Civil Appeals sets out in detail the evidence relating to the procurement of the policy. We need repeat only so much of that Court's statement as may be necessary to make the bases of our holdings clear.

[1] At the outset it should be said that we agree with the holding of the Court of Civil Appeals that the findings of the jury which have evidentiary support establish no basis for either a waiver or estoppel against the insurance company. That Court correctly held that there was no evidence "that the company or (its) agent knew insured had any pre-issuance disease of the heart before the promise to pay (the proceeds of the insurance to Mrs. Allen) was made." The waiver and estoppel issues are adequately discussed in the opinion of the Court of Civil Appeals and hence further discussion relating thereto is pretermitted.

The trial judge submitted certain issues embodying the fraudulent representations defense which were answered favorably to the insurance company. However, judgment was rendered for Mrs. Allen. The recitals of the judgment do not specifically point out the theory upon which it is based, although the insurance company pleaded two special defenses and the plaintiff asserted a waiver or estoppel against the insurance company based upon the actions of the insurance company representatives which took place after the death of Mr. Allen. The judgment simply recites that "the court having found from said verdict and evidence herein that defendant is legally bound and obligated to pay plaintiff under the terms of the insurance policy on the life of Ernest Allen, deceased * *."

In it motion for new trial, the insurance company urged that the judgment theretofore rendered should be vacated and in lieu thereof judgment should be rendered that plaintiff take nothing. It was averred that:

> "In its answers to Special Issue No. 22a, 23, 24, 25, 26 and 27, the jury found on the basis of sufficient evidence all of the elements of a defense to Plaintiff's claim on the ground of misrepresentation on the health of Ernest Jody Allen except materiality. Allen's answers to the inquiries in his application for insurance that he had had no diseases of the heart, when in fact he had had serious heart attacks and flare ups about every six months for several years prior to his death and when he died from a heart attack were material as a matter of law. In any event the Jury's finding in Special Issue No. 29 that Allen suffered an acute myocardial infarction made his death from a later myocardial infarction more likely, which answers were based on sufficient evidence, constitute a finding of materiality. Since all of the elements of the defense to Plaintiff's claim based on misrepresentation have been thus established, the trial court erred in entering judgment for Plaintiff and failing to enter Judgment for Defendant."

This position was constantly maintained in both the Court of Civil Appeals and in this Court. In our opinion it must be sustained.

By its answers to the issues mentioned in the motion, the jury found from a preponderance of the evidence that (22-a) Mr.

Allen answered "no" to the question in the life insurance application inquiring whether he had ever had or had been treated for high blood pressure, shortness of breath, any disease of the heart, chest pain, low blood pressure or abnormal pulse; that (23) Allen intentionally answered "no" to such question; that (24) such answer was false; that (25) "Allen knew *or should have known* that the answer 'no' * * * was false" (italics supplied); that (26) Allen gave the answer "no" for the purpose of inducing the insurance company to issue the policy; that (27) the insurance company relied upon Allen's answer to the question in the application "referred to preceding Special Issue 3 (sic, evidently 23 was intended) in issuing the life insurance policy in question"; that (29) Allen suffered an acute myocardial infarction in 1957, and that (30) the 1957 infarction made his death from a later myocardial infarction more likely.

The Court of Civil Appeals ordered a new trial of the cause stating that the trial court's judgment was apparently based upon the erroneously submitted issues relating to estoppel and waiver. (370 S.W.2d 144). That Court also, in effect, held that the insurance company had sustained its defense of fraudulent representations and that except "for another finding to be noticed," would be entitled to judgment. (370 S.W. 2d 143) The finding or findings thereafter discussed relate to plaintiff's specially pleaded grounds of recovery, namely, waiver and estoppel, which were not sustained by the facts and hence were not well taken. In our opinion none of the findings relating thereto would prevent a judgment being rendered in favor of the insurance company upon its fraudulent representations defense. However, plaintiff, in an effort to secure a reversal of the judgment of the Court of Civil Appeals and an affirmance of the trial court's judgment asserts, among other points, that the Court of Civil Appeals erred (1) in holding that "a finding that a false representation was made when the maker knew *or should have known* its falsity was a finding of a conscious intent to deceive."; (2) "in holding that the making of a false representation in an application for a life insurance policy when the maker merely 'should have known' its falsity was ground for vitiating the insurance contract", and (5) "in failing to hold that (the insurance company) failed to establish that the false representation was material."

[2] We thus have a squarely drawn issue. The defendant says that this Court should render judgment in its favor upon the jury's findings while the plaintiff asserts that no judgment should be rendered against her because the defense was improperly submitted to the jury because of the inclusion of the phrase "or should have known" in Special Issue No. 25.

In Clark v. National Life & Accident Insurance Company, 145 Tex. 575, 200 S.W. 2d 820 (1947), this Court said:

> "It is the settled rule that, in order to avoid a policy, false statements must have been made willfully and with design to deceive or defraud. American Cent. Life Ins. Co. v. Alexander, Tex.Com.App., 56 S.W.2d 864; Great Southern Life Ins. Co. v. Doyle, 136 Tex. 377, 151 S.W.2d 197; Westchester Fire Ins. Co. v. Wagner, 24 Tex.Civ. App. 140, 57 S.W. 876" (writ denied).

In Great Southern Life Insurance Company v. Doyle, 136 Tex. 377, 151 S.W.2d 197 (1941) it was held that one having syphilis but being unaware of such condition could not be said to have willfully made a representation as to the absence of the disease with an intent to deceive.

See also, American Cent. Life Ins. Co. v. Alexander, Tex.Com.App., 56 S.W.2d 864 (1933); Colorado Life Co. v. Newell et al., Tex.Civ.App., 78 S.W.2d 1049 (1935) writ refused; Pioneer Am. Insurance Co. v. Meeker, Tex.Civ.App., 300 S.W.2d 212 (1957) ref. n. r. e.; 21 Appleman Insurance Law and Practice, § 12122; 11 Baylor Law Rev. 236 (1959). This means, as stated by

Couch, that "the insured must have made (the representations) with knowledge of their falsity or with an intent to deceive, otherwise the policy is not avoided by their falsity." Couch on Insurance 2d, § 37:101.

It is true, as pointed out by the Court of Civil Appeals, that in Clark v. National Life & Accident Ins. Co., 145 Tex. 575, 200 S.W.2d 820, supra, this Court used the words "should have known" in connection with the statement of the rule relating to fraudulent representations in applications for insurance. It was said that:

> "It is also well settled in this State that to avoid a policy of insurance because of misrepresentations, the burden is on the insurer to plead and prove, not only that the answers made by the insured were false or untrue, but that the insured knew, *or should have known*, that they were untrue, and that he made them willfully and with the intention of inducing the insurer to issue him a policy. American Cent. Life Ins. Co. v. Alexander, Tex.Com. App., 56 S.W.2d 864; Doyle v. Great Southern Life Ins. Co., Tex.Civ.App., 126 S.W.2d 735, affirmed 136 Tex. 377, 151 S.W.2d 197; General American Life Ins. Co. v. Martinez, Tex.Civ. App., 149 S.W.2d 637; American Nat. Ins. Co. v. Green, Tex.Civ.App., 96 S. W.2d 727; Provident Life & Accident Ins. Co. v. Flowers, Tex.Civ.App., 91 S.W.2d 847; 46 C.J.S. Insurance, § 1319, pp. 435–437." (Italics supplied.)

In *Clark*, the Court was concerned with the argument that it appeared conclusively as a matter of law that the application for insurance contained false representations willfully made with the intention of inducing the insurance company to issue the policy. This contention was not sustained by the Court and the use of the words "should have known" was clearly not necessary to dispose of the issue. None of the Texas cases cited in *Clark* suggest that simply because an applicant should have known that a certain statement made by him was untrue will bar a beneficiary's recovery upon the policy issued as a result of the application.

A court might properly conclude from certain facts that, inferences of the knowledge of disease or bodily condition must be drawn as a matter of law. The phrase "should have known" may suggest this concept. However, such words are not suitable for this purpose as the usual connotation of the phrase "should have known" has to do with negligence and would so be understood by a jury. It is not a proper phrase for use in a jury submission because it does not correctly present the substantive law governing the defense of fraudulent representations. Cf. Halepeska v. Callihan Interests, Inc., Tex.Sup., 371 S.W.2d 368 (1963)

Texas Industrial Trust, Inc. v. Lusk, Tex.Civ.App., 312 S.W.2d 324, wr. ref. (1958) lends no support to the submission of the "should have known" theory. The holding in *Lusk* is that, "The utterance of a *known* false statement, made with intent to induce action, * * * is equivalent to an intent to deceive." The Court there was talking about a statement made with the knowledge that it was false and not with a representation that was negligently or carelessly made.

We have, however, come to the conclusion that the defect in the jury submission occasioned by the use of the words "or should have known" may not be urged by plaintiff as a grounds for refusing to render judgment for the insurance company.

While Special Issue No. 25 was defective in that it did not correctly inform the jury of the substantive law relating to the controversy, no objection was lodged against such issue. Apparently, in the trial court, plaintiff, as well as defendant, accepted the issues as constituting a correct submission and no objection was made to use of the words, "or should have known" until after the Court of Civil Appeals had ordered a remand.

[3] It seems well settled in this State that where no objection is made to a defective submission of a controlling issue constituting a component element of a ground of recovery or a defense and a judgment is rendered thereon, such judgment will not be reversed because the failure to object is considered as a waiver of the defective submission of such issue. Rule 274, Texas Rules of Civil Procedure. Wichita Falls & Oklahoma Ry. Co. v. Pepper, 134 Tex. 360, 135 S.W.2d 79 (1940); Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853 (1950); Cox v. Huffman, 159 Tex. 298, 319 S.W.2d 295 (1959); Frozen Foods Express v. Odom, Tex.Civ.App., 229 S.W.2d 92, ref. n. r. e. (1950); McDonald, Texas Civil Practice, § 12.27.

[4] In the case of the omission of a controlling issue which is one of a cluster of issues embodying a theory of recovery or defense, it will be implied that the omitted issue was found in support of the judgment, Rule 279. Rodriguez v. Higginbotham-Bailey-Logan Co., Tex.Civ.App., 172 S.W.2d 991, wr. ref. (1943). When, however, as in the present case, the controlling issue is submitted, albeit in defective form, a question of waiver and not implied findings is involved. Rule 274 provides that:

> "A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. * *"

This rule is largely the restatement of a statutory provision in existence at the time the Rules of Civil Procedure went into effect. In discussing the practice, Chief Justice McClendon, speaking for the Austin Court of Civil Appeals in Panhandle & Santa Fe Ry. Co. v. Friend, 91 S.W.2d 922, no wr., (1936), said:

> "Where, however, the ground (of recovery or defense) is submitted, however erroneously or incompletely, the parties are thereby put upon notice that the jury's answers to the issues actually submitted will form the basis of the court's judgment thereafter to be rendered thereon. *It then becomes the duty of each party to point out errors of omission or commission, or be held estopped from thereafter urging them.*" (Italics supplied.)

See also, Service Life Insurance Co. v. Miller, Tex.Civ.App., 271 S.W.2d 301, l. c. 305, ref. n. r. e. (1954); Goff v. Texas Employers' Insurance Association, Tex.Civ. App., 278 S.W.2d 326, ref. n. r. e.; Hodges, Special Issue Submission in Texas, p. 206.

[5] From the above authorities we take it that the waiver which arises from the failure to object to an issue is equally binding upon both litigants and the contention that the issue was defective in wording and content cannot, because of such failure to object, be thereafter raised either in the Court of Civil Appeals or this Court, and, further, that this rule of waiver is operative regardless of the action of the trial court in awarding judgment or refusing to award judgment upon an asserted ground of recovery or defense of which the issue in question is in itself a ground of recovery or defense or constitutes a component element thereof.

[6] We are further of the opinion that the findings of the jury establish that the misrepresentations in question were material to the risk.

None of the other contentions raised in plaintiff's application for writ of error need be discussed. Even if such contentions were sustained, judgment would nevertheless have to be rendered for the defendant upon its theory that the policy was procured

through fraudulent representations contained in the application for insurance.

The judgments of the trial court and the Court of Civil Appeals are reversed and judgment here rendered that plaintiff take nothing against the insurance company.

The TRAVELERS INSURANCE COMPANY, Petitioner,

v.

EMPLOYERS CASUALTY COMPANY, Respondent.

No. A-9808.

Supreme Court of Texas.

June 17, 1964.

Rehearing Denied July 15, 1964.

Insurer's suit against another insurer to establish latter's liability for amount of settlement made by plaintiff. The District Court, Dallas County, entered judgment against plaintiff and plaintiff appealed. The Dallas Court of Civil Appeals, Fifth Supreme Judicial District, 370 S.W.2d 105, affirmed and error was brought. The Supreme Court, Walker, J., held that deaths of general contractor's employees killed when crane owned and operated by subcontractor collapsed while it was being used to transport concrete from ready-mix concrete truck to forms of general contractor arose out of unloading of truck within policy of defendant insurer of truck owner and that where substantial injustice would be done to plaintiff if take nothing judgment against it was affirmed because of failure to introduce policies, judgments of courts below should be reversed and cause remanded to district court for new trial.

Reversed and remanded for new trial.

1. Insurance ⇐435.17

"Loading and unloading" within automobile liability policy covering such embraces not only immediate transference of goods to or from vehicle but complete operation of transporting goods between vehicle and place from or to which they are being delivered.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇐435.17

When additional insured is involved, "delivery" with respect to automobile liability policy providing coverage during loading and unloading refers not to legal transfer of title, control or risk of loss but to physical placing of articles at point where unloading process may be regarded as complete.

See publication Words and Phrases for other judicial constructions and definitions.

3. Insurance ⇐435.17

Deaths of general contractor's employees killed when crane owned and operated by subcontractor collapsed while it was being used to transport concrete from ready-mix concrete truck to concrete forms of general contractor arose out of "unloading" of truck within truck owner's automobile liability policy providing that use of automobile included loading and unloading and subcontractor was an additional insured and was covered by policy.

See publication Words and Phrases for other judicial constructions and definitions.

4. Insurance ⇐512.1(1)

Even though plaintiff insurer suing defendant insurer to establish defendant's liability for amount of settlement made by plaintiff did not show limits of defendant's policy or that it constituted primary coverage, plaintiff was entitled to nominal damages upon establishing that it was insurer of owner of crane which collapsed killing em-

there is no evidence that the express warranty meant only that a bond could be obtained ignores the language of Certainteed's warranty. To remand this case the court *must* find the language of the express warranty made by Certainteed to be ambiguous—it does not so hold. I would remand to the trial court for the jury to determine if the implied warranties explicitly extended to future performance.

WALLACE, Justice, dissenting.

I respectfully dissent. The contractual provision that a roof is "bondable up to 20 years," by its nature, means *capable* of being bonded for a period of up to 20 years. In other words, the product is made of such quality that a surety is willing to issue a 20 year bond, as opposed to a ten year bond for lesser quality materials or a 30 year bond for higher quality materials. The surety bond itself is what protects the purchaser against repairs or defects in the roof. *Grand Island School District v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). It would be logically inconsistent for a seller to represent on the one hand that the purchaser could obtain a repair bond and at the same time guarantee the product against repairs and defects. *See Little Rock School District of Pulaski City v. Celotex*, 264 Ark. 757, 574 S.W.2d 669, 675 (1978) (Smith, J., dissenting).

Furthermore, even if this term could be construed as an express warranty, what it expresses is clearly confined to a specific point in time: i.e., the time the roof is completed. To say, as the majority does, that "bondable up to 20 years" may be construed as an explicit reference to future performance is tantamount to saying that the purchaser of the roof could approach a surety at any time and obtain a bond for 20 years into the future. The majority makes the term "bondable" synonymous with "bonded" and, in doing so, defies the plain meaning of the term and re-forms the manner in which it is used in the construction industry.

I would hold that Certainteed made no express warranty to Safeway that the roof would last for 20 years and, accordingly, affirm the judgment of the court of appeals.

ISLAND RECREATIONAL DEVELOPMENT CORPORATION, et al., Petitioners,

v.

REPUBLIC OF TEXAS SAVINGS ASSOCIATION, et al., Respondents.

No. C-3762.

Supreme Court of Texas.

May 7, 1986.

Rehearing Denied June 25, 1986.

Developer and owner of condominium brought action against bank for alleged breach of contract for failure to permanently fund first mortgages of condominium units in accordance with the terms of a commitment letter. The 136th District Court, Jefferson County, Jack R. King, J., entered judgment in favor of owner and developer, and bank appealed. The Court of Appeals, Ninth Supreme Judicial District, Beaumont, 680 S.W.2d 588, reversed and rendered. Owner and developer brought error, and on grant of motion for rehearing, the Supreme Court, Wallace, J., held that: (1) submission of single issue, of whether developer and owner had performed their obligations under the commitment letter in question, was not reversible error; (2) there was more than "no evidence" that bank knowingly waived application deadline of loan commitment; and (3) developer and owner had interest in commitment letter which provided commitment was not assignable without committed bank's consent, notwithstanding assignment of the letter of commitment by owner

and developer to lender to arrange interim construction financing.

Judgment of the Court of Appeals reversed; judgment of the trial court affirmed.

Spears, J., filed dissenting opinion in which McGee, and Campbell, JJ., joined.

Gonzalez, J., filed dissenting opinion.

1. Estoppel ⇐107, 110

Waiver is an independent ground of recovery or defense and must be pleaded and proved as such.

2. Trial ⇐352.1(1)

Trial courts are permitted, and even urged, to submit the controlling issues of a case in broad terms so as to simplify jury's chore by civil procedure rule. Vernon's Ann.Texas Rules Civ.Proc., Rule 277.

3. Appeal and Error ⇐1062.1

Submission of single issue, in action by developer and owner of condominium against bank for breach of contract for failure to comply with obligations under loan commitment letter, of whether owner and developer performed their obligations under commitment letter, was not reversible error, where only issue which would authorize recovery by developer and owner of condominium was whether developer and owner had performed all of the things required by bank as conditions precedent so as to entitle developer and owner to enforce commitment. Vernon's Ann.Texas Rules Civ.Proc., Rule 277.

4. Trial ⇐215

Trial court should submit appropriate accompanying instructions to broad submissions of issue to jury when requested. Vernon's Ann.Texas Rules Civ.Proc., Rule 277.

5. Appeal and Error ⇐1067

Failure to submit requested appropriate accompanying instructions with broad issue submission to jury is not reversible error per se. Vernon's Ann.Texas Rules Civ.Proc., Rule 277.

6. Trial ⇐295(1)

To determine whether alleged error in jury charge is reversible error, reviewing court must consider pleadings of parties, evidence presented at trial, and the charge in its entirety, with alleged error being deemed reversible only if, when viewed in light of the totality of the circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated to and probably did cause rendition of improper judgment. Vernon's Ann. Texas Rules Civ.Proc., Rule 434.

7. Contracts ⇐322(3)

Evidence introduced in action against bank for breach of loan commitment was more than "no evidence" of waiver by bank of application deadline applicable to loan commitment to developer and owner of condominium, and, thus, supported finding that preconditions for commitment were satisfied; unfinished loan applications were accepted by employee in charge of bank's loan department who continued working on the forms until the loan commitment deadline, notwithstanding provision that forms were to be completed and filed 30 days in advance of deadline, and bank's top officers discussed loan commitment knowing that applications had not been filed prior to deadline but did not inform developer and owner's employees that commitment would not be honored.

8. Evidence ⇐450(5)

Assignment, though absolute in form, can be shown by parol evidence to be intended only as collateral security.

9. Assignments ⇐58

Any attempted assignment of loan commitment letter providing that commitment was not assignable without committed bank's consent would be of no force and effect, whether attempted assignment was absolute or collateral.

10. Assignments ⇐58

Developer and owner of condominium had enforceable interest in loan commitment letter providing that commitment was not assignable without committed bank's consent, even though developer and owner

of condominium had executed assignment of the letter to lender to arrange interim construction financing, where developer and owner produced evidence that committed bank was aware when commitment letter was issued that developer and owner would necessarily acquire interim construction financing and it was customary for commitment to be collaterally assigned to lender of construction financing.

Robert M. Hardy, Jr., Butler & Binion, Houston, Jon B. Burmeister, Moore, Landrey, Garth & Jones, Beaumont, for petitioners.

Carrin F. Patman, Bracewell & Patterson, Houston, Roger S. McCabe, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Brian R. Davis, Davis DeShazo & Gill, Austin, for respondents.

ON MOTION FOR REHEARING

WALLACE, Justice.

We grant the motion for rehearing, withdraw the opinion and judgment of July 3, 1985, and substitute this opinion.

Island Recreational Development Corporation and Sea Cabins, Inc. (Island) sued Republic Bank of Texas Savings Association and Bankers Capital Corporation (Republic) for breach of contract in failing to comply with its obligations under a loan commitment letter. The trial court rendered judgment for Island for $667,882.87 in actual damages and $52,500 in attorneys' fees. The court of appeals reversed the judgment of the trial court and rendered judgment for Republic. 680 S.W.2d 588. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Island paid $40,000 for a loan commitment letter under which Republic was to fund mortgages to qualified purchasers of Sea Cabins Condominiums at 13⅜ percent interest. The commitment letter was to expire on March 15, 1981. In August, Island paid an additional $20,000 to have the expiration date extended until September 15, 1981. The interest rate was also raised to 13⅞ percent. The commitment letter provided in part:

> Bankers Capital Corporation shall agree to make first mortgage loans under this commitment based on the following terms and conditions:
>
> 15. *Transfer of Commitment*
>
> This commitment is nontransferable or assignable to any other individual, corporation or entity unless specifically approved in writing by Bankers Capital Corporation.
>
> ....
>
> 17. *Commitment Term*
>
> This commitment shall remain in effect until March 15, 1981. Applications for loans must be received at least 30 days prior to this date and closings and fundings of the loans must be completed prior to March 15, 1981.

On September 14, 1981, Michael J. Ryan, President of Island, wrote Richard S. Waring, Senior Vice-President of Republic, that the provisions of the commitment contract had been met. Ryan demanded that Republic honor its mortgage commitment. Waring responded that the terms and conditions were not satisfied and denied any obligation to fund the loans. Waring alleged that the construction was not completed by the deadline. He also asserted, "paragraph 17 requires that loan applications were to have been received at least 30 days prior to September 15, 1981. This requirement was not met."

Island contends Republic waived its right to demand strict compliance with the condition, or was estopped to deny its obligation to perform. The trial record reflects that both parties, the court and the jury were aware that waiver was an important element in the trial.

Both Island and Republic requested the trial court to submit issues that included waiver. The trial court rejected the re-

quested issues of both parties and submitted a broad issue which asked:

> Do you find from a preponderance of the evidence that plaintiffs performed their obligations under the commitment letter in question?
>
> ANSWER: "We do."

The trial court submitted no instructions with the above issue and neither party objected to the charge on this ground. However, when the totality of the trial proceedings are considered it is apparent that waiver of Paragraph 17 of the letter of commitment was considered by the jury and found adversely to Republic.

[1] We recognize that waiver is an independent ground of recovery or defense and must be pleaded and proved as such. That is not the question before us. Our question is whether it is reversible error for a trial judge to submit a single broad issue encompassing more than one independent ground of recovery.

[2] Rule 277 of the Texas Rules of Civil Procedure specifically states that:

> It shall be discretionary with the court whether to submit separate questions with respect to each element of a case *or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.* Inferential rebuttal issues shall not be submitted. (emphasis added).

In *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex.1984), we reemphasized our approval of broad issue submission. We stated:

> In 1973, after sixty years, it became apparent that Texas courts ... had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex.R.Civ.P., by abolishing the requirement that issues be submitted distinctly and separately. *Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission.*
>
> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice *and that a workable jury system demands strict adherence to simplicity in jury charges.* (emphasis added)

The *Lemos* case, while our latest pronouncement upon this subject, was founded upon a long and distinguished line of authority beginning with *Haas Drilling Co. v. First National Bank in Dallas*, 456 S.W.2d 886 (Tex.1970) where we stated:

> [I]t is quite clear that there will be no reversal in non-negligence cases simply because the issue is too broad or too small. The trial court has almost complete discretion, so long as the issue in question is unambiguous and confines the jury to the pleading and the evidence. 456 S.W.2d at 889 (quoting G. Hodges, Special Issue Submission in Texas [Supp. 1969]).

In *Scott v. Ingle Brothers Pacific, Inc.*, 489 S.W.2d 554 (Tex.1972) we upheld an issue which inquired "[d]o you find ... that H.L. Scott was discharged by the Defendant without good cause?" against an objection that the issue was too broad. We re-urged our holding in *Haas* that the trial court has wide discretion to submit broad issues. *Id.* at 557. In *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex.1974), decided only three months after we adopted the amended version of Rule 277, we recommended that a single broad negligence issue be given rather than giving issues on each of the many various elements of a negligence cause of action. In *Siebenlist v. Harville*, 596 S.W.2d 113 (Tex.1980), we again approved this form of submission when we upheld the single issue submis-

sion of gross negligence. In *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 924 (Tex. 1981), we stated:

> It is understandable that a rule requiring issues to be submitted 'distinctly and separately' which prevailed from 1913 until 1973 would slowly relinquish its hold upon trial practice, but after 1973, Rule 277, as amended, permits the submission of issues broadly even though they include a combination of elements or issues. This court, in addition to the times it has written in the opinions already cited, has on a number of other occasions, approved broad submissions. [Citing dozens of cases both by this court and by courts of appeals.]

Our exasperation at the bench and the bar for failing to embrace wholeheartedly broad issue submission is thinly veiled in the above quote. *See also, Maples v. Nimitz*, 615 S.W.2d 690 (Tex.1981) and *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex.1980). This court has clearly mandated that Rule 277 means precisely what it says and that trial courts are permitted, and even urged, to submit the controlling issues of a case in broad terms so as to simplify the jury's chore.

[3] In the instant case, the controlling issue, the only issue which would authorize a recovery by Island, was whether Island had performed all of the things required by Republic as conditions precedent so as to entitle Island to enforce the commitment. This was precisely the single issue the trial court chose to submit to the jury.

[4–6] We hold that in the instant case the trial judge was following the policy this court has enunciated concerning broad issue submissions. We further hold that, when requested, the trial court should submit appropriate accompanying instructions. However, we decline to say that the failure to do so is reversible error *per se*. To determine whether an alleged error in the jury charge is reversible, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. Alleged error will be deemed reversible only if, when viewed in the light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment. Tex.R.Civ.P. 434.

In the instant case, if the absence of an instruction on waiver was detrimental to either party, it was Island. Nonetheless, Island received a favorable jury verdict. Republic, as the complaining party, has failed to demonstrate harm from an alleged error from which it benefited. When the totality of this case is considered, we find no reversible error on the part of the trial court in broadly submitting the case to the jury.

The court of appeals held there was no evidence of waiver by Republic. In deciding a no evidence point, the appellate court must consider only the evidence and inferences tending to support the finding and disregard all evidence and inferences to the contrary. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965).

[7] The record shows that Island's principal officer, Mike Ryan, met several times with officers and employees of Republic concerning the applications. Ryan first contacted Republic's officer in charge of the loan commitment, Senior Vice-President Richard Waring. Waring had Pat Green call Ryan in June of 1981. Green was in charge of Republic's loan department in Houston. Ryan requested the materials that were necessary to prepare the loan applications. Green sent the materials necessary to prepare the loan applications to the Beaumont office of Republic, which was in the process of being closed. When he did not receive the materials, Ryan contacted a former officer of Republic and secured F.N.M.A. forms. Waring told Ryan in August of 1981 that Republic wanted to handle the applications in Houston.

Ryan then began preparing the forms with Green at Republic's Houston office on August 18, or August 25, 1981. At that time Ryan delivered the unfinished loan

applications to Green, who accepted them. Green agreed to help finish the forms but stated that it would be difficult to finish the forms by September 15, 1981. Green testified that federal law required her merely to accept the applications, not continue processing them. Ryan traveled almost daily to Houston, to aid Green in processing the applications. The day after accepting them, Green met with Waring concerning the applications. They spoke about the time it would take to process the applications. Green put aside her regular work and began working full time on Island's loan applications. Three days after accepting them Green learned of the provision requiring the forms to have been filed by August 15, 1981, however, she continued working full time on the forms until September 15, 1981. She learned of the deadline only because Ryan provided her with a copy of the commitment letter when her own bank and attorneys could, or would, not.

There was also evidence that the very top officers at Republic discussed the Island commitment daily between August 15, and September 15, 1981, knowing the applications had not been filed before the deadline, and yet took no action to inform Ryan that the commitment would not be honored. Republic's officers knew that Ryan had crews working 24 hours a day and was thereby incurring excessive expense, to complete the units by the September 15, 1981 completion deadline. On September 14, 1981, Republic sent an inspector out to the project and on September 15, 1981, hired an independent appraiser to determine if the project was complete. Republic's highest officers were cognizant of the Island commitment and its deadlines, they did not want to have to fund the commitment, and yet they never gave Island any indication that the forms would not be accepted or acted upon, or that the loan would not be funded for that reason.

This evidence constitutes *some* evidence that Republic knowingly waived the application deadline. The court of appeals thus erred in finding there was no evidence of waiver.

The court of appeals found as a matter of law that Island breached paragraph 15 of the commitment letter and thus had no interest in the letter as of the date of trial. The record shows that prior to commencing construction and in order to arrange interim construction financing Island executed an assignment of the letter of commitment to Allied Merchants Bank. The assignment stated:

> Borrower [I.R.D.C.] hereby assigns to lender [Allied] (i) all of the right, title and interest of Borrower to and under the commitments of the long-term lenders described in Exhibit "B" and (ii) the agreement between Borrower and the general contractor which is described in Exhibit "B".

Island contends that the assignment was merely a collateral assignment and the record shows that Republic's attorney conceded such at trial. Island produced evidence that Republic was fully aware at the time the commitment letter was issued that Island would necessarily acquire interim construction financing. Further, it was customary in this type of transaction that the commitment of the long term financer would be collaterally assigned to the lender of the construction financing.

[8] An assignment, though absolute in form, can be shown by parol evidence to be intended only as collateral security. *Kaufman v. Blackman*, 239 S.W.2d 422, 427 (Tex.Civ.App.—Dallas 1951, writ ref'd n.r.e.). *See Wilbanks v. Wilbanks*, 160 Tex. 317, 330 S.W.2d 607 (1960).

[9, 10] This question was argued to the jury which by its answer to the liability issue found for Island. Further, by the terms of the paragraph in question the letter of commitment was not assignable without Republic's consent. Thus, any attempted assignment, whether absolute or collateral, would be of no force and effect. The letter contained no penalty provision for an attempted assignment. We hold that the court of appeals erred in finding

that Island had no interest in the commitment letter.

All of Republic's other cross-points were correctly determined by the court of appeals.

The judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

SPEARS, J., files a dissenting opinion in which McGEE and CAMPBELL, JJ., join.

GONZALEZ, J., files a dissenting opinion.

SPEARS, Justice, dissenting.

I respectfully dissent. At the outset, I wish to note that I am not writing this dissent to discourage or impede broad issue submission. I write only to encourage wise and efficient broad issue practice.

I agree with the majority's advocating a simpler, fairer, more efficient jury charge system through broad issue submission. However, I do not agree that the charge in this case broadly submitted both waiver and performance. The issue in this case reads:

> Do you find from a preponderance of the evidence that plaintiffs performed all their obligations under the commitment letter in question?

The jury answered "We do."

In reviewing this issue, the majority characterizes the question before this court as: "whether it is reversible error for the trial court to submit a single broad issue encompassing more than one independent ground of recovery." While I believe the answer to this question is "no," the answer to this general question does not resolve this case. The only question which answered will resolve this case is whether the charge submitted to this jury encompassed both performance and its independent counterpart, waiver. I will show why it does not. I will then discuss the myriad of procedural traps and legal tangles under the majority's approach which will undermine broad issue practice.

In a jury charge system, it is fundamental that a judgment be based on the verdict. Tex.R.Civ.P. 301; *First Nat. Bank in Dallas v. Zimmerman*, 442 S.W.2d 674 (Tex. 1969). The jury's verdict is composed of findings on independent grounds of recovery or defense placed before it. Consequently, to support judgment, an independent ground of recovery or defense not conclusively proven must be included in the charge. *Orkin Exterminating Co. v. Gulf Coast Rice Mills*, 362 S.W.2d 159 (Tex.Civ. App.—Houston 1962, writ ref'd n.r.e.). A broad issue charge can place a ground of recovery before the jury by mentioning the ground in issues or by including instructions which refer the grounds to an issue. *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex.1974); O. Walker, W. Corcoran & M. Lipscombe, *Survey of Special Issue Submission in Texas Since Amended Rule 277*, 7 St. Mary's L.J. 345, 363–65 (1975).

The charge in this case does not place waiver before the jury. Waiver is not subsumed in the issue asking if Island performed its obligations under the commitment letter because waiver and performance are independent, mutually exclusive legal theories. *Middle States Petroleum Corp. v. Messenger*, 368 S.W.2d 645, 654 (Tex.Civ.App.—Dallas 1963, writ ref'd n.r.e.). While waiver and performance may be submitted in the same issue,[1] the issue submitted to this jury did not mention waiver; therefore, the issue itself does not support a judgment for Island.

A broad issue, silent on a ground of recovery, may envelop that ground through instructions which refer the ground to the issue. Walker, *supra* at 363–65; Pope, A

1. I suggest submitting a broad issue on waiver and performance as follows:

> Do you find from a preponderance of the evidence that [plaintiff] performed all of the obligations under the commitment letter which [defendant] did not waive?
>
> You are instructed that waiver is defined as intentionally giving up a known right.
>
> You are instructed that performed means carrying out obligations as required by the contract.

New Start on the Special Verdict, 37 Tex. B.J. 335 (1974). The purpose of definitions and explanatory instructions is to aid the jury to render a verdict. Tex.R.Civ.P. 277. When certain grounds of recovery or defense are not specifically mentioned in a broad issue, the jury needs instructions to guide and limit its consideration to the pleaded and tried grounds of recovery and defense. *Scott v. Atchison, Topeka and Santa Fe Railway Co.*, 572 S.W.2d 273 (Tex.1978); Pope, *supra* at 335–37. In a broad issue practice, instructions rather than separate issues can place the specific grounds of recovery or defense before the jury. Pope, *supra* at 335–37. *See also Mobil*, 572 S.W.2d at 255–56. In this way, an instruction on waiver would have provided support for the judgment. The trial court, however, submitted no instruction on waiver; therefore, waiver was not before the jury.

This charge simply does not submit waiver and performance broadly, but only submits performance specifically. Waiver is not mentioned in the issue or in any instruction. The issue asks about performance of "obligations under the commitment letter in question." It does not ask or instruct about waiver. It does not even ask or instruct, as the majority states, "whether Island had performed all of the things required by Republic" (indicating those things not required by Republic were waived). The word "performed" is modified in the issue by "obligations under the commitment letter in question," not by "all of the things required by Republic" as the majority states. Even this rewording would not encompass waiver without instructions.

Because the charge is silent on waiver, the majority truly holds that it is acceptable to *imply* a jury answer to an independent ground of recovery or defense never mentioned in the charge. No broad issue case or comment so holds. Nevertheless, the majority gratiously quotes out of context from several cases espousing broad issue submission. For example, the majority quotes from *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 914 (Tex.1981), to support its holding. *Burk Royalty* does encourage broad issue submission. In fact, *Burk Royalty* states that broad issues may "include a combination of elements or issues." 616 S.W.2d at 924. For a ground of recovery or defense to support a judgment, however, the charge must expressly mention the ground either in issues or in instructions. Neither *Burk Royalty* nor any of the other cases cited hold that independent grounds of recovery not expressed in the charge can support judgment.

However, the majority holds that "when the totality of the trial proceedings are considered it is apparent that waiver of paragraph 17 of the commitment letter was considered by the jury and found adversely to Republic." The majority believes that because waiver was pleaded, tried, and argued, the jury apparently considered it in its deliberations. The majority ignores the crucial last step in establishing a ground of recovery: placing the ground before the jury in the charge. *Harkey v. Texas Employer's Insurance Agency*, 146 Tex. 504, 208 S.W.2d 919 (1948).

This points out the true problem in this case. The charge submitted did not expressly mention waiver in an issue or in an instruction. The jury was instructed, as in all cases, "not to speculate on matters not shown by the evidence admitted before you and *about which you are not asked any questions.*" This instruction closely parallels Rule 226a's model instruction that the jury "consider only the evidence introduced ... together with the law as given [it] *by the court.*" The law on waiver was never given the jury by the court. We cannot presume that the jury violated their instructions. Rather, it is apparent that the jury did not consider waiver because waiver was not mentioned in the charge. Nevertheless, the majority upholds the judgment based on waiver despite the inescapable conclusion that if the jurors followed their oath as jurors, they did not consider waiver.

Notwithstanding that waiver was not mentioned in the charge, the majority holds

that failure to submit an instruction on waiver was harmless error, precluding Republic's complaint on appeal. This is incorrect. Republic does not complain of lack of an instruction on waiver, but complains that the verdict does not support the judgment because Island undisputedly did not perform as required by the commitment letter, and waiver was never submitted. Republic is harmed by the trial court's erroneously rendering judgment on the verdict, not just by its failure to instruct on Island's independent ground of recovery.

The majority's harmless error analysis leaves the party defending against a broad issue (opponent) remediless on appeal. The party relying on a broad issue (proponent) may submit that issue, silent on certain tried independent grounds of recovery or defense. The opponent would then be in real trouble. Under the majority's approach, the trial court must render and the court of appeals must uphold judgment on the omitted grounds, even if it finds no evidence to support affirmative answers to the submitted grounds. This precludes no evidence or factual insufficiency review of grounds submitted to the jury. Furthermore, the majority would then hold that failure to include in the charge other tried grounds was harmless as to the grounds' opponent, precluding his complaint that the judgment is not supported by affirmative findings on evidenced grounds of recovery or defense.

This analysis also impliedly and incorrectly places the burden to request such an instruction on the opponent of an issue, for he is better off requesting the omitted ground and hoping for a negative finding than facing certain implication of an affirmative finding on appeal. Even if requested, the judge's failure to submit will be harmless. Never before now has one party been required to request submission of his opponent's independent ground of recovery or defense.

The majority's harmless error holding also gives the issue's proponent an incentive not to request instructions. The issue's proponent, to avoid reversal on defective instructions or unevidenced mentioned grounds, will not request them, knowing the majority will uphold the verdict if any evidence supports any tried but omitted ground.

In addition to confusing trial practice, the majority's implying that the jury considered a ground not expressed in the charge also radically alters appellate review. Following the majority's lead, the appellate courts in reviewing charges cannot render for no evidence or remand for factual insufficiency on affirmative answers to submitted grounds. Rather, they will have to speculate on what omitted grounds of recovery the jury may have considered and imply affirmative answers to those grounds. This speculation into the jurors mental processes violates the tantamount rule of appellate review that the court shall not substitute its judgment for the jury's. This also forces the appellate court to violate an instruction always given jurors not to speculate on matters not mentioned in the charge. *See* Tex.R.Civ.P. 226a.

To avoid all of these problems, I propose a simple rule: broad issues encompass only those grounds of recovery actually written and appearing on the face of an issue or an instruction. The converse is that unexpressed independent grounds of recovery or defense cannot support judgment. Under this rule, the parties will know precisely how to place grounds of recovery and defense before the jury: expressly mention them in issues or instructions. If the party relying on a ground of recovery or defense fails to request an issue or instruction specifically mentioning the ground, he waives it. The jury also will know clearly, not just apparently, from reading the charge what grounds of recovery it may consider in reaching its verdict. Furthermore, the trial court and the appellate court will know clearly from reading the charge what grounds of recovery the jury considered, and review the case accordingly, without speculation.

Under this rule, the verdict in this case does not support judgment for Island.

While I share the appellate courts' reluctance to reverse cases on technical charge problems, I do not consider the trial court's error merely technical. The judgment is erroneous because it is based on a ground of recovery not conclusively proven and never presented to the jury. This error contravenes the most basic principles of the law of judgments. *Akin v. Dahl*, 661 S.W.2d 911, 913 (Tex.1983); *Glen Falls Ins. Co. v. Peters*, 386 S.W.2d 529, 531–32 (Tex.1965). *See also* 3 McDonald, *Texas Civil Practice in District and County Courts* § 12.36.2 (1983); 1 Freeman, *Freeman on Judgments* §§ 9, 10 (1925).

Normally, when a judgment is erroneously rendered, we reverse and render. However, out of fairness to both parties, I would remand this cause to the trial court in the interest of justice.

Rule 505 entitles this court to "reverse the judgment and remand the cause to the trial court, if it appears that the justice of the cause demands another trial." Tex.R. Civ.P. 505. Island did not raise on appeal the trial court's failure to submit an issue or instruction on waiver. Thus, we could simply render against Island because the court of appeals found no evidence of performance. However, it seems unfair to render against Island because the jury could have believed Republic waived Island's contract obligations. Further, Island may not have complained of lack of issues or instructions on appeal because it felt the submitted issue did include waiver. While I disagree, this highlights the true problem: the trial court tried but failed to submit a broad issue which included waiver when Island requested issues and instructions on waiver. Under these circumstances, rendering against Island would be unjust. This court has held that remand in the interest of justice is proper in this situation. *Hicks v. Matthews*, 153 Tex. 177, 266 S.W.2d 846, 49 (1954). Rendering against Republic would also be unjust because the charge's silence on waiver, and the absence of evidence on performance, prevents the verdict from supporting judgment for Island.

Considering all of the circumstances surrounding this charge, and the novelty of the majority's holding, we can fairly dispose of this case only by remanding to the trial court to proceed according to this opinion.

McGEE and CAMPBELL, JJ., join in this dissent.

GONZALEZ, Justice, dissenting.

I respectfully dissent. While I agree with this court's policy concerning broad issue submission, I disagree that the policy should be advanced in this case.

Island sought Republic's assistance in providing financing to prospective purchasers of Island's condominiums. One of the requirements (Paragraph 17) of their agreement was that loan applications be submitted to Republic thirty days prior to the termination date. Island did not comply with this requirement. Republic refused to fund the loans. Island then sued Republic for breach of contract.

At trial, both sides requested various issues and instructions on both performance of the commitment letter's conditions and waiver. The trial court, however, refused to submit the requested issues and instructions on waiver and only submitted one issue on liability which read:

> Do you find from a preponderance of the evidence that plaintiffs performed their obligations under the commitment letter in question?
>
> Answer: We do.

The majority states that "when the totality of the trial proceedings are considered it is apparent that waiver of Paragraph 17 of the letter of commitment was considered by the jury and found adversely to Republic."

I disagree for the following reasons: (1) a trial court's failure to submit instructions with broad issues that "subsume" mutually exclusive independent grounds of recovery or multiple causes of action is harmful

error;[1] (2) the majority's position is not supported either by the cases cited promoting broad issue submission or by Rule 277;[2] and (3) the majority's approach disregards the requirements of Rule 279 dealing with issue submission.

(1) *Broad Issue Instructions and Harmful Error*

The question presented on appeal is whether the issue submitted to the jury includes Island's ground of recovery alleging that Republic waived the condition that the loan applications be received at least thirty days prior to the termination date. Applying the evidence introduced at trial to contract law, a verdict in Island's favor can only be based on a theory of waiver. The majority concludes that the submitted "broad" issue includes an issue on waiver.[3] The trial court did not, however, submit an accompanying instruction on waiver. Where multiple grounds of recovery are included in one broad issue, the trial court should give the jury appropriate instructions. *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex.1975). Where, as here, the broad issue contains independent grounds of recovery that are mutually exclusive or otherwise conflicting, the trial court must submit an instruction. Otherwise, the verdict can be based upon a jury finding to an erroneous legal theory.

The majority holds that a trial court's failure to give an instruction to a "broad" issue is not reversible error *per se*, and further, that Republic, the party whose liability is premised on the omitted ground of recovery, has failed to "demonstrate

1. The liability issue submitted to the jury only addresses performance. The jury was asked: Did Island perform its obligations under the commitment letter? The majority essentially argues that "we do" means "we do not" find Island performed, but it does not matter because Republic waived its right to require performance. A literal reading of the issue and answer, however, shows that the jury merely answered "we do" find that Island performed its obligations. Because the jury said "Yes, Island performed," it would not address whether Island is *excused* from performance under a theory of waiver. The majority does not explain how the jury knowingly found waiver in an issue asking about performance.

   Contract law governs the parties' rights and obligations. The court of appeals held, as a matter of law, that Paragraph 17 was a condition precedent (an "obligation") under the commitment letter. Island did not appeal this holding. The majority implicitly holds that failure to perform the condition precedent was undisputed. Apparently, the majority is holding that nonperformance of Paragraph 17 was established as a matter of law. Utilizing these two legal conclusions (Paragraph 17 is a condition precedent and Island failed to perform Paragraph 17), the majority reasons Island could not have performed its obligations under the letter. Thus, after precluding as a matter of law any question on performance, the court then implies a finding of waiver of the condition precedent.

   If failure to perform was conclusively established and the trial court and jury treated Paragraph 17 as a condition, then the trial court should not have submitted an issue asking if Island performed its obligations. Only disputed controlling issues are submitted to the jury. TEX.R.CIV.P. 279. The majority does not explain why it was proper for the trial court to submit only one undisputed question on liability.

   The majority's assumption on the jury determination is not supported by the events at trial. Several issues were requested in regard to whether Island made certain improvements on the premises as required under Paragraph 15 (not Paragraph 17) of the commitment letter. Such requests by the parties indicate a disputed issue on performance in connection with other obligations, or paragraphs, under the letter. When the jury answered the issue on performance, a question arises regarding whether the jury found Island performed Paragraph 15 of the commitment letter or whether the jury also found Republic waived its right to enforce Paragraph 15 and various other paragraphs of the commitment letter. There is no way to determine what the jury may or may not have found.

2. All references to "Rules" are to Tex.R.Civ.P. (1984).

3. The issue in this case is not a broad issue. The issue asked about "obligations *under the commitment letter.*" By modifying "obligations" with "under the commitment letter," the issue limits the jury's consideration to the literal requirements of the letter. This issue does not allow the jury to consider other grounds of recovery nowhere mentioned in the charge.

   To hold that the submitted issue includes waiver, the majority must read "obligations under the commitment letter" as "obligations under the commitment letter that Republic did not waive." The merits of broad issue submissions aside, this court should not rewrite an issue so as to include an independent ground of recovery never mentioned in the charge.

harm." The harm in this case is obvious. The submitted issue does not ask about waiver and does not contain an accompanying instruction or definition on waiver. Despite the omission, this court affirms a verdict against Republic.[4]

In reviewing whether the trial court's failure to give an instruction or issue is "harmful error," this court is guided by Rule 503 which states that a judgment shall not be reversed unless the error "was reasonably calculated to cause and probably did cause the rendition of an improper judgment." The determination of whether an improper judgment probably resulted is based on the record as a whole. *Lumbermen's Lloyds v. Loper*, 153 Tex. 404, 269 S.W.2d 367, 370 (1954).

This court has frequently discussed "harmful error" in the context of the jury charge. In 1973, this court amended Rule 277 in an effort to give trial judges greater latitude in submission of the jury charge. Despite the greater discretion given to trial judges, this court has repeatedly held that errors in the jury charge require reversal as harmful error. In *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449 (Tex. 1978) this court held that the instructions given to the jury constituted a "misstatement of law." In reversing, we stated that "[a] trial court's charge which does not instruct the jury as to the correct law applicable to the facts is improper.... The erroneous charge constituted error which was reasonably calculated to cause and probably did cause the rendition of an improper judgment." *Id.* at 453–54. Thus, the *inclusion* of misstatements of law in the instructions was harmful error. The rationale is equally applicable that the *exclusion* of instructions on the applicable law, when they are required, results in harmful error.

Similarly, in *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex.1973) this court held that an issue on actual damages was overly broad when it contained an inappropriate instruction that allowed recovery for "loss of monetary reward." A proper instruction would have included net profits or another legal measure of damages. Thus, this improper submission "was fatally defective, because it simply failed to guide the jury on *any proper legal measure of damages.*" *Id.* at 90. This court reversed the judgment because the accompanying instruction failed to limit the jury's considerations on the "broad" issue. When the jury's answer to a broad issue can include inapplicable types of damages or inapplicable grounds of recovery, the issue requires an appropriate accompanying instruction. The "broad" issue submitted in this case does not have such an accompanying instruction.

In *Scott v. Atchison, Topeka & Santa Fe Ry.*, 572 S.W.2d 273 (Tex.1978) the adversely affected party complained of the submission of a broad issue which allowed the jury to find negligence on facts that were neither pleaded nor proved. In reversing, we stated:

> In view of the wide variance between the pleadings and unplead facts and circumstances from which the jury *could have* inferred that the railroad was negligent, such error was reasonably calculated to and probably did cause the rendition of an improper judgment.

Id. at 277. Other Texas Supreme Court cases have reversed the lower court judgments for errors in the charge. *Washington v. Reliable Life Ins. Co.*, 581 S.W.2d 153 (Tex.1979) (trial court submitted irrelevent issue); *Dutton v. Southern Pacific Transportation*, 576 S.W.2d 782 (Tex.1978) (trial court submitted com-

4. On review, the court of appeals held that there was *no evidence* of waiver. The majority presumes, in the absence of an issue or instruction, that the jurors knew they had to find that Republic relinquished its right to insist on performance. The majority fails to cite any authority allowing this court to make an implied "finding" on an independent ground of recovery that is not even mentioned in the charge. This court cannot "find" waiver. We have jurisdiction over questions of law only and no power to decide facts. *Stanfield v. O'Boyle*, 462 S.W.2d 270, 272–73 (Tex.1971); TEX. CONST. art. 5 § 3. This court cannot hold that a judgment based on a jury finding on a ground of recovery upon which no inquiry was made is harmless error.

mon law definition in a F.E.L.A. case); *Southwestern Bell Tel. Co. v. Thomas*, 554 S.W.2d 672 (Tex.1977) (trial court failed to submit requested issues on contributory negligence); *Missouri Pacific R.R. Co. v. Cross*, 501 S.W.2d 868 (Tex.1973) (errors in submission of issues and objections to the charge). These cases all stand for the proposition that when a trial judge submits an improper instruction or issue, the error is harmful and the judgment will be reversed. There is no sound basis for distinguishing between the submission of an improper instruction and the failure to submit an instruction when one is necessary.

The majority observes that "if the absence of an instruction on waiver was detrimental to either party, it was Island." The majority fails to state on what basis it makes this determination. If the issue is properly construed as only addressing performance, then the majority's statement is accurate. However, when the issue is construed as containing questions on both performance and waiver in one "broad" issue; the submitted issue, without instruction, gives Island "two bites at the apple." The jury could either find that Island performed its obligations, or, as under the majority's analysis, the jury may "impliedly" find that Republic waived its rights to enforce the obligations.

The majority states that "the controlling issue, the only issue which would authorize a recovery by Island, was whether Island had performed all of the things required by Republic as conditions precedent so as to entitle Island to enforce the commitment." The majority, then, emphasizes the fact that performance of conditions precedent was the question before the jury, not waiver. Thus, the submitted issue was not "detrimental" to Island, but allowed Island to recover on a ground of recovery that was not addressed in the charge. The issue was detrimental to Republic both because it was held liable on an omitted ground of recovery and because it was not required to request that Island's omitted theory of recovery be submitted.

This case will have a far reaching impact. Regardless of the result reached here, the majority should not place its stamp of approval allowing a trial court to submit broad, even innocuous, issues without any limiting instructions or definitions. The majority opinion makes it virtually impossible for appellate courts to review the trial court's charge. The prevailing party need only argue that the issue submitted to the jury was a "broad" issue, thereby encompassing any and all theories of recovery. All omitted grounds of recovery will be "subsumed" in "broad" issues. Without instructions, the submission of broad issues leads to verdicts unsupported by legitimate legal theories. Broad issues will virtually become general charge submissions.

(2) *Rule 277 and Issue Submission*

In reaching its conclusion that failure to submit an instruction is not harmful error, the majority relies on the portion of Rule 277 which allows the combined submission of elements or issues. The majority, however, disregards another portion of Rule 277, which states:

> In submitting the case, the court *shall* submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict ...

Tex.R.Civ.P. 277 (emphasis added). *See* Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw.L.J. 577, 587 (1973). In holding that the trial court's failure to instruct was not reversible error, the majority ignores the mandatory language of Rule 277—that the trial court *shall* submit necessary instructions. In this case, the issue submitted, in the absence of an instruction, did not allow the jury to arrive at a proper verdict. *See Line Enterprises v. Hooks & Matteson*, 659 S.W.2d 113, 117 (Tex.App.—Amarillo 1983, no writ). In light of the affirmative language of Rule 277, the trial court's failure to submit an instruction resulted in reversible error.

The majority further relies upon cases dealing with Rule 277 and the submission of broad issues. Although these cases pro-

mote the submission of broad issues, none of them utilize the inherently detrimental "subsumed issue" analysis which is presently being employed by the majority. Further, none of the cases permit recovery upon an omitted independent ground of recovery in contravention of the requisites of Rule 279.

(3) *Rule 279 and Issue Submission*

In framing the issue of this case, the majority states that the "question is whether it is reversible error for a trial judge to submit a single broad issue encompassing more than one independent ground of recovery?" The majority, then, holds that questions both on performance and on waiver are included in the same issue. Yet, the word "waiver" does not appear in the issue. Under Rule 279:

> Upon appeal all independent grounds of recovery or defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived ...

Waiver is an independent ground of recovery. *Middle States Petroleum Corp. v. Messenger,* 368 S.W.2d 645, 654 (Tex.Civ. App.—Dallas 1963, writ ref'd n.r.e.). *See Sun Oil Co. (Delaware) v. Madeley,* 626 S.W.2d 726 (Tex.1981); *Washington v. Reliable Life Ins.,* 581 S.W.2d 153, 157 (Tex. 1979). Waiver was neither conclusively established nor was an issue submitted on waiver. The waiver ground of recovery was waived. Thus, Island, the party relying on waiver, should not be allowed to recover on the submitted issue.

The majority's approach in this case disregards well established rules relating to the party who has the burden of requesting the submission of issues. Island relies on the waiver theory for its recovery. Under Rule 279, the party relying on waiver has the burden of proof upon the issue. *Washington,* 581 S.W.2d 157. *See Texas Prudential Ins. v. Dillard,* 158 Tex. 15, 307 S.W.2d 242, 249 (1957). Island's burden is the same whether the issues are separately or broadly submitted. Island requested issues and instructions on waiver, it knew that it had the burden to have such issues submitted. The trial judge refused to submit the requested issues and instructions on either of these theories. *Island did not complain of this failure in the court of appeals or in this court.* Island waived any complaint of improper refusal to submit requested issues or instructions. *State Farm Mut. Auto Ins. v. Cowley,* 468 S.W.2d 353, 354 (Tex.1971); Tex.R.Civ.P. 476. Since Island did not preserve error on the trial court's failure to submit the issues on waiver and estoppel, Island can only recover on those grounds if they are established as a matter of law. Tex.R.Civ.P. 279; *Washington,* 581 S.W.2d at 157. An issues is conclusively established when the evidence is such that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. *Triton Oil & Gas Corp. v. Marine Contractors & Supp., Inc.,* 644 S.W.2d 443, 446 (Tex. 1982). *See Cavanaugh v. Davis,* 149 Tex. 573, 235 S.W.2d 972, 977 (1951). Island did not conclusively establish waiver; Island failed to meet its burden.[5]

5. Pat Green received the loan applications and began processing them August 25, 1981. Green testified she did not know of the provision in the loan commitment letter which required Island to file the applications by August 15. She also stated that she was obligated under federal law to accept the applications. Hal Huddleston, an executive of Republic, not Pat Green, had the authority to make a final decision whether to fund the commitment. There is no evidence that Green had actual authority to waive the condition, nor was there any evidence Ryan believed Green had such authority. Island admits that there is a question whether the scope of Green's agency included the authority to waive performance of the condition. There is "room for ordinary minds to differ" whether Green had authority to waive the condition that the applications be submitted by August 15.

Island also contends Republic is estopped to deny the condition was waived. The primary element of estoppel is a false representation or concealment of material facts. *Gulbenkian v. Penn,* 151 Tex. 412, 252 S.W.2d 929 (1952). Island does not contend Republic made any false representation or intentionally concealed facts. Further, the evidence does not establish such conduct.

Neither waiver nor estoppel was conclusively established. In addition, Island failed to preserve its error to challenge the trial court's re-

By its holding, the majority implicitly requires that Republic request and object to the submission of its adversary's omitted theories of recovery. In light of Rule 279, we cannot shift the burden upon Republic to request Island's theory of recovery. More importantly, we cannot say that Republic was not harmed when it was held liable on such omitted ground of recovery.

For the above reasons, I would affirm the judgment of the court of appeals.

1980 FORD PICKUP, Petitioner,

v.

The STATE of Texas, Respondent.

No. C–1854.

Supreme Court of Texas.

May 21, 1986.

The District Court for the 44th Supreme Judicial District, Dallas County, H. Dee Johnson, J., ordered automobile, which it had found had been used by person other than owner to transport cocaine, forfeited to city police department. The Court of Appeals for the Fifth Supreme Judicial District, Pat McClung, J., affirmed. On appeal, the Supreme Court held that Texas Controled Substance Act requires an aggravated offense involving a drug transaction as a predicate to forfeiture when person other than owner is in charge of conveyance at time of delivery or sale of drug.

Application for writ of error granted; judgment of Court of Appeals reversed.

1. Drugs and Narcotics ⇐190

Texas Controlled Substance Act requires an aggravated offense involving a drug transaction as a predicate to forfeiture when person other than owner is in charge of conveyance at time of delivery or sale of drug. Vernon's Ann.Texas Civ.St. art. 4476–15, §§ 1.01 et seq., 5.03(a)(5).

2. Drugs and Narcotics ⇐191

Forfeiture of automobile used by person other than owner to transport cocaine which weighed between 1.1 and approximately four grams was improper. Vernon's Ann.Texas Civ.St. art. 4476–15, §§ 1.01 et seq., 4.02(b)(3), 4.03(c), 4.04(c), 5.03(a)(5); Vernon's Ann. Texas Rules Civ. Proc., Rule 483.

J. Stephen Cooper, Dallas, for petitioner.

Henry Wade, Crim. Dist. Atty. and Alec B. Stevenson and Paige E. Jones, Asst. Crim. Dist. Attys., Dallas, for respondent.

PER CURIAM.

This is an appeal from an automobile forfeiture. The issue raised is whether the Texas Controlled Substances Act requires an aggravated offense involving a drug transaction as a predicate to forfeiture when a person other than the owner is in charge of the conveyance at the time of delivery or sale of the drug.

The trial court found that on January 17, 1984 a person other than the owner of the 1980 Ford Pickup used that truck "to transport or in any manner facilitate the transportation, sale, receipt, possession, concealment, or delivery of a controlled substance, to wit: Cocaine." The evidence at trial showed that the cocaine weighed between 1.1 and approximately 4 grams. The trial court held that such use of the vehicle violated the Texas Controlled Substances Act, TEX.REV.CIV.STAT.ANN. art. 4476–15, § 5.03(a)(5) and ordered the vehicle forfeited to the City of Dallas Police Department. In an unpublished opinion, the court

fusal to submit an issue on waiver or estoppel. Therefore, because it is undisputed that Island did not file the applications by August 15, Republic was relieved of its obligations to perform under the loan commitment.

1. Bills and Notes ⇐416

Acceleration of indebtedness on promissory note was invalid where holder of note made demand for payment to maker at time she gave maker notice of acceleration.

2. Bills and Notes ⇐398

Creditor must give debtor opportunity to pay past-due installments before acceleration of entire indebtedness; therefore, demand for payment of past-due installments must be made before exercising option to accelerate.

3. Bills and Notes ⇐529, 530

Holder of note was entitled to judgment against maker for past-due installments plus accumulated interest as provided in note, even though her acceleration was invalid.

Terry Clark, Temple, for petitioners.

Jerry Scarbrough, Killeen, Busby & Wilson, Don Busby, James O. Cure, Temple, for respondents.

PER CURIAM.

Olga Williamson sued Riley Butler Dunlap, Raymond Wilkinson, and Peggy Wilkinson to collect on a promissory note. The trial court rendered judgment against all three defendants. The court of appeals reversed the judgment of the trial court and rendered a take nothing judgment as to all defendants. 683 S.W.2d 544 (1984).

We grant petitioner's application for writ of error and, without hearing oral argument, reverse the take nothing judgment of the court of appeals on the claim against Raymond Wilkinson and sever the cause. That part of the cause relating to Raymond Wilkinson is remanded to the trial court for the rendition of a judgment consistent with this opinion. TEX.R.CIV.P. 483.

[1-3] Olga Williamson made demand for payment to Raymond Wilkinson at the time she gave him notice of acceleration. The court of appeals correctly held that the acceleration is invalid. The creditor must give the debtor an opportunity to pay the past due installments before acceleration of the entire indebtedness; therefore, demand for payment of past due installments must be made *before* exercising the option to accelerate. *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975). However, Williamson is entitled to judgment against Raymond Wilkinson for past due installments plus accumulated interest as provided in the note. *Id.*

Because the opinion of the court of appeals conflicts with our holding in *Allen Sales & Servicenter*, we grant petitioner's application for writ of error and, without hearing oral argument, reverse the judgment of the court of appeals in part and affirm in part. The claim against Raymond Wilkinson is severed and remanded to the trial court for the rendition of a judgment consistent with this opinion. We affirm the judgment of the court of appeals on the claims against Riley Butler Dunlap and Peggy Wilkinson.

SEARS, ROEBUCK & COMPANY d/b/a Sears, El Paso, Petitioner,

v.

Concepcion G. CASTILLO, Respondent.

No. C-3888.

Supreme Court of Texas.

July 17, 1985.

Customer brought action against department store for slander, negligence and false imprisonment. The District Court No. 171, El Paso County, Berliner, J., entered judgment in favor of department store, and customer appealed. The Court of Appeals, Stephen F. Preslar, J., reversed, 682 S.W.2d 432, and department store sought writ of error. The Supreme

Court held that trial court did not abuse its discretion in instructing jury on department store's privilege to detain suspected shoplifters, in the words of the applicable statute.

Judgment of the Court of Appeals reversed and rendered.

1. False Imprisonment ⇐2

Essential elements of cause of action for false imprisonment are willful detention, lack of consent, and absence of authority of law.

2. Trial ⇐241

In false imprisonment action against department store, trial court did not abuse its discretion in instructing jury on store's privilege to detain suspected shoplifter, in the language of Civil Article 1(d), rather than submitting such privilege to the jury as a special issue. Vernon's Ann.Texas Civ.St. art 1d.

Grambling and Mounce, H. Keith Myers, El Paso, for petitioner.

Caballero and Panetta, Barbara Masse and Raymond C. Caballero, El Paso, for respondent.

PER CURIAM.

Concepcion G. Castillo brought suit against Sears, Roebuck & Company for slander, negligence, and false imprisonment. The suit was premised on a security incident occurring within the Sears store. Mrs. Castillo visited the Sears store to pick up several items which she had previously placed in the lay-away department. The merchandise was properly purchased, and a receipt given to Mrs. Castillo. As Mrs. Castillo was leaving the Sears store, a loud alarm bell sounded and her package was taken from her. Upon examination of the merchandise carried by Mrs. Castillo, a security device was located and removed. Mrs. Castillo testified that she was not restrained and stated that the store employee said "not a word" to her, and made no accusations. The trial court submitted the case to the jury on a false imprisonment theory.

The pertinent parts of the jury charge are as follows:

Special Issue No. 1:

From a preponderance of the evidence, do you find that the plaintiff was falsely imprisoned by the defendant?

Answer "She was" or "She was not."

We answer: She was not.

The remainder of the six special issues were conditioned on an affirmative finding; therefore, they were not answered. In addition, the trial court submitted the following instructions:

You are instructed that the term "false imprisonment" as used in this charge means the willful detention by another without legal justification, against her consent, whether such detention be effected by violence, by threats or by other means, which restrains a person from moving from one place to another.

Further you are instructed that under the law of this state a person reasonably believing another has stolen or is attempting to steal property is privileged to detain the person in a reasonable manner and for a reasonable period of time for the purpose of investigating ownership of the property.

The trial court instructed the jury as to the statutory privilege to make a reasonable detention in order to investigate a possible theft. TEX.REV.CIV.STAT.ANN. art. 1d (Vernon 1984). The court of appeals reversed the judgment of the trial court and held that the privilege to detain must be submitted to the jury as a special issue. 682 S.W.2d 432 (Tex.App.1984). We reverse the judgment of the court of appeals.

[1] The essential elements of a cause of action for false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. *James v. Brown*, 637 S.W.2d 914 (Tex.1982); *Cronen v. Nix*, 611 S.W.2d 651, 653 (Tex.Civ.App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Moore's, Inc. v. Garcia*, 604 S.W.2d

261, 263-64 (Tex.Civ.App.—Corpus Christi 1980, writ ref'd n.r.e.). Article 1d provides:

> A person reasonably believing another has stolen or is attempting to steal property is privileged to detain the person in a reasonable manner and for a reasonable period of time for the purpose of investigating ownership of the property.

TEX.REV.CIV.STAT.ANN. art. 1d (Vernon 1984). The plaintiff must prove the absence of authority in order to establish the third element of a false imprisonment cause of action.

[2] The trial court in *Kroger v. Demakes*, 566 S.W.2d 653 (Tex.Civ.App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.), submitted the question of authority in a false imprisonment case as an issue. Conversely, the trial court in *Gibson Discount Center, Inc. v. Cruz*, 562 S.W.2d 511 (Tex.Civ.App.—El Paso 1978, writ ref'd n.r.e.), instructed the jury regarding the existence of the privilege. Under Rule 277, "it shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly." TEX.R.CIV.P. 277 (Vernon 1984). The trial court in this case submitted the false imprisonment claim broadly, with appropriate instructions. The charge correctly stated the law with respect to the elements of the plaintiff's cause of action, and the statutory privilege contained in article 1d. Therefore, we hold that the trial court did not abuse its discretion in submitting the article 1d privilege as an instruction pursuant to Rule 277.

Pursuant to TEX.R.CIV.P. 483, we grant the writ of error and, without hearing oral argument, reverse the judgment of the court of appeals and render judgment for Sears, Roebuck & Company.

L. Jean TAYLOR, Petitioner,

v.

The NORTH RIVER INSURANCE COMPANY, NEW JERSEY, Respondent.

No. C-3968.

Supreme Court of Texas.

July 17, 1985.

Widow brought action against insurer seeking recovery of workers' compensation death benefits. The 68th District Court, Dallas County, Hall, J., entered judgment for widow, and ordered that attorneys' fees be paid in lump-sum, and insurer appealed. The Court of Appeals, Guittard, J., reversed, and widow petitioned for writ of error. The Supreme Court held that trial court properly awarded attorneys' fees in lump-sum to widow.

District Court affirmed; Court of Appeals reversed.

Workers' Compensation ⇐1984

Trial court properly awarded attorneys' fees in lump-sum to widow who was forced to litigate workers' compensation death benefits claim with insurer. Vernon's Ann.Texas Civ.St. art. 8306, § 8(d).

Cox and Bader, Bertran T. Bader, III, and William D. Cox, Jr., Dallas, for petitioner.

Larry Hayes, Dallas, for respondent.

PER CURIAM.

The sole issue for our consideration in this action for workers' compensation death benefits is the proper method of payment of attorneys' fees under TEX.REV.CIV.STAT.ANN. art. 8306 § 8(d). The trial court awarded attorneys' fees in a lump sum; the court of appeals, in an unpub-

YELLOW CAB AND BAGGAGE COMPANY et al., Petitioners,

v.

Mrs. Jewell GREEN, Respondent.

No. A-4733.

Supreme Court of Texas.

March 30, 1955.

Rehearing Denied April 27, 1955.

Personal injury suit growing out of collision between defendant's taxicab, in which plaintiff was a passenger, and another vehicle. The District Court, Wichita County, entered judgment for plaintiff, and defendant appealed. The Fort Worth Court of Civil Appeals, Second Supreme Judicial District, Frank A. Massey, C. J., 268 S.W.2d 519, affirmed, and defendant brought the case on for further review. The Supreme Court, Griffin, J., held that when trial court gives definition or instruction in connection with special issue, it is not necessary for objecting party to tender with his objection a substantially correct instruction or definition; but in the instant case found that the special issue given, together with its explanatory instruction, was adequate.

Affirmed.

1. Appeal and Error ⇐216(1, 3)

Where trial court gives definition or instruction in connection with special issue, and party is not satisfied, all that is necessary to be done is to file an objection specifically and clearly pointing out wherein it is claimed given instruction or definition is insufficient or is in error, and it is not necessary to tender a substantially correct instruction or definition; but when court's charge contains no instruction, complaining party must accompany his clear and specific objections to such omission with a substantially correct definition or explanatory instruction. Rules of Civil Procedure, rules 274, 279.

2. Damages ⇐221

In personal injury action, special issue submitting damages issue, when taken together with explanatory instruction affirmatively directing jury not to allow any sum of money for pain and suffering or loss of earnings not proximately caused by defendant's negligence was sufficient and obviated necessity of giving affirmative instruction excluding damages resulting to plaintiff by virtue of prior infirmities. Rules of Civil Procedure, rules 1, 279.

Jones, Parish & Fillmore, Wichita Falls, for petitioners.

E. W. Napier, Wichita Falls, for respondent.

GRIFFIN, Justice.

This is an action for personal injuries suffered by respondent, Mrs. Jewell Green, as a result of a collision between a taxicab belonging to petitioner and an automobile belonging to a third party, and in which cab, at said time of the collision, respondent, Mrs. Jewell Green, was a passenger. The cause was submitted to a jury, and upon their verdict, the trial court rendered a judgment for respondent against petitioner. Petitioner appealed to the Court of Civil Appeals. That Court affirmed the trial court's judgment. 268 S.W.2d 519.

Petitioner comes to this Court upon four points of error, all of which have to do with the refusal of the trial court to give an affirmative instruction excluding damages resulting to Mrs. Green by virtue of prior infirmities, except in so far as Mrs. Green's physical condition prior to the injury involved in this litigation may have been aggravated as a result of petitioner's negligent act. The Court of Civil Appeals held that the petitioner would have been entitled to such affirmative instruction had petitioner presented to the trial court, and accompanying petitioner's objections to the court's charge, a correct instruction; but that since petitioner only objected to the

court's charge, he could not complain of the failure of the trial court to limit his charge as requested. There is no dispute as to the facts surrounding this procedural point. All complaint has to do with Special Issue No. 23, and the accompanying instruction given by the Court. These are as follows:

"Special Issue No. 23:

"What amount of money, if any, if now paid in cash, do you find from a preponderance of the evidence would reasonably compensate the Plaintiff, Mrs. Jewell Green, for the damages, if any, which she has sustained, or will, in all reasonble probability, sustain in the future, as a direct and proximate result of the negligence, if any, of the Defendant herein? Answer in dollars and cents, or 'None'.

"In answering the foregoing Issue, you will take into consideration only the following elements: Physical and mental pain and suffering, if any, which Mrs. Jewell Green has suffered to the time of the trial, and such physical and mental pain and suffering, if any, which Mrs. Jewell Green will, in all reasonable probability, suffer in the future; and the loss of earnings, if any, from the date of the collision to the time of this trial, and the reasonable value of her reduced capacity, if any, to labor and earn money in the future, if you find that her capacity to labor and earn money will, in reasonable *probably*, be diminished in the future. You will not allow any sum of money for any pain and suffering, loss of earning, or earning capacity, except those which you find to be directly and proximately caused by the negligence, if any, of the Defendant herein."

In the case of Texas Employers' Ins. Ass'n v. Mallard, 1944, 143 Tex. 77, 182 S.W.2d 1000, 1002, there was before this Court the same legal question as is here involved. After quoting from Rule 274 and Rule 279, T.R.C.P., this Court clearly declared the law to be that a good and sufficient objection to the instruction given by the trial court was sufficient, and that the party complaining of the erroneous instruction was not required to go farther and submit "a substantially correct definition or explanatory instruction" as provided in Rule 279, and says:

"It seems clear to us that this case falls under Rule 274 and not Rule 279. Rule 279 applies when there is a failure to submit a definition, while Rule 274 applies when a definition is actually contained in the charge, but the complaining party objects to it because it is thought to be erroneous. When the court fails to define a term which a litigant is entitled to have defined Rule 279 is applicable; but when, as here, the court's charge does contain a definition, but same is unsatisfactory to the litigant, Rule 274 is applicable."

See also Dallas Ry. & Terminal Co. v. Ector, 1938, 131 Tex. 505, 116 S.W.2d 683; Russell Const. Co. v. Ponder, 1945, 143 Tex. 412, 186 S.W.2d 233(7); Hines v. Kelley, Tex.Com.App.1923, 252 S.W. 1033; Robertson & Mueller v. Holden, Tex.Com. App.1928, 1 S.W.2d 570; 41B Tex.Jur. 672, et seq., Sec. 511, Trial-Civil Cases.

[1] We hold that in a case where the trial court gives a definition or an instruction in connection with a special issue, and a party is not satisfied with the instruction or definition given, all that is necessary to be done by the complaining party is to file an objection to the court's instruction or definition specifically and clearly pointing out wherein it is claimed the given instruction or definition is insufficient or is in error. It is not necessary for the objecting party to tender with his objection a substantially correct instruction or definition. Rule 274, Vernon's Annotated Texas Rules of Civil Procedure. When the court's charge contains no instruction, the complaining party must accompany his clear and specific objections to such omission with a substantially correct definition or explanatory instruction.

[2] This brings us to the question as to whether or not Special Issue No. 23, to-

gether with its explanatory instruction was sufficient to confine the jury to a consideration of the amount of money damages to be awarded, if any, to those directly and proximately resulting from the petitioner's negligence. Petitioner claims that said instruction did not affirmatively exclude from the consideration of the jury such damages the respondent may have suffered from prior infirmities. In our present case the evidence shows that the respondent was a woman who suffered from indigestion and female trouble. She was going through the "menopause" and as a result of all her illness she was nervous at times. She had two operations prior to the accident—one was a hysterectomy which was in 1950 and approximately two and one half years previous to the accident; the other was the removal of her gall bladder in April or May of 1951. The testimony further shows that for some six or eight months prior to the injuries received in the collision in question, Mrs. Green was in good health, and was working at a heavy and rather strenuous job in a cleaning establishment, with no ill effects from her operations save being unable to sleep at nights on occasion. For her insomnia she was taking a "little tablet" which was a mild sedative; for her indigestion she took occasional injections of liver extract as a substitute for nature's function through the gall bladder. She continued both of these medicines after the accident. She was highly nervous after the accident, and her doctor testified it would take some time for Mrs. Green to be restored to the state of health which she enjoyed prior to her injury in the collision in question. Respondent's doctor further testified that, in his opinion, all of Mrs. Green's injuries were the result of the collision in question. The doctor offered by the petitioner stated that, in his opinion, Mrs. Green was of the "hysterical" type; a very nervous woman; and that her injuries resulted from her previous operations and physical condition, and did not result from injuries suffered in the accident of December 1952 for which recovery was sought. He further testified that, in his opinion, the collision in which Mrs. Green was involved definitely could "temporarily increase her nervous symptoms, and aggravate her previous nervousness."

The court. in the issue itself, confined respondent's recovery to "* * * damages * * * which she * * * will * * * sustain * * * *as a direct and proximate result of the negligence, if any, of the defendant herein?*" In the explanatory instruction accompanying this issue the trial court again limited respondent's damages by the last sentence of such instruction, reading: *"You will not allow any sum of money* for any pain and suffering, loss of earning, * * * except those which you find to be *directly and proximately caused by the negligence, if any, of the defendant herein."* (Emphasis added.)

Petitioner relies upon the case of Dallas Ry. & Terminal Co. v. Ector, 131 Tex. 505, 116 S.W.2d 683 to sustain its contention that the court's charge herein was error. Our case is distinguishable from the Ector case in that our case contains an affirmative instruction that the jury would "not allow any sum of money for pain and suffering, loss of earnings, or earning capacity" except such as were proximately caused by the defendant's negligence. There was no such instruction in the Ector case.

We must presume that the jurors in this case were intelligent, honest and fairminded men, as has been our experience in dealing with jurors in the practice of our profession. We do not believe that any juror would be misled, or encouraged by this instruction, to include any damages suffered by respondent which might result from her previous infirmities or physical condition. The trial court tells them plainly, clearly and pointedly that they must exclude all damages except those arising as a result of the negligence, if any, of the petitioner herein, and, in our opinion, this instruction affirmatively excludes any other damages. We do not see how petitioner could have suffered any injury by the failure to include in the instruction the matter pointed out by petitioner's objections to the court's charge. Having confined and limited respondent's recovery to those damages suf-

fered as a result of petitioner's negligence, we hold that petitioner was not entitled to have another phase or shade of meaning included in the court's instructions. The intent and purpose of the new rules of civil procedure adopted in 1941, and as further amended by this Court, was to promote the speedy disposition of causes and to simplify the special issue practice and eliminate the submission of one ground of recovery or defense in a multitude of different ways depending upon the ingenuity of trial counsel to submit them. The same reasoning will apply to giving of explanatory instructions as to issues. Vernon's Annotated, Texas Rules of Civil Procedure, Rules 1 and 279. We hold the instruction given to be sufficient.

Upon an examination of the record we find that the Court of Civil Appeals acted upon each of the points of error raised by appellant therein (petitioner here). Petitioner in this Court makes complaint only of the error of the Court of Civil Appeals in holding it was necessary to submit a substantially correct instruction to accompany its objections to the trial court's charge. This point of error we have sustained.

The judgment of the Court of Civil Appeals is affirmed.

Camille DE WINNE et ux., Petitioners,

v.

William ALLEN, By and Through His Guardian ad litem, Edgar Pfeil, Respondents.

No. A-4787.

Supreme Court of Texas.

March 23, 1955.

Rehearing Denied April 20, 1955.

Action was brought for damages resulting from intersectional automobile collision, which occurred when plaintiff driver failed to see defendant's automobile traveling in wrong direction on one way street. The District Court, Bexar County, Walter Laughridge, J., entered judgment for plaintiffs notwithstanding verdict, and defendant appealed. The San Antonio Court of Civil Appeals of the Fourth Supreme Judicial District, Pope, J., 268 S.W.2d 677, reversed and remanded with instructions, and plaintiffs brought error. The Supreme Court, Walker, J., held that on appeal from judgment notwithstanding verdict, if appellee raises by cross points of error questions of great weight and preponderance of the evidence, jury misconduct, or other matters, which can be presented only on motion for new trial, or otherwise informs reviewing court in his brief that he wishes to file motion for new trial to present such matters to trial court, reviewing court, in event it concludes that trial court erred in rendering judgment notwithstanding verdict, will reverse and remand case to trial court with instructions to enter judgment on verdict and permit appellee to file motion for new trial for limited purpose of complaining of matters, which are thus called to reviewing court's attention, and which could not have been previously presented to and ruled on by trial court.

Judgment of Court of Civil Appeals modified and judgment of District Court reversed and cause remanded with instructions.

1. Judgment ⇐199(3.17)

Trial ⇐350(7)

In action for damages resulting from intersectional automobile collision, which occurred when plaintiff driver failed to see defendant's automobile traveling in wrong direction on one way street, evidence raised issues whether plaintiff driver failed to keep a proper lookout and whether such failure was a proximate cause of the collision, and trial court erred in disregarding jury's answers thereto in favor of defendant and in granting judgment for plaintiffs notwithstanding verdict.

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

Supreme Court of Texas Advisory Committee

Rules 315-331

Subcommittee Proposed Amendments

March 7, 1986

Rule 324. Prerequisites of Appeal

Preface

The following amendment has been drafted by Harry L. Tindall in response to a letter received by the committee from Richard H. Kelsey of March 7, 1984. Mr. Kelsey notes that we have probably not eliminated the use of motions for new trial by virtue of the amendments added in 1984 regarding matters of evidence. He points out that any careful practitioner would probably proceed with the filing of a motion for new trial in order to be certain that these matters have been preserved on appeal. Thus, the question is raised: "Do we return to the formal practice of requiring a motion for new trial, and if so, do we require it in nonjury trials as well as jury trials?" The draft below would require a motion for new trial as a prerequisite to all appeals.

Rule 324. Prerequisites of Appeal

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

~~(b)~~ (a) Motion for New Trial Required. A point in a motion for new trial is a prerequisite to ~~the following complaints on~~ an appeal.

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

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

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

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

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

00000156

Supreme Court of Texas Advisory Committee

Rules 315-331

Subcommittee Proposed Amendments

March 7, 1986

Rule 324. Prerequisites of Appeal

Preface

The following amendment has been dra
in response to a letter received by the c
Kelsey of March 7, 1984. Mr. Kelsey note
not eliminated the use of motions for new
amendments added in 1984 regarding matter
out that any careful practitioner would p
filing of a motion for new trial in order
matters have been preserved on appeal. T
"Do we return to the formal practice of r
trial, and if so, do we require it in non
jury trials?" The draft below would requ
trial as a prerequisite to all appeals.

Uman Rejects!

Rule 324. Prerequisites of Appeal

~~(a) Motion for New Trial Not Requir~~
~~for new trial is not a prerequisite to a~~
~~either a jury or a nonjury case, except as~~
~~(b).~~

~~(b)~~ (a) Motion for New Trial Require
for new trial is a prerequisite to ~~the~~ fo
an appeal.

~~(1) A complaint on which evidenc~~
~~one of jury misconduct or newly discovere~~
~~set aside a judgment by default;~~

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

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

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

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

00000156

~~(e)~~ (b) Judgment Notwithstanding Findings; Cross-Points.

When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon a ground which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such a cross-point.

Committee Alternative Number 1

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

(b) Motion for New Trial Required. A point in a motion for new trial is a prerequisite to ~~the following complaints~~ a complaint on appeal~~:~~ in a jury case.

(c) Judgment Notwithstanding Findings; Cross-Points.

When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon a ground which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such a cross-point.

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

Supreme Court of Texas Advisory Committee

Rules 315-331

Subcommittee Proposed Amendments

March 7, 1986

Rule 329. Motion for New Trial on Judgment Following Citation by Publication

Preface

This amendment is drafted in response to a letter received by Charles G. Childress of March 19, 1984. The problem with Rule 329 as presently written is that the defendant's motion for new trial must be served as in the case of citation upon the filing of a new suit. Gilbert v Lobley, 214 SW2d 646 (Tex. Civ. App, Fort Worth, 1948, writ refused). Since under Rule 329(d), a motion for new trial following judgment on citation for publication is deemed to have been filed 30 days after the date of judgment is signed, a defendant has 45 days in which to secure service and have a hearing on the motion for new trial. This is usually impossible. There are two possible alternatives: (1) to permit service on counsel for the plaintiff as under Rule 21(a); or (2) to compute time limits from the date the last adverse party is served rather than from the date of filing of the motion. Both alternatives have been drafted for the committee.

Rule 329. Motion for New Trial on Judgment Following Citation by Publication

In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defandant 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~~.~~ , or alternatively, the motion for new trial may be served upon the adverse party or his attorney under Rule 21(a).

(b) Execution of such judgment shall not be suspended unless the party applying therefore shall be given a good and sufficient bond payable to the plaintiff in the judgment in an amount fixed in accordance with Rule 364 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

Supreme Court of Texas Advisory Committee

Rules 315-331

Subcommittee Proposed Amendments

March 7, 1986

Rule 329. Motion for New Trial on Judgment Following Citation by Publication

Preface

This amendment is drafted in response to a letter received by Charles G. Childress of March 19, 1984. The problem with Rule 329 as presently written is that the defendant's motion for new trial must be served as in the case of citation upon the filing of a new suit. Gilbert v Lobley, 214 SW2d 646 (Tex. Civ. App, Fort Worth, 1948, writ refused). Since under Rule 329(d), a motion for new trial following judgment on citation for publication is deemed to have been filed 30 days after the date of judgment is signed, a which to secure service and have a heari trial. This is usually impossible. The alternatives: (1) to permit service on as under Rule 21(a); or (2) to compute t the last adverse party is served rather filing of the motion. Both alternatives committee.

Rule 329. Motion for New Trial on Judgm Publication

In cases in which judgment has been process by publication, when the defenda person or by attorney of his own selecti

(a) The court may grant a new tria defandant showing good cause, supported two years after such judgment was signed interested in such judgment shall be cit or alternatively, the motion for new tri adverse party or his attorney under Rule

(b) Execution of such judgment sha the party applying therefore shall be gi bond payable to the plaintiff in the jud in accordance with Rule 364 relating to approved by the clerk, and conditioned t his petition for new trial to effect and as may be rendered by the court should its decision be against him.

Rejected

00000159

SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

(c) If property has been sold under the judgment ansd execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment of the proceeds of such sale.

(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.

Committee Alternative Number 1

(a) The court may grant a new trial upon petition of the defandant 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, unless the motion is filed within thirty days after the judgment was signed, the parties adversely interested in such judgment shall be cited as in other cases.

(b) Execution of such judgment shall not be suspended unless the party applying therefore shall be given a good and sufficient bond payable to the plaintiff in the judgment in an amount fixed in accordance with Rule 364 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment ansd execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment of the proceeds of such sale.

(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 before the completion of service on the last party adversely interested in such judgment.

00000160

Union adopted as Am.

been sold under the judgment ansd execu-
as suspended, the defendant shall not
old, but shall have judgment against the
of the proceeds of such sale.
~~periods shall be computed pursuant to Rule 306a(7)~~
~~s filed more than thirty days after the~~
~~periods of time specified in Rule~~
~~as if the judgment were signed thirty days~~
~~iling the motion.~~
~~shall be computed as~~

ee Alternative Number 1

rant a new trial upon petition of the
ıse, supported by affidavit, filed within
ment was signed. The parties adversely
ıt shall be cited as in other cases. ,
l within thirty days after the judgment
iversely interested in such judgment shall
;.

:h judgment shall not be suspended unless
)re shall be given a good and sufficient
iff in the judgment in an amount fixed
4 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment ansd execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment of the proceeds of such sale.

(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.~~ before the completion of service on the last party adversely interested in such judgment.

Supreme Court of Texas Advisory Committee

Rules 315-331

Discussion Draft Rules 315, 316, 317, 318, and 319

Rule 315. Remittitur

Any party in whose favor a judgment has been rendered may remit any part thereof:

(a) In open court, and such remittitur shall be noted on the docket and entered in the minutes~~.~~ or

(b) ~~In vacation, by~~ By executing and filing with the clerk, a written release ~~signed by him or his attorney of record, and attested by the clerk with his official seal.~~ duly acknowledged by the party or the party's attorney. Such releases shall be a part of the record of the cause.

(c) Execution shall issue for the balance only of such judgment.

Comment: It appears somewhat archaic for the clerk of the court to be taking attestation of a party who is remitting part of a judgment. This would more properly appear to be something done as in the execution of other documents appropriate for filing.

Rule 316. ~~Correction of Mistakes~~ Judgment Nunc Pro Tunc

Mistakes in the record of any judgment or decree may be amended by the judge in open court according to the truth or justice of the case after notice of the ~~application~~ motion therefor has been given to the parties interested in such judgment or decree, and thereafter the execution shall conform to the ~~judgment~~ or decree as amended.

~~The opposite~~ Any adverse party shall have reasonable notice of ~~any application to enter a~~ judgment nunc pro tunc. the motion as provided in Rule 21a.

Comment: The admentment would identify the commonly used method for correcting errors in a judgment and would have it obtained by motion practices distinguished from the uncertainty as to the proper method of giving notice on such practice.

Supreme Court of Texas Advisory Committee

Rules 315-331

Discussion Draft Rules 315, 316, 317, 318, and 319

Rule 315. Remittitur

Any party in whose favor a judgment has been rendered may remit any part thereof:

(a) In open court, and such remittitur shall be noted on the docket and entered in the minutes~~.~~ or

(b) ~~In vacation, by~~ By executing and filing with the clerk, a written release ~~signed by him or his attorney of record, and attested by the clerk with his official seal.~~ duly acknowledged by the party or the party's attorney. Such releases shall be a part of the record of the cause.

(c) Execution shall issue for the balance only of such judgment.

Comment: It appears somewhat archaic court to be taking attestation of a party part of a judgment. This would more prope something done as in the execution of othe for filing.

Rule 316. ~~Correction of Mistakes~~ Judgme

Mistakes in the record of any judgmen amended by the judge in open court accordi of the case after notice of the ~~applicatio~~ been given to the parties interested in su and thereafter the execution shall conform decree as amended.

~~The opposite~~ Any adverse party shall ~~any application to enter a~~ judgment nunc pro tunc. the motion as provided in Rule 21a.

Comment: The admentment would identify the commonly used method for correcting errors in a judgment and would have it obtained by motion practices distinguished from the uncertainty as to the proper method of giving notice on such practice.

Rule 317. Misrecitals Corrected

Where in the record of any judgment or decree of a court, there shall be any omission or mistake, miscalculation or misrecital of a sum or sums of money, or of any name or names, if there is among the records of the cause any verdict or instrument of writing whereby such judgment or decree may be safely amended, it shall be corrected by the court, where in such judgment or decree was rendered, or by the judge thereof in vacation, upon application of either party, according to the truth and justice of the case. ~~The opposite~~ Any adverse party shall have reasonable notice of ~~the application for such amendment.~~ the motion as provided in Rule 21a.

Comment: The admendment would make procedure consistent with Rule 316.

Rule 330. Rules of Practice and Procedure in Certain District Courts

Comment: This appears to be an archaic rule that should be repealed. Vernon's Texas Rules Annotated has the following quote:

"General Commentary - 1966

* * *

"The rules above referred to must therefore be read and applied with the amendment of Article 1919 in mind. All district courts are now continuous term courts, so that the Special Practice Act has application to all district courts."

It would further seem that the above rule is largely an administrative rule and does not really have any relevance to Texas Rules of Civil Procedure. Finally, it would appear that the Court Administration Act and the administrative rules about to be promulgated under that Act would be a more appropriate place for dealing with such matters.

Rule 331. Rules in Other Courts Apply

Comment: This rule is obtuse and impossible to understand. Again Vernon's Texas Rules Annotated contains the following comment as it did pertaining to Rule 330 as follows:

"General Commentary - 1966

* * *

"The rules above referred to must therefore be read and applied with the amendment of Article 1919 in mind. All district courts are now continuous term courts, so that the Special Practice Act has application to all district courts."

It would appear that "special practices" should be delineated by local rule.

R331 dr
Clean
Approve to
Repeal

A PROFESSIONAL CORPORATION
ATTORNEYS-AT-LAW

RICHARD H. KELSEY
MIKE GREGORY
JUDD B. HOLT
RONNIE PHILLIPS

Reply to:
SUITE 611, FIRST STATE BANK BLDG.
DENTON, TEXAS 76201
817/387-9551
METRO. 430-1072

March 7, 1984

SD - Dec 1/1
Hungry

Rules Committee
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

Re: Recent Rules Changes

See R 200

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.

9-14-84 COA

No DG

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:ssa

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

RAY SHIELDS
COURT REPORTER

LINDA BURLESON
COURT COORDINATOR

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT
ARCHER, CLAY AND
MONTAGUE COUNTIES

P. O. BOX 530
HENRIETTA, TX 76365—0530

AREA CODE 817
538-5913

May 21, 1986

Luther H. Soules, III
800 Milam Building, East Travis at Soledad
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee

Dear Luke:

Thanks for your list of the members of the above committee. I was in the State Bar Center at the same time as your meeting and ran into Frank Branson. He invited me to come in and talk to the Committee about my problem, but we were so busy with Pattern Jury Charges I, I never got in.

From looking at the Committee it's obvious that very few of the Committee members practice in a multi-county district court. Because of that, I want to make one more short comment about the two matters I have brought to the Committee's attention in the past. One has to do with recusal practice and the other with time table for filing the record in appellate courts. Both are problems in rural districts. Apparently, they are not such a problem in an urban district. I believe I know why.

P-182

RECUSAL PRACTICE

My original proposal was that the lawyer be required to swear to a Motion for Recusal setting forth with particularity the reasons he seeks to recuse a judge. That the rule be changed (and probably the statute) to permit the judge that the recusal is directed against to summarily deny it if it does not state a proper cause for removal.

In an urban area, there are many judges in the courthouse and a judge can simply get one of them to come hear the recusal motion. It creates no problem. In a rural area, we have to get a judge from somewhere else assigned. The recusal has to wait until that judge can be there and until the judge against whom the recusal is directed can be available in the county that the recusal is filed in. He may have to recess a jury trial in another county in order to meet the visiting judge's schedule, or make some other kind of docket change. Usually, the recusals that I see are actually made for the purposes of delay and that is obvious. If the lawyers had to swear to these, they wouldn't file them except when they were true. They would not then be summarily denied by the judge against whom they are directed.

A couple of years ago when my daughter was showing heifers, we had a show in Tucumcari, New Mexico followed by one in Cheyenne, Wyoming. Because a recusal that did not state proper grounds had been filed in a criminal case, set for jury trial the week following the calf shows, I had to make a trip from Tucumcari back to Henrietta when a visiting judge could be here so I could have the hearing on the recusal. I then went on to Cheyenne to be with my daughter showing heifers. If I had not done that, the case would not have gone to trial the week in question.

I am probably the only judge that ever had to make that kind of a trip because of a recusal practice, but it's ridiculous to have rules that permit lawyers to use recusals for continuances.

354
R 356

APPELLATE TIME TABLE

Luke, I am not going to go into any further detail about the rules themselves and the time table. From the transcript furnished me of the meeting, the Committee understands that. What they don't understand, is that the rules permit a lawyer to perfect an appeal and request the statement of facts as

little as 10 days prior to the time it's due in the Appellate Court. I don't know of any court reporter except those with a CAT who can get out a record in 10 days if he's got any business in his courthouse. It's a bigger problem in the country because if you have 30 minutes or an hour of dead time in the court, and you are in the city, the court reporter is always at his office and can simply go in and type during that time period.

In the country, my court reporter is with me in the other two counties and the office is in Clay County. If we are sitting idle for an hour in Montague, he cannot be working on that record.

There is no problem with the 60 days permitted if the lawyer has to notify the court reporter timely and there is no problem with the additional time period in the event of a motion for new trial. However, it just makes sense that a court reporter ought to have at least 30 days to get a statement of facts ready.

If the rule is not going to be changed, I think the appellate judges should quit going to the conferences and complaining about court reporter delay when the Supreme Court's own rules create some of the problem.

Luke, my feeling about these two matters is really not much different than a lot of other things. The Legislature very seldom thinks about those of us out here that have got miles and miles between courthouses. I guess those drafting the rules seldom do either. I don't know all the details of how your committee operates. However, I obviously have not been able to articulate the problem well by letter and probably haven't improved on it much with this letter. If the Committee ever takes testimony from individuals about these matters, I would certainly like to appear. Based upon the transcripts you have furnished me with respect to both of these matters, I do not think the problem that exists

for rural judges is being addressed. I know the rules should not be tailored just to fit the rural judges. However, they should not be drafted ignoring us either.

Luke, I appreciate your consideration of this matter and if I can do anything further to at least get the real issues discussed, I would appreciate hearing from you.

Sincerely,

Frank J. Douthitt

FJD:lb

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

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.

00000177

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.

LAW OFFICES

SOULES & REED

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

TELEPHONE
(512) 224-9144

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

August 22, 1986

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Our Committee receives continuing complaints about the derelicts among the court reporters and their duties to prepare transcripts. Do you and your Subcommittee believe that there is some way that we could amend Rule 376c, or some other Rule, to impose additional burdens on the court reporters. One case was dismissed after the third request for extension of time to file the record, because the court reporter would not get the record together, and the lawyer on the third "go around" missed his deadline of December 17 by more than fifteen days (the filing was January 16, 1985). At some point, should the courts impose the penalties for missed deadlines on their own officers, i.e. their own court reporters, in event the extensions are plainly caused by the officers of the court, and the missed deadlines would not have occurred had the court's officer properly prepared a record. In this case, the lawyer recognized the deadlines on two occasions, presumably he would have filed the record had it been ready on either of those two occasions, but missed the third deadline when the reporter failed to get the record the third time, and ultimately the client's case was forfeited.

Very truly yours,

LUTHER H. SOULES III

LHSIII:gc
Enclosure

cc: Mr. Frank Baker

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: . . . . . .

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

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 214/922-0268
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.

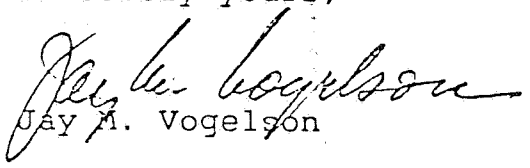
This suggestion is prompted by my involvement in a case in a District Court in Dallas. The case concerns an alleged breach of an international commercial contract. The threshold

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.

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

00000191

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
CLERK OF THE COURT

LAW OFFICES
DIBRELL & GREER
ONE MOODY PLAZA
GALVESTON, TEXAS 77550

GALVESTON (409) 765-5525
HOUSTON (713) 331-2442

W E GREER
CHARLES BROWN
JAMES R FOUTCH
IRWIN M. HERZ, JR., P.C.
JERRY L. ADAMS
FRANK T. CREWS, JR.
THOMAS P. HEWITT
RONALD M. GIPSON
CHARLES M. JORDAN
STEPHEN G. SCHULZ, P.C.

THOMAS W. McCUAGE
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

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, 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

00000207

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

00000208

92, 376
492, 758, 109

TO Justice Hulse.

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

00000209

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

EUGENE R. SMITH
WILLIAM DUNCAN
TAD R. SMITH
JACK DUNCAN
JOSEPH P. HAMMOND
JAMES F. GARNER
LEIGHTON GREEN, JR.
RAYMOND H. MARSHALL
ROBERT B. ZABOROSKI**
W. ROYAL FURGESON, JR.
CHRIS A. PAUL
CHARLES C. HIGH, JR.
DAVID H. WIGGS, JR.
JIM CURTIS
THOMAS SMIDT II*
DANE GEORGE
LARRY C. WOOD
CHRIS HAYNES**

E. LINK BECK
MICHAEL D. McQUEEN
JOHN J. SCANLON, JR.
ROBERT L. KELLY
TAFFY D. BAGLEY
LUIS CHAVEZ
DAVID S. JEANS
DARRELL R. WINDHAM
ROGER D. AKSAMIT
CHARLES A. BECKHAM, JR.
MARGARET A. CHRISTIAN
LINDA K. KIRBY
ROBERT E. VALDEZ
DAN C. DARGENE
JOHN W. McCHRISTIAN, JR.
MARK E. MENDEL
ENRIQUE MORENO
STANCY STRIBLING

NANCY C. SANTANA
JEFFRY H. RAY
MITZI TURNER
PHILIP R. MARTINEZ
MARK R. GRISSOM
SUSAN F. AUSTIN
JOEL FRY
CHRISTOPHER J. POWERS
W. N. REES, JR.
J. SCOTT CUMMINS
KEN COFFMAN
PAUL E. SZUREK
DONNA CHRISTOPHERSON
MARK N. OSBORN
ELIZABETH J. VANN
STEPHEN R. NELSON*

*MEMBERS OF NEW MEXICO BAR
**MEMBERS OF TEXAS AND NEW MEXICO BARS
OTHERS MEMBERS OF TEXAS BAR

EL PASO OFFICE
2000 MBANK PLAZA
EL PASO, TEXAS 79901-1441
P. O. DRAWER 2800
EL PASO, TEXAS 79999-2800
(915) 533-4424
TELECOPIER: (915) 532-1153
RAPICOM: (915) 533-0253
TELEX II: 9109641357

ALBUQUERQUE OFFICE
200 LOMAS BOULEVARD, N.W.
SUITE 700
ALBUQUERQUE, NEW MEXICO 87102-2240
P. O. BOX 1276
ALBUQUERQUE, NEW MEXICO 87103-1276
(505) 247-2318
TELECOPIER: (505) 843-6099

MIDLAND OFFICE
1004 N. BIG SPRING
SUITE 507
MIDLAND, TEXAS 79701-3340
(915) 687-0011
(915) 561-8834

SANTA FE OFFICE
300 CATRON
SANTA FE, NEW MEXICO 87501-1806
(505) 982-4212
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

COAJ 2i

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

00000229

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

00000230

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 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

00000231

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

00000232

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

00000233

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.

COA & SCBC

THE SUPREME COURT OF TEXAS

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 specificall 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. Rule of Procedure 373 requires a bill of exception setting out the proffered testimony. The committee may have suggestion as to whic if either of these rules should be amended.

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

EUGENE R. SMITH
WILLIAM DUNCAN
TAD R. SMITH
JACK DUNCAN
JOSEPH P. HAMMOND
JAMES F. GARNER
LEIGHTON GREEN, JR.
RAYMOND H. MARSHALL
ROBERT B. ZABOROSKI**
W. ROYAL FURGESON, JR.
CHRIS A. PAUL
CHARLES C. HIGH, JR.
DAVID H. WIGGS, JR.
JIM CURTIS
THOMAS SMIDT II*
DANE GEORGE
LARRY C. WOOD
CHRIS HAYNES**

E. LINK BECK
MICHAEL D. MCQUEEN
JOHN J. SCANLON, JR.
ROBERT L. KELLY
TAFFY D. BAGLEY
LUIS CHAVEZ
DAVID S. JEANS
DARRELL R. WINDHAM
ROGER D. AKSAMIT
CHARLES A. BECKHAM, JR.
MARGARET A. CHRISTIAN
LINDA K. KIRBY
ROBERT E. VALDEZ
DAN C. DARGENE
JOHN W. MCCHRISTIAN, JR.
MARK E. MENDEL
ENRIQUE MORENO
STANCY STRIBLING

NANCY C. SANTANA
JEFFRY H. RAY
MITZI TURNER
PHILIP R. MARTINEZ
MARK R. GRISSOM
SUSAN F. AUSTIN
JOEL FRY
CHRISTOPHER J. POWERS
W. N. REES, JR.
J. SCOTT CUMMINS
KEN COFFMAN
PAUL E. SZUREK
DONNA CHRISTOPHERSON
MARK N. OSBORN
ELIZABETH J. VANN
STEPHEN R. NELSON*

*MEMBERS OF NEW MEXICO BAR
**MEMBERS OF TEXAS AND NEW MEXICO BARS
OTHERS MEMBERS OF TEXAS BAR

EL PASO OFFICE
2000 MBANK PLAZA
EL PASO, TEXAS 79901-1441
P. O. DRAWER 2800
EL PASO, TEXAS 79999-2800
(915) 533-4424
TELECOPIER: (915) 532-1153
RAPICOM: (915) 533-0283
TELEX II: 910-860-1357

ALBUQUERQUE OFFICE
200 LOMAS BOULEVARD, N.W.
SUITE 700
ALBUQUERQUE, NEW MEXICO 87102-2240
P. O. BOX 1278
ALBUQUERQUE, NEW MEXICO 87103-1278
(505) 247-2315
TELECOPIER: (505) 843-6099

MIDLAND OFFICE
1004 N. BIG SPRING
SUITE 807
MIDLAND, TEXAS 79701-3340
(915) 687-0011
(915) 561-6534

SANTA FE OFFICE
300 CATRON
SANTA FE, NEW MEXICO 87501-1809
(505) 982-4212
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

92, 376-c
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

00000241

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.

NELSON, WILLIAMSON & YAÑEZ
ATTORNEYS-ABOGADOS
10 EAST ELIZABETH STREET
BROWNSVILLE, TEXAS 78520

A. C. NELSON
JOHN WILLIAMSON
LINDA REYNA YAÑEZ

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:

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
ATTORNEYS AT LAW
815 WALKER AVENUE
1600 MELLIE ESPERSON BUILDING
HOUSTON, TEXAS 77002

TELEPHONE (713) 223-1415
CABLE: DYCHWRIGHT HOU
TELEX: 792184
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

MATTHEWS & BRANSCOMB
ATTORNEYS AT LAW
ONE ALAMO CENTER
106 S. ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205-3692
TELEPHONE 512-226-4211
TELECOPIER 512-226-0521

CORPUS CHRISTI OFFICE
1800 FIRST CITY BANK TOWER
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 December 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

of such defect by the exercise of reasonable diligence?

Answer: "We do" cr "We do not"

Answer: We do

The evidence revealed that when the Bains moved into the house they noticed a bulge under one window, a crack in the kitchen wall, and a sticking door. Within six or seven months after occupying the house, they noticed a foundation crack near the patio. Karen Bain testified that during the spring or summer of 1977 she was told there might be a slab problem with the house.

The Bains presented some evidence to the contrary. They consulted with a foundation expert in April, 1978, who informed them that there was not a substantial foundation defect. Also, they argue the flaws in the house could have been indicative of problems other than a foundation defect, such as ordinary subsidence problems common to the Houston area, or the effects of age, dampness and weathering on a 20-year-old house.

On appeal, the Bains asserted that the jury finding that they were on constructive notice of the foundation defect was against the great weight and preponderance of the evidence. The court of appeals reversed the trial court's judgment and remanded the cause, holding the flaws and evidence of defects in the house "do not point unerringly to a substantial foundation defect." This is not the correct standard of review for a challenge to the sufficiency of the evidence.

When reviewing a jury verdict to determine the factual sufficiency of the evidence, the court of appeals must consider and weigh all the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Dyson v. Olin Corp.*, 692 S. W. 2d 456, 457 (Tex. 1985); *In Re King's Estate*, 150 Tex. 662, 664-65, 244 S. W. 2d 660 ,661 (1951).

The court of appeals imposed a different standard—that the evidence supporting the jury's finding must point "unerringly" to the conclusion found by the jury. The court also held the evidence was "much too slight and indefinite" to support the jury verdict. The jury's task is to decide a fact issue based on the preponderance of the evidence. We hold that the court of appeals has decided this case under an inappropriate standard of law. There is some evidence to support the jury verdict. Therefore, we reverse the judgment of the court of appeals and remand the cause to that court to consider the insufficiency points of error under the proper test.

OPINION DELIVERED: February 12, 1986.

EX PARTE HECTOR SANCHEZ

No. C-4829

Original Habeas Corpus Proceeding.

Writ of habeas corpus granted December 30, 1985 and the cause submitted on January 15, 1986.

Relator is remanded to the custody of the Sheriff of Nueces County, Texas. (Opinion by Justice Kilgarlin.)

For Relator: Thomas G. White, Corpus Christi, Texas.

For Respondent: Larry Ludka and Tom Greenwell, Corpus Christi, Texas.

Hector Sanchez, official court reporter for the 103rd Judicial Distirct Court of Cameron County, was held in contempt by the Court of Appeals for the Thirteenth Supreme Judicial District for failing to file, as ordered, a statement of facts in a cause on appeal in that court. His punishment was a $500 fine and thirty days in jail, and he was further ordered confined until he purged himself of contempt by completing and filing the statement of facts.

Sanchez has sought a writ of habeas corpus from this court, asserting four reasons why his restraint is unlawful. Pending disposition of this case, we released Sanchez from the Nueces County jail upon his posting a proper bond as ordered by this court. Now, having concluded that the order of the court of appeals holding Sanchez in contempt was proper, we deny the writ of habeas corpus and order Sanchez remanded to the custody of the Nueces County Sheriff.

The underlying cause in the court of appeals is *Lee Ross Puckett v. Grizzard Sales, Inc.* The record on appeal was due October 11, 1985. Sanchez received a request for the statement of facts on October 3, 1985, and signed an affidavit in support of Puckett's motion to extend the time for filing the record on appeal. Sanchez's affidavit stated "[t]he Statement of Facts can be prepared by December 11, 1985." In that affidavit, Sanchez estimated that the statement of facts would be 350 pages in length. The court of appeals, in an order dated November 14, 1985, extended the time for filing the record but specifically ordered Sanchez to prepare and file the statement of facts by December 11, 1985. A copy of the order was received by Sanchez on November 19, 1985.

Sanchez was already under order to prepare and file a statement of facts in a criminal case on appeal in the same court. In that case, *Domingo Gonzalez, Jr. v. The State of Texas*, a statement of facts had been requested from Sanchez on October 10, 1984. The court of appeals ordered Sanchez to complete and file the statement of

facts in Gonzalez by August 30, 1985. That statement of facts was not timely filed, and, after two hearings on contempt, Sanchez was incarcerated in the Nueces County jail on November 26, 1985.[1]

Sanchez did not file a statement of facts in *Puckett* by December 11, 1985. Accordingly, on December 12, 1985, the court of appeals ordered Sanchez to appear on December 23, 1985 and show cause why he should not be held in contempt for failing to file the statement of facts in *Puckett* by the date ordered. Sanchez, still in the Nueces County jail as a result of the contempt holding in *Gonzalez*, was promptly served with that show cause order.

The attorney for Sanchez in this habeas corpus proceeding was also his attorney in the last *Gonzalez* contempt hearing, November 7, 1985.[2] On December 4, 1985, the attorney, Thomas G. White, who serves without compensation by appointment from the court of appeals, met with Sanchez in the Nueces County jail. White discussed Sanchez's needs for securing his court reporting equipment, notes, and other matters necessary for the preparation of the statement of facts in *Puckett*.

White concedes in argument before this court that Sanchez did not attempt to obtain his notes and equipment until December 15, 1985, because he was under the mistaken belief that he would be released from the Nueces County jail on the basis of two for one credit. Sanchez's testimony admits much the same, except he places the date as December 13, 1985. Upon realizing his mistake, Sanchez testified that he requested the equipment be delivered to him. However, he received notes from another case, rather than notes from *Puckett*.

In any event, from about December 15, 1985 until the hearing on contempt on December 23, 1985, Sanchez still had not completed the statement of facts in *Puckett*. Moreover, in addition to *Puckett*, Sanchez owed statements of fact in at least six criminal appeals and two civil appeals in the Corpus Christi court. The records of that court reflect that it became necessary on December 31, 1985 for the court, on its own motion, to extend the filing of the statements of facts in those other eight cases and in *Puckett* until further order. By December 31, 1985, Sanchez had completed and filed the statement of facts in *Gonzalez*.

Sanchez's four grounds for habeas corpus relief are: (1) he was not granted a ten-day delay of the contempt hearing as requested in a motion for continuance; (2) because he was in jail as a result of the *Gonzalez* contempt, and without equipment and cooperation from the Nueces County Sheriff's Office, there was impossibility of compliance with the November 14, 1985 order; (3) if he were sentenced for contempt in each of the additional cases in which he owed statements of facts, his punishment could exceed six months, entitling him to a jury trial, and thus it was error to overrule his motion to consolidate all causes in which statements of facts were due; and (4) civil contempt (the coercive aspect of the order) and criminal contempt (the thirty days confinement and $500 fine punishment aspect) cannot be combined in the same order of contempt.

The last two contentions do not require much discussion. It is true that the United States Supreme Court has said that where a court may impose a sentence in excess of six months, a contemner may not be denied a right of trial by jury. *Bloom v. Illinois*, 391 U.S. 194, 198-202 (1967). It is also true that even when offenses are separate and the sentence for each contempt is less than six months, the contemner is nevertheless entitled to a trial by jury if the offenses are aggregated to run consecutively, so as to result in punishment exceeding six months. *Ex Parte McNemee*, 605 S. W. 2d 353, 356 (Tex. Civ. App.—El Paso 1980, habeas granted).

However, Sanchez asks us to assume that he will fail to timely file the statements of facts in the eight additional cases; that this will result in a show cause order from the court of appeals; that this will next result in a holding of contempt; that this will further result in punishment for each separate offense; and, that such combined punishment will exceed a total of six months confinement. We cannot possibly make all of these assumptions, nor could the court of appeals in passing upon Sanchez's motion for consolidation of all of the various causes. There was no error in the court of appeals overruling the motion to consolidate causes.

As to combining criminal contempt and civil contempt (punishment and coercion) into one order, Sanchez cites no cases. Moreover, Sanchez offers no policy argument as to why the two types of contempt should not be combined in the same order and we can think of no reason why the orders should be separate. Separate orders would only tend to confuse jailers. A judgment combining punishment and coercion was found not to be in violation of a predecessor contempt statute. *Ex parte Klugs-*

[1] For an explanation of facts and proceedings in that cause, *see* In Re Hector Sanchez, 698 S. W. 2d 462 (Tex. App.—Corpus Christi 1985).

[2] Sanchez remained out of jail on bond in *Gonzalez*, from November 7, 1985 until November 26, 1985 while seeking habeas corpus relief from the Court of Criminal Appeals, which was denied.

berg, 126 Tex. 225, 229, 87 S. W. 2d 465, 468 (1935). The enactment of Tex. Rev. Civ. Stat. Ann. art. 1911a[3] does not change the permissiveness of incorporating the two forms of contempt into one order.

In respect to Sanchez's continuance argument, all parties agree that attorney White was informally advised four days prior to the December 23 contempt hearing that he would again represent Sanchez. However, the order appointing White to represent Sanchez was not signed until the date of the hearing. Arguing that a continuance should have been granted, Sanchez cites Tex. Code Crim. Proc. art. 26.04(b), which states: "The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by the counsel and the accused."

We recognize that contempt proceedings are quasi-criminal in nature. *Ex Parte Cardwell*, 416 S. W. 2d 382, 384 (Tex. 1967). Further, we acknowledge that proceedings in contempt cases should conform as nearly as practicable to those in criminal cases. *Ex Parte Scott*, 133 Tex. 1, 10, 123 S. W. 2d 306, 311 (1939). It is because of our eagerness to guarantee that Sanchez's rights of due process be protected and that he not be deprived of his liberty except by due course of law that we do not consider as waiver of this point that the motion for continuance was orally made and was unsworn. It is set out in the statement of facts of the contempt hearing.

It is now settled law in this state that if a contemner requests, he is entitled to be represented by counsel in a contempt proceeding. *Ex Parte Hiester*, 572 S. W. 2d 300, 302 (1978). However, it is a unique situation that would allow the appointment of counsel for a court reporter, whom we would ordinarily assume to have sufficient funds to retain an attorney. Nevertheless, upon Sanchez's request, the Corpus Christi Court of Appeals appointed counsel, and that counsel was entitled to a reasonable time to prepare his defense of Sanchez. We concede, as did the United States Supreme Court in *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), that the right to counsel can be rendered an empty formality if counsel is denied a justifiable request for delay. But, as the Supreme Court said in that case, "[t]he answer [to whether the case should be delayed] must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*

The sole reason given by White to the court of appeals in support of his motion for continuance was so that he could secure witnesses who would testify in support of the impossibility of compliance defense. He identified those witnesses as jail personnel and the person who furnished the wrong notes and diskettes to Sanchez.

Under the rule announced in *Ungar v Sarafite*, and in consideration of the circumstances of this case, we conclude attorney White had adequate time to prepare for the contempt hearing. The hearing on contempt in *Gonzalez* was already completed when White counseled Sanchez in the Nueces County jail on December 4, 1985 about completing the *Puckett* statement of facts. White admits that he was informally told on December 19, 1985 that he would again be Sanchez's counsel. He came to court armed with a written motion for consolidation. Jail personnel who could testify as to any restrictions placed upon Sanchez's use of his equipment and preparation of the statement of facts were readily available for subpoena in the same courthouse complex in which the contempt hearing was held. Sanchez's testimony as to receiving the wrong notes and diskettes was not disputed. The other relevant facts of the impossibility defense were likewise not disputed, only the legal conclusions to drawn therefrom.

We hold that the time requirements of the Code of Criminal Procedure are not hard and fast rules to be adopted in contempt cases insofar as motions for continuance are concerned. Rather, due process requires only that the judge consider the reasons given for delay in context with the circumstances of the particular case. Sanchez's rights to due process were protected. The ingenuity of attorney White and the able defense he rendered is apparent from the record. Minimally, White had four days to prepare a defense. Based on the grounds asserted in his motion for continuance, that was adequate. The motion for continuance was properly denied.

Finally, we turn to the impossibility of compliance argument. Sanchez testified that the sheriff's office would only allow him to work in preparation of the *Puckett* record from 7 o'clock a.m. until 3 o'clock p.m. (but not during two meal breaks and two roll call breaks). He also testified as to his having received the wrong notes on *Puckett*. He further testified that he needed to compare his notes with certain records of the District Clerk of Cameron County. None of this was disputed. What is in dispute is whether Sanchez voluntarily put himself in a position where it would be impossible for him to comply with the court order.

In this regard, it will be noted that Sanchez knew on November 19, 1985 that he

[3]Now Tex. Gov't Code Ann. § 21.001.

was under order to have the statement of facts prepared and filed by December 11, 1985. Sanchez admitted that the preparation of the *Puckett* statement of facts would consume no more than thirty hours. While it is true that the court had ordered Sanchez to simultaneously prepare the *Puckett* statement of facts and the *Gonzalez* statement of facts, the testimony reveals that Sanchez undertook to do much of the legal preparation and leg work for the *Gonzalez* habeas corpus petition, rather than prepare the *Puckett* statement of facts.

Certainly until his incarceration on November 26, 1985, Sanchez was free to work on the *Puckett* statement of facts. All parties concede that after his incarceration, the sheriff's office, at least as early as December 4, 1985, made it possible for Sanchez to work on the *Puckett* statement of facts. That he elected not to do so until about December 15, 1985 was a decision that Sanchez voluntarily made. Thus, his impossibility of compliance defense must fall. As we-said in *Ex Parte Helms*, 152 Tex. 480, 482, 259 S. W. 2d 184, 186 (1953), it is only involuntary inability to perform a judgment or comply with a court's order that is a good defense in a contempt proceeding.

The requested habeas corpus relief by Hector Sanchez is denied. He is ordered remanded to the custody of the sheriff of Nueces County to comply with the order of contempt of the court of appeals.

WILLIAM W. KILGARLIN
Justice

OPINION DELIVERED: February 12, 1986.

RAILROAD COMMISSION OF TEXAS vs. COMMON CARRIER MOTOR FREIGHT ASSOCIATION, INC. ET AL.

No. C-4883

From Tarrant County, Third District.

Opinion of CA, 699 S. W. 2d 291.

Under the provisions of Rule 483, T.R.C.P., the application for writ of error is granted and without hearing oral argument the judgment of the court of appeals is reversed and the cause is dismissed and the order of the Railroad Commission is final. (Per Curiam Opinion.)

For Petitioner: Jim Mattox, Attorney General, Stephen J. Davis, Assistant Attorney General, Austin, Texas.

For Respondents: Brooks and Brooks, Barry Brooks, Dallas, Texas. Robinson, Felts, Starnes, Angenend and Mashburn, John R. Whisenhunt, Phillip Robinson and Mert Starnes, Austin, Texas. Jerry Prestridge, Austin, Texas.

PER CURIAM

This case involves an appeal by the Common Carrier Motor Freight Association, Inc. and its members from an order of the Texas Railroad Commission relating to line-haul rates and minimum charges. The question before us is whether the Association's appeal from the Commission's final order was timely filed in the District Court of Travis County. We hold that it was not and, without hearing oral argument, reverse the judgment of the court of appeals and dismiss the cause. Tex. R. Civ. P. 483.

The Railroad Commission issued its final order regarding the requested rate increase on September 20, 1982. The Commission's order stated that "an imminent peril to the public welfare requires that this order have immediate effect" and that the "order shall be final and appealable on the date issued." Section 19(b) of the Administrative Procedure and Texas Register Act (TEX. REV. CIV. STAT. ANN. art 6252-13a) requires that proceedings for review of an agency order be instituted by filing a petition within 30 days after the decision complained of is final and appealable. Under the Commission's final order, then, the Association was required to file its appeal to the District Court of Travis County by October 20, 1982. The appeal was not filed until November 24, 1982, some 35 days after the required time.

The Association contends that the time for filing its appeal was tolled by its motion for rehearing to the Commission's final order, which was not overruled until November 1, 1982. Generally, a motion for rehearing to the appropriate agency is a prerequisite to a judicial appeal. A.P.T.R.A. § 13(a)(e). However, § 16(c) of the Act specifically provides that if an agency finds the existence of an imminent peril to the public health, safety, or welfare and notes that finding on its final order, a motion for rehearing is not required. The Association acknowledges § 16(c) but contends that this provision merely relieves them of the *necessity* of filing a motion for rehearing, it does not *prevent* them from doing so if they so choose.

Clearly, the purpose of the "imminent peril" clause is to shorten the time frame for the appellate process to preserve the public health, safety, or welfare. Were we to allow a prospective appellant to unilaterally lengthen that process, the "imminent peril" clause would be rendered virtually meaningless. We therefore hold that when a regulatory agency designates a final order as constituting an imminent peril to the public, a party wishing to contest that order must file an appeal to the district

shown to the court, by affidavit of the party, his agent or attorney, that all lawful fees have been paid or tendered to such witness.

Source: Acts 1939, 46th Leg., p. 323, Sec. 4, amending R.C.S. Art. 3707, unchanged.

Note: Same as Rule 176.

Rule 180. Refusal to Testify

Any witness refusing to give evidence may be committed to jail, there to remain without bail until such witness shall consent to give evidence.

Source: Acts 1939, 46th Leg., p. 323, Sec. 5, amending Art. 3709, unchanged.

Note: Same as Rule 176.

Rule 181. Party As Witness

Either party to a suit may examine the opposing party as a witness, and shall have the same process to compel his attendance as in the case of any other witness.

Note: Same as Rule 176.

Source: Acts 1939, 46th Leg., p. 323, Sec. 6, amending Art. 3711.

Rule 182. Testimony of Adverse Parties in Civil Suits

In the trial of any civil suit or proceeding in any justice court, county court, or district court any party plaintiff or defendant shall have the right to call as a witness in his behalf any other individual who is a party to such suit or proceedings, either as plaintiff or defendant. If such other party be a corporation, then any officer or director of such corporation, or manager, superintendent, agent or party in control of the particular matters and things under investigation by any of said courts in the trial of a case may be called as a witness with like effect as if they were individual parties to such suit or proceeding. Any such witness may be examined by the party calling the witness, and if such witness give testimony adverse to the party calling him, the party so calling such adverse witness shall not be bound to accept the testimony of such adverse witness as true, but shall have the right to impeach such witness and the testimony of such witness, and shall have the right to introduce other evidence upon any issue involved in such suit or proceeding without regard to the testimony of such adverse witness; and in examining such adverse witness leading questions may be asked by counsel for the party calling such witness but opposing counsel shall not be permitted to ask such witness leading questions or in any manner lead such witness.

Source: Acts 1929, 41st Leg., 1st C.S., p. 255, ch. 105, Sec. 1; Acts 1931, 42nd Leg., p. 307, ch. 181, Sec. 1, appearing in Vernon's Tex.Ann.Civ.St. as Art. 3769c, with minor textual change.

Rule 182a. Court Shall Instruct Jury on Effect of Article 3716

R182

Legal

9 to 1

Comment' ıt in-
Cancelled same
607 & 61 ect to

Rule 184. Common Law Rules

The common law of England as practiced and understood shall, in its application to evidence, be followed and practiced in the courts of this State, so far as the same may not be inconsistent with the provisions of the statutes or of these rules.

Source: Art. 3713, with minor textual change.

Rule 184a. Judicial Notice of Law of Other States, Etc.

The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and

offered as a witness, or who, in the opinion of the Court, were in that condition when the events happened of which they are called to testify.

(2) *Children.* Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

(b) In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by, the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Rule 605. Competency of Judge as a Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as a Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-

examination of the witness nor proved by extrinsic evidence.

Rule 609. Impeach by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment, or (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile adjudications. Evidence of juvenile adjudications is not admissible under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) Pendency of appeal. Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 610. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. 647

Rule 611. Writing Used to Refresh Memory

If a witness uses a writing to refresh his memory for the purpose of testifying either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera*, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order