II

SUPREME COURT ADVISORY COMMITTEE

MAY 26 - 27, 1989 MEETING

AGENDA

1. Report on Suggested Pattern Local Rules: Luther H. Soules III

2. Report on n.r.e. designation: Rusty McMains

3. Report on Special Project on Family Law Section: Kenneth Fuller

4. Rep... onduct: Dav...

5. Rep... idence: Nev...

6. Rep... ellate Pro...

7. Rep... Branson or ...

8. Rep... cluding spe...

9. Rep... ofessor Dor...

10. Report of Standing Subcommittee on TRCP 216-314: Professor E...

11. R... L: Harry T...

12. R... Anthony S...

13. R... 4: Steve M...

14. ... Professor ...

TRCP 614

Not Covered

See R 200 & 208

counsel depo

and the identity of all persons who will attend other than witnesses in addition to witnesses, parties, counsel, and the officer taking the deposition

employees of counsel.

If any other party intends to have counsel also present at the deposition, other parties must give timely notice of the identities of such other persons.

II

SUPREME COURT ADVISORY COMMITTEE

MAY 26 - 27, 1989 MEETING

AGENDA

1. Report on Suggested Pattern Local Rules: Luther H. Soules III

2. Report on n.r.e. designation: Rusty McMains

3. Report on Special Project on Family Law Section: Kenneth Fuller

4. Report on Special Project re: Code of Judicial Conduct: David J. Beck and Frank Branson

5. Report of Standing Subcommittee on Rules of Civil Evidence: Newell Blakely

6. Report of Standing Subcommittee on Rules of Appellate Procedure: Rusty McMains

7. Report of Standing Subcommittee on TRCP 1-14: Frank Branson or other committee person

8. Report of Standing Subcommittee on TRCP 15-165 including special report on Rule 51(b): David Beck

9. Report of Standing Subcommittee on TRCP 166b-215: Professor Dorsaneo

10. Report of Standing Subcommittee on TRCP 216-314: Professor Edgar

11. Report of Standing Subcommittee on TRCP 315-331: Harry Tindall

12. Report of Standing Subcommittee on TRCP 523-591: Anthony Sadberry

13. Report of Standing Subcommittee on TRCP 592-734: Steve McConnico

14. Report of Standing Subcommittee on TRCP 737-813: Professor Carlson

INDEX

VOLUME II

00593-00595	Rule 54
00596	Rule 62
00597	Rule 63
00598-00642	Rule 72
00643-00648	Rule 73
00649-00651	Rule 85
00652-00654	Rule 87
00655-00659	Rule 99(c)
00660-00661	Rule 100
00662-00686	Rule 103
00687-00690	Rule 106(b)
00691-00696	Rule 107
00697-00701	Rule 120(a)
00702-00705	Rule 121
00706-00710	Rule 125
00711-00712	Rule 136
00713-00721	Rule 145
00722-00728	Rule 165a
00729-00735	Rule 166a
00736-00741	Correspondence to Subcommittee on Rules 166b-215
00742-00746	Rule 166b(2)
00747-00794	Rule 166b(3)
00795-00798	Rule 166c
00799-00819	Rule 167
00820-00830	Rule 168
00831-00858	Rule 169
00859-00860	Rule 182
00861-00866	Rule 183
00867-00873	Rule 201
00874-00879	Rule 206
00880-00894	Rule 208
00895-00904	Rule 215
00905-00913	Rule 216
00914-00924	Rule 223
00925-00927	Rule 224
00928-00929	Rule 226a
00930-00931	Rule 239
00932-00933	Rule 239a
00934-00950	Rule 245
00951-00952	Rule 248
00953-00955	Rule 254
00956-00962	Rule 260
00963-00965	Rule 267
00966-00970	Rule 269
00971-00972	Rule 274
00973-00975	Rule 278
00976-00995	Rule 279
00996-00998	Rule 295
00999-01021	Rule 296
01022-01041	Rule 297
01042-01047	Rule 305

01048	Rule 306a
01049-01067	Rule 324
01068-01072	Rule 324b
01073-01109	Rule 329
01110-01112	Rule 330
01113-01123	Subcommittee Report on Rules 523-591
01124-01127	Rule 534
01128-01132	Rule 680
01133-01137	Rule 687e
01138-01141	Rule 771
01142-01144	Rule 781
01145-01167	COAJ Action 87/88 & 88/89

Rule 54. Time to File Record

(a) No change.

(b) In Criminal Cases - Ordinary Timetable. The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed.

(c) No change.

Comment: To conform to the rule amendment adopted by the Court of Criminal Appeals.

Order approved

00593

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ‡‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 17, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 54
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of a letter I received from Ralph H. Brock regarding suggested changes to Rule 54 along with a redlined version of same. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Stanton Pemberton

00594

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

RJH
SCAC Subc
Cp AJ
SCAC Agenda

RALPH H. BROCK
LAWYER

First Federal Plaza Annex
1313 Broadway, Suite 6A

P.O. Box 959
Lubbock, Texas 79408-0959

Telephone
806/762-5671

Saturday, April 15, 1989

Luther H. Soules, III
Chairman
Supreme Court Advisory Committed
Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

Thank you for your letter of the 11th concerning the recent order of the Court of Criminal Appeals amending the Rules of Appellate Procedure. I agree that the adoption of the amendments contained in the Supreme Court's order of July 15, 1987, cures all of the problems related to those rules.

There are now two versions of Rule 54 (b), though! Even though Rule 54 (a) and the Court of Criminal Appeals' version of Rule 54 (b) each provide 120 days for filing the record after a timely motion for new trial, the text of the Supreme Court's version of Rule 54 (b) still purports to allow only 100 days in criminal cases. The Supreme Court needs to adopt the Court of Criminal Appeals' amendment in order to achieve complete consistency.

I was aware of the Court of Criminal Appeals' January 9, 1989, order shortly after it appeared in the *Texas Register*, and I intended to mention the amendments in the latest *Appellate Advocate*, but (as you will see when your copy arrives in the next few weeks) there just wasn't room. Frankly, I failed to notice the two versions of Rule 54 (b), and it was only when I received your letter and took a closer look that I discovered the problem with Rule 54 (b). Of course, that is a housekeeping matter which can be easily remedied.

Thank you for the opportunity to offer this input to your committee.

Yours very truly,

Ralph H. Brock
RHB/

cc: Hon. Nathan Hecht
Hon. Sam Houston Clinton

COPY TO LHS
11/20/87

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 19, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 62 and 63.

Dear Luke and Doak:

We have considered two different applications recently regarding whether a counterclaim is an amended pleading as contemplated by Tex. R. Civ. P. 62 and 63. If we are getting the question that means it is probably arising with some frequently in the lower courts. Perhaps we should clarify it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

00596

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 19, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 62 and 63.

Dear Luke and Doak:

We have considered two different applications recently regarding whether a counterclaim is an amended pleading as contemplated by Tex. R. Civ. P. 62 and 63. If we are getting the question that means it is probably arising with some frequently in the lower courts. Perhaps we should clarify it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

00597

TRCP

Rule 72 Filing Pleadings: Copy Delivered to All Parties or Attorneys

[A] Whenever any party [who] files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon [all other parties] the adverse party, he shall at the same time either deliver [by any method approved for service in Rule 21a to] or mail to the adverse party [all parties not required to be served] or their attorneys [attorneys] of record a copy of such pleading, plea, or motion. The [party or] attorney, or authorized representative of such attorney [of record], shall certify to the court [compliance with this rule in writing over signature] on the filed pleading, [plea or motion]. In writing over his personal signature, that the same was compared with the provisions of this rule. If there is more than one adverse [other] party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney, respectively, the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to the adverse parties, and the more than four adverse parties shall be designated with the clerk of court, or the parties filing them, or asking leave to file them, shall furnish all additional copies to the clerk. The copies shall be delivered to the first four applicants entitled thereto, and in such

¢á$¢/ńø/¢øþí¢$/$ħáll/þ¢/ŧ¢ɋúíŧ¢đ/ŧø/þ¢/ɱáíll¢đ/ør/đ¢líɣ¢ŧ¢đ/ŧø/ŧħ¢ áđɣ¢ŧ$¢ /þárŧí¢$ /ør /ŧħ¢ír /áŧŧørń¢ɣ$ /þɣ /ŧħ¢ /áŧŧørń¢ɣ /ŧħú$ /fílińɡ ŧħ¢/þl¢ádińɡ. After [one] á copy of a pleading is furnished, ŧø/áɱ áŧŧørń¢ɣ/ /ħ¢ [a party] cannot require another copy of the same pleading ŧø /þ¢ /fúrńi$ħ¢đ /ŧø /ħim [without tendering reasonable charge for copying and delivering.]

COMMENT: Copy technology has significantly changed since 1941 and this amendment brings approved copy service practices more current.

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rules 21, 21a, 72 and 73

Dear Mr. Beck:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 21, 21a, 72 and 73. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

00600

Chair approved

STATE BAR OF TEXAS

TTEE ON ADMINISTRATION OF JUSTICE

ANGE OF EXISTING RULE — TEXAS RULES OF CIVIL PROCEDURE

212

Rule 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

les, or asks leave to file any pleading, plea, or motion not by law or by these rules required to be served upon l at the same time either deliver or mail to the adverse of record a copy of such pleading, plea or motion. The resentative of such attorney, shall certify to the court riting over his personal signature, that he has complied s rule. If there is more than one adverse party and the ented by different attorneys, one copy of such pleading ed to each attorney representing the adverse parties, but ated in the case shall count as one. Not more than four ea, or motion shall be required to be furnished to adverse ore than four adverse parties, four copies of such l with the clerk of court, and the party filing them, or shall inform all adverse parties or their attorneys of [illegible] have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

A ~~Whenever any~~ party who files, or asks leave to file any pleading, plea or motion of any character which is not by law or by these rules required to be served upon all other parties ~~the adverse party, he~~ shall at the same time ~~either~~ deliver by any method approved for service in Rule 21a to ~~or mail to the adverse party~~ all parties not required to be served or their ~~attorney(s)~~ attorneys of record a copy of such pleading, plea, or motion. The party or ~~attorney or authorized representative of such~~ attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea or motion. ~~in writing over his personal signature, that he has complied with the provisions of this rule.~~ If there is more than one ~~adverse~~ other party ~~and the adverse parties~~ are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney, ~~representing the adverse parties,~~ but a firm of attorneys ~~associated in the case~~ shall count as one. ~~Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that~~

(continued on attached page)

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 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party or their attorney(s) of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

A ~~Whenever any~~ party who files, or asks leave to file any pleading, plea or motion of any character which is not by law or by these rules required to be served upon all other parties ~~the adverse party, he~~ shall at the same time ~~either~~ deliver by any method approved for service in Rule 21a to ~~or mail to the adverse party~~ all parties not required to be served or their ~~attorney(s)~~ attorneys of record a copy of such pleading, plea, or motion. The party or ~~attorney or authorized representative of such~~ attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea or motion. ~~in writing over his personal signature, that he has complied with the provisions of this rule.~~ If there is more than one ~~adverse~~ other party ~~and the adverse parties~~ are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney, ~~representing the adverse parties,~~ but a firm of attorneys ~~associated in the case~~ shall count as one. ~~Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that~~

(continued on attached page)

Rule 72. (continued)

II. ~~such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading.~~ After one a copy of a pleading is furnished, ~~to an attorney,~~ he a party cannot require another copy of the same pleading ~~to be furnished to him~~ without tendering reasonable charge for copying and delivering.

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

Copy technology has significantly changed since 1941 and this amendment brings approved copy service practices more current. It also revives the requirement that service be made on all other parties, not just those which are adverse. Because of the numerous instances when parties on the same side of a case may have interests that are not necessarily consistent, it is submitted that it is fairer and far more efficient to notify all parties, not just those which are nominally adverse. This can eliminate unnecessary duplication of effort on the part of parties and the courts when persons who did not receive notice are required to seek reconsideration of issues which they believe have a material effect on them and on the potential outcome of the case.

Respectfully submitted,

Robert F. Watson
LAW, SNAKARD & GAMBILL
3200 Texas American Bank Bldg.
Fort Worth, Texas 76102

January 16, 1989

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rules 21, 21(a), 72 and 73

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Evelyn A. Avent, Secretary for the Committee on Administration of Justice regarding changes to Rules 21, 21(a), 72 and 73. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

STATE BAR OF TEXAS

HJR 1 SubC SCAC + Agenda

Copy to LH
Orig. to file
1-27-89
Hjh

January 23, 1989

To the Committee on Administration of Justice

From Evelyn A. Avent, Secretary

Enclosed are proposed changes in final form to Rules 21, 21a, 72 and 73 submitted by Robert F. Watson.

Also enclosed are proposed changes in final form to Rules 223 and 245 submitted by Charles Tighe.

These items will be on the Agenda for action at the March 11 meeting.

Evelyn A. Avent

Enclosures

00605

Rules 21, 21a, 72 &

LAW OFFICES OF
LAW, SNAKARD & GAMBILL
A PROFESSIONAL CORPORATION
3200 TEXAS AMERICAN BANK BUILDING
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

AREA 817 335-7373
METRO 429-2991
TELECOPY 332-7473
DIRECT DIAL NUMBER:

(817) 878-6374

THOS H LAW
ROBERT M RANDOLPH
RICE M TILLEY, JR
SAMUEL A DENNY
WALTER S FORTNEY
ROBERT F WATSON
KENT D KIBBIE
JOE SHANNON, JR.
DENNIS R SWIFT
MARVIN CHAMPLIN
JAY S GARRETT
G. THOMAS BOSWELL
JAMES W SCHELL
WILLIAM F MCCANN
MICHAEL L. MALONE
ALAN WILSON
WALKER FRIEDMAN
ROBERT W BLAIR
ED HUDDLESTON

JONATHAN G. KERR
VERNON E. REW, JR.
A. BURCH WALDRON, III
GARY L. INGRAM
JOHN W McNEY
LARRY BRACKEN
H ALLEN PENNINGTON, JR.
JAMES C. GORDON
GEORGE PARKER YOUNG
STEVEN D. GOLDSTON
PAMELA ARNOLD OWEN
LINDA K. GOEHMAN
CAROL WARE DAVIDSON
DABNEY D. BASSEL
ELIZABETH P. STURDIVANT
HUGH A. SIMPSON
LYNN M. JOHNSON
JOHN L. BECKHAM
RICK WEAVER

KATHERYN M. MILLWEE
W. BRADLEY PARKER
ED FARRAR
ROBERT C. BEASLEY
B. BLAKE COX
KELLEY B. HILL
KENNETH N. STRINGER
MARK S. PFEIFFER
BONNIE VON ROEDER
STEVEN M. SMITH
VICTORIA FAY PRESCOTT
MICHAEL P. SCHUTT
JOSEPH C. SCHMITT
MICHAEL T. COOKE
LEE F. CHRISTIE
*JOHN A. KOBER
KERN A. LEWIS

JEFFREY LANG MAURICE
DAVID M HALL
JOHN E. KOEMEL, JR.
BRENDA LOUDERMILK
KENT R SMITH
TODD P KELLY
JAMES H CHEATHAM IV
JAY K. RUTHERFORD
STEPHEN G. WILCOX
M. ELAINE BUCCIERI

OF COUNSEL

RICE M. TILLEY
ROBERT F. SNAKARD
LAWTON G. GAMBILL
HARRY HOPKINS

*LICENSED IN A STATE OTHER THAN TEXAS

January 16, 1989

Ms. Evelyn A. Avent
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Dear Evelyn:

Enclosed are copies of the proposed changes to Rules 21, 21a, 72 and 73. You will notice two versions of Rule 21a are enclosed. One provides for service by first class mail. The other does not. As I indicated at our recent meeting, our sub-committee has no particular feelings either way on the issue of first class mail, and welcomes the consideration of the entire committee of this issue.

After a more thorough review of the language of the proposed rules as amended and the language of existing Rule 8, it appears that any reference to the "attorney in charge" concept of Rule 8 would be redundant inasmuch as the last paragraph of the rule states "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge." This would appear to leave no latitude on the part of anyone attempting to comply with the methodology set forth in proposed Rules 21a and 72, when delivering a copy to a party's "attorney of record" to address it to anyone other than the "attorney in charge" as mandated by Rule 8. I would be very grateful if you would send copies of the proposed rules to all members of the committee so that they may be considered at our meeting on March 11th.

Sincerely,

Bob

Robert F. Watson

RFW/ran#5
L.RULES

REPORT

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

December 1, 1988

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

Copy to LH
Orig to Yelderman
11-28-88-GE

SPIVEY, GRIGG, KELLY AND KNISELY
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
1111 WEST 6TH STREET, SUITE 300
P. O. BOX 2011
AUSTIN, TEXAS 78768-2011
(512) 474-6061

BROADUS A. SPIVEY
BOARD CERTIFIED*
PERSONAL INJURY TRIAL LAW
DICKY GRIGG
BOARD CERTIFIED*
PERSONAL INJURY TRIAL LAW
PAT KELLY
BOARD CERTIFIED*
PERSONAL INJURY TRIAL LAW
PAUL E. KNISELY
BOARD CERTIFIED*
CIVIL APPELLATE LAW

INVESTIGATOR*
RICK LEEPER
BUSINESS MANAGER:
MELVALYN TOUNGATE

HJH
RJD Subc

November 23, 1988

BAS88.303(6202)

COAJ
SCAC Subcte.

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney St.
Houston, TX 77010

Re: Supreme Court Advisory Committee
Subcommittee on Rules 72, 73 and 74

Dear Mr. Beck:

I have read your letter and the attachments, and Mr. Loomis has a complaint which appears very valid. Frankly, I was unaware that it might be proper to forward a copy of any pleading to the court, or any other party, without immediately notifying every other party. I know Charles Babb, and have always found him to be a very honorable lawyer and person, but even without any intent or effort to give notice to the other side in a tardy fashion, it is the party who is injured.

I am sorry I did not retain the cite or reference, but I noticed in the case section of last week's Texas Lawyer that a court of appeals reversed a case out of Lubbock where notice was given to a party rather than an attorney, and thus the attorney for that party was deprived of the opportunity of timely responding to a motion for summary judgment.

This type of "sand-bagging" is unacceptable. It is apparent that we should address these specific problems.

Sincerely,

Broadus A. Spivey

Broadus A. Spivey

BAS/sm

cc: Mr. Luther H. Soules, III
Justice William Kilgarlin
Mr. Tom Ragland

CITATION RANK(R) DATABASE MODE
Slip Copy R 1 OF 462 TX-CS P
1988 WL 115312 (Tex.App.-Amarillo)

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

George KRCHNAK, Appellant,
v.
Joe Kirk FULTON, Appellee.
07-88-0124-CV.
Court of Appeals of Texas, Amarillo.
Nov. 1, 1988.

Before REYNOLDS, C.J., and DODSON and BOYD, JJ.

BOYD

Appellant George KRCHNAK brings this appeal from a default summary judgment. In that judgment, appellee Joe Kirk FULTON was awarded $22,820 for boarding care, stud fees, and veterinary services rendered to appellant's mare named Miss Mighty Moon, plus $2,500 attorney's fees. In the judgment, appellee was also awarded a foreclosure of stablemen's lien. We reverse and remand.

In six points, appellant argues the trial court erred in (1) overruling his motion to transfer venue; (2) holding a hearing on appellee's motion for summary judgment with only six days notice to defense counsel; (3) overruling appellant's motion for new trial because genuine issues of fact existed as to appellee's right to recover on account and foreclosure of a stablemen's lien; (4) overruling his motion for new trial because he had set up meritorious defenses to appellee's suit and established that his failure to respond to the motion for summary judgment was the result of insufficient notice and time to respond and was not intentional or the result of conscious indifference; (5) denying his motion for extension of time to file a response to appellee's motion for summary judgment; and (6) granting the summary judgment because it unconstitutionally denied appellant the right to a trial.

In his first point, appellant says the trial court erred in. overruling his motion to transfer venue. The general venue rule is that now set out in the Texas Civil Practice and Remedies Code Annotated section 15.001 (Vernon 1986). It provides:

> Except as otherwise provided by this subchapter or Subchapter B or C, all lawsuits shall be brought in the county in which all or part of the cause of action accrued or in the county of defendant's residence if defendant is a natural person.

Texas Rule of Civil Procedure 87 specifies the method and mechanics for determination of a motion to transfer. Paragraph 2(a) provides that a party seeking to maintain venue in reliance upon section 15.001 has the burden to make proof, as provided in paragraph 3 of the rule. Paragraph 3(a) provides that all properly pleaded venue facts are taken as true unless specifically denied by the adverse party. If specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact. It also provides that prima facie proof is made "when the venue facts are properly pleaded and

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading." Paragraph (b) provides that the court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by and between the parties, and such affidavits and attachments as may be filed by the parties.

It is undisputed that appellant was a resident of Austin County and that the mare in question was delivered to, and the services for which recovery is sought were performed at, appellee's ranch, which was located in Lee County, Texas. That being the case, in order to maintain venue, appellee must have made prima facie proof that all or a part of the cause of action accrued in Lubbock County. It is appellee's theory that this burden was met by his allegation, in his response to the motion supported by his affidavit, that appellant orally agreed to make payment in Lubbock, Lubbock County, Texas. Parenthetically, we note that in his motion to transfer, appellant specifically asserted that he "did not enter into the alleged contract in Lubbock County and none of the performance of the alleged contract was to take place in Lubbock County." Neither in his response to the transfer motion nor in his supporting affidavit does appellee allege where the contract was entered into. Our task, therefore, is to determine whether appellee's allegation and supporting affidavit that an agreement was entered into, in Lubbock, Lubbock County, and that the agreement provided that payment due thereunder was to be made in Lubbock, Lubbock County, was sufficient prima facie proof of the necessary venue fact that a part of the cause of action accrued in Lubbock County.

A "cause of action" consists of a plaintiff's primary right and the defendant's act or omission which violates that right. Stone Fort Nat. Bank of Nacogdoches v. Forbess, 126 Tex. 568, 91 S.W.2d 674, 676 (1936); Martinez v. Goodyear Tire & Rubber Co., 651 S.W.2d 18, 19 (Tex.App.--San Antonio 1983, no writ). Moreover, a "cause of action" comprises every fact which is necessary for a plaintiff to prove in order to obtain judgment. It does not comprise every evidentiary fact, but does comprise every essential fact. Hoffer Oil Corporation v. Brian, 38 S.W.2d 596, 597 (Tex.Civ.App.--Eastland 1931, no writ). The essential elements, then, of appellee's cause of action would be that an agreement existed under which services were rendered by appellee for which payment was not made by appellant. A part of that underlying contract would be an agreement that payment would be made in Lubbock County.

The accrual of a cause of action means the right to institute and maintain a suit and whenever one person may sue another a cause of action has accrued. Luling Oil & Gas Co. v. Humble Oil & Refining Co., 144 Tex. 475, 191 S.W.2d 716, 721 (1945). As early as 1854, the Texas Supreme Court held that in a case such as this, the contract, its performance and its breach were all essential parts of the cause of action. Phillio v. Blythe, 12 Tex. 124, 127-28 (1854). Since the payment, under the allegations of appellee, was to be made in Lubbock County, and that payment was not made, a portion of the cause of action accrued in that county and, within the purview of Texas Civil Practice & Remedies Code Annotated section 15.001 (Vernon 1986), the suit was permissibly maintainable in that county. Hoffer Oil Corporation v. Brian, 38 S.W.2d at 597.

In his argument to the contrary, appellant places primary emphasis upon Gay Ranch Co. v. Rowland, 50 S.W. 1086 (Tex.Civ. App.--San Antonio 1899, no writ). However, that case is distinguishable. While the case did hold that a suit for similar services rendered at that appellee's ranch in Runnels County was maintainable in that county, there were no allegations as to an underlying

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

contract or as to the provisions of that contract. Moreover, that case construed a venue statute which provided that suit was maintainable in the county in which the cause of action arose. That language is, of course, different from the language of present section 15.001 and, for the reasons above stated, we conclude that a part of the instant cause of action accrued in Lubbock County. Appellant's first point is overruled.

In appellant's second point, he says the trial court erred in holding a hearing on appellee's motion for summary judgment with only six days nOtice to appellant's counsel. In his fifth point, appellant says the trial court erred in denying his motion for extension of time to file a response to appellee's motion for summary judgment. Because of the nature of this complaint, it is necessary to make a chronological listing of the sequence of events.

Appellee's motion for summary judgment was filed on January 11, 1988, and was set for hearing on February 12, 1988, at 1:15 P. M. That motion contained a certificate of service certifying that a copy and notation of hearing time was sent to appellant by certified mail, return receipt requested. No copy of the motion was sent to appellant's counsel.

On February 2, 1988, appellee's counsel sent a copy of the motion to appellant's counsel, which was received on February 4, 1988. In that letter, it was stated that a copy was mailed to appellant on the day of its filing by certified mail, but was returned unclaimed to appellee's counsel. In the letter, appellee's counsel said he had inadvertently failed to forward a copy to opposing counsel, apologized for the delay, and commented that he felt they had complied with the requirements of Texas Rule of Civil Procedure 21A, the rule prescribing the method of giving notice. With the letter, appellee's counsel included a copy of the Lubbock County local rule on summary judgment practice, which provided for no oral arguments unless requested, and commented that he would not be requesting such argument. The motion for summary judgment, according to the trial judge's findings, was granted on February 24, 1988.

On February 15, 1988, appellant's counsel mailed a motion to extend time for filing a response to the summary judgment motion. The basis of that motion was that he had commenced trial in federal court in Harris County on February 1, which would continue until "at least" February 15, 1988. Although counsel's certificate of service states that it was mailed on February 15, the Lubbock County District Clerk's mail stamp shows it was not filed until February 24, 1988, at which time it was overruled with the trial judge's handwritten notation that the summary judgment had already been granted.

Texas Rule of Civil Procedure 166a (c) provides:

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing....

Appellant argues that implicit in the above rule is the requirement that his counsel have twenty-one (21) days notice of the hearing date and motion for summary judgment so that he would have fourteen (14) full days to prepare his counter-affidavits and prepare his objections to the summary judgment evidence of the proponents. The thrust of his argument is that the requisite twenty-one

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

day notice must be given to counsel, where there is counsel of record, and appellee's failure to do so requires reversal.

In support of his proposition, appellant cites Williams v. City of Angleton, [illegible] S.W.2d 414 (Tex.App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.); Delta (Del.) Petroleum v. Houston Fishing, 670 S.W.2d 295 (Tex.App.--Houston [1st Dist.] 1983, no writ); International Ins. v. Herman G. West, Inc., 649 S.W.2d 824 (Tex.App.--Fort worth 1983, no writ); Gulf Refining v. A.F.G. Management 34 Ltd., 605 S.W.2d 346 (Tex.Civ.App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.); and Booker v. Hill, 570 s.w.2d 460 (Tex.Civ.App.--Waco 1978, no writ). However, while these cases do speak to the proposition that a full twenty-one day notice must be given, they are inapposite to the question before us, i.e., whether that notice is required to be given to opposing counsel or to the opposing party.

Texas Rule of Civil Procedure 21a provides:

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

Under this rule, a certificate of service, such as the instant one, creates a presumption that the requisite notice was served and, in the absence of evidence to the contrary, has the force of a rule of law. Cliff v. Huggins, 724 S.W.2d 778, 780 (Tex. 1987); Costello v. Johnson, 680 S.W.2d 529, 532 (Tex.App.--Dallas 1984, writ ref'd n.r.e.). While the sending of such a notice directly to the party without a copy to his attorney of record should not be encouraged, and indeed, it would seem proper that the rule require this, it does not do so. The notice of setting of appellee's motion for summary judgment was, then, in accordance with allowable procedure. moreover, since appellant's motion to extend the time for filing a response to the motion was

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

not prepared nor received in Lubbock until after the hearing date, nor was it received in Lubbock until after the granting of the motion, no error is shown in the overruling of that motion. Appellant's second and fifth points of error are overruled.

In his third and fourth points, appellant argues that the trial court erred in overruling his motion for new trial. Consideration of these points requires that we first determine the standard to be used in reviewing the motion and the trial court's overruling of that motion. There is a split in authority on this question.

In Costello v. Johnson, 680 S.W.2d at 531, the Court held the standard of review of a motion for new trial in a summary judgment proceeding where no response to the motion was filed is the same as in reviewing such a motion in a default judgment proceeding. That standard is that a default judgment should be set aside and a new trial ordered in any case in which (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part but was due to mistake or an accident, (2) the motion for a new trial sets up a meritorious defense, and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. Craddock v. Sunshine Bus Lines, 134 Tex. 388, 133 s.w.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted). Parenthetically, we mte that in the recent case of Lopez v. Lopez, 31 Tex. Sup. Ct. J. 648, 649 (September 14, 1988), the Supreme Court has qualified the requirement as to a showing of a meritorious defense by stating that in a case where a defendant was not properly notified of a hearing date, to require such a showing as a condition of granting a new trial would violate due process rights under the fourteenth amendment to the United States Constitution.

However, in International Corp. v. Exploitation Engineers, 705 S.w.2d 749, 751 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.), the Court, without noting the Costello case, and citing City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979), held that the Craddock standard was not applicable to an appeal from a summary judgment. The Houston Court's rationale for making that distinction was "[a] summary judgment is not granted because a movant fails to answer, but because the movant's summary judgment proof is sufficient as a matter of law.". 705 S.W.2d at 751. We disagree with that premise.

The teaching of Clear Creek, as relevant here, is that the trial court may not grant a summary judgment by default for lack of an answer or response to the motion by the non-movant but, in the words of the Court, "(t]he movant still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court...." 589 S.W.2d at 678. However, in a case such as this, the mere fact that the issues presented by a summary judgment motion, and the evidence in connection with the motion, in the absence of any response, might appear to justify the judgment is not sufficient to justify a deviation from the basic fairness of applying the Craddock test to a motion for new trial after such summary judgment.

if a summary judgment respondent, in his motion for new trial, could meet the requirements of the Craddock rule, logically and reasonably the situations are so analogous that the same standard should be applied. Of course, in our situation, the meritorious defense prong, if required, would be satisfied by a showing that fact questions exist which should be decided by a fact finder. Our conclusion that the Costello approach is the correct one is strengthened by

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

the oft-quoted axiom that summary judgment is a harsh remedy and a party's entitlement to that remedy should be strictly construed in procedural as well as substantive matters. International Ins. v. Heman G. West, Inc., 649 S.W.2d 825.

Having made the determination that our review of the trial court action challenged in these points should be conducted in the light of the Craddock explication, it is necessary to review that motion and its surrounding circumstances. When the original transcript was received in this court, it appeared that the appeal bond would not have been timely filed unless a motion for new trial had been timely filed. No such motion was contained in the transcript. We abated this appeal and directed the trial court to determine whether such a motion was filed with the proper authority within the requisite time frame.

As a result of that hearing, the trial court determined that a motion for new trial was not timely filed in the clerk's office but a motion for new trial was received by the Lubbock County courthouse mailroom on March 7, 1988, and was thereafter lost or mislaid. With this finding, this Court found that appellant had substantially complied with the proper requisites for the filing of such a motion and, on July 1, 1988, ordered the filing of the tendered transcripts and allowed the appeal.

A copy of the motion for new trial is shown in the transcript. Attached to the motion is an affidavit executed by appellant in which he categorically denies that he agreed to pay appellee for stallion service or for care and board for his mare. His version was that a friend of appellee's, in appellant's presence, placed a call to appellee and "asked for and received approval for the offer to breed my mare without charge because he wanted to have some good foals out of his stallion," and, in reliance upon that agreement, he delivered his mare to appellee' s ranch. In the affidavit he also asserted facts by virtue of which he asserted deceptive trade practice and conversion claims.

In Ivy v. Carrell, 407 S.W.2d 212 (Tex. 1966), the Court had occasion to explicate the Craddock requirement that a motion for new trial in a default judgment case set up a meritorious defense. The Court said:

> The motion must allege facts which in law would constitute a defense to the cause of action asserted by the plaintiff, and must be supported by affidavits or other evidence proving prima facie that the defendant has such meritorious defense. [Emphasis in original].

Id. at 214.

The motion and affidavit in the case at bar were sufficient to establish prima facie that fact questions requiring resolution by a fact finder exist in this case. That, of course, would be a meritorious defense to a motion for summary judgment. The motion and its attachments are also sufficient to show that appellant's failure to file a response to the summary judgment motion was not intentional but was the result of a mistaken assumption that he had twenty-one days from the date appellant's counsel received notification and that it was filed at a time when the granting of the motion would not occasion delay or otherwise work an injury to appellee. That being the case, appellant's motion for new trial should have been granted. Appellant's third and fourth points of error are sustained and that sustention requires reversal of the trial court judgment and a remand for new trial. The disposition which we have made of these two points obviates the necessity for discussion of appellant's sixth point.

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

In summary, appellant's third and fourth points having been sustained, the judgment of the trial court is reversed and the cause remanded to the trial court for new trial.

k.App.-Amarillo,1988.
George KRCHNAK, Appellant, v. Joe Kirk FULTON, Appellee.
1988 WL 115312 (Tex.App.-Amarillo)

END OF DOCUMENT

COPR. (C) WEST 1988 NO CLAIM TO ORIG. U.S. GOVT. WORKS

******** END 224995-ATTORNEYS AT LAW 11/29/88 12:47 END ********

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

November 1, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rules 72, 73 and 74

Dear Mr. Beck:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 72, 73 and 74. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to LHS

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

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

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

11/1
HJA,
R 72 SubC
also TRAP Subc
SCAC Agenda.

006

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. It used to be that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,

Wendell S. Loomis

WSL:slm

10-13-92

Your phone number (with area code)

Russell R. Lucius | 713/663-8830

Department / Floor No.

FULL FLORIS ATTY

Your Street Address (Use of P.O. Boxes or P.O. * Zip Codes Will Delay Delivery And Result in Extra Charge.)

707 LH 1960 WEST STE 250

City | State | ZIP Required For Correct Invoicing

HOUSTON | TX | 7 7 0 6 6

Company

John Dickson, Clerk | 512 473-9427

Department / Floor No.

District Court, Travis County

Exact Street Address (Use of P.O. Boxes or P.O. * Zip Codes Will Delay Delivery And Result in Extra Charge.)

1060 Guadalupe

City | State | ZIP Street Address Zip Required

Austin, | TX | 78767

YOUR BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.)

McQuiston vs TWCARP

PAYMENT ☒ 1st Sender ☐ 2nd Recipient's FedEx Acct. No. ☐ 3rd 3rd Party FedEx Acct. No ☐ 4th Credit Card

☐ Cash

HOLD FOR PICK-UP AT THIS FEDERAL EXPRESS LOCATION

Street Address (See Service Guide or Call 800-238-5355)

City | State

ZIP * Zip Code of Street Address Required

Federal Express Use

Base Charges

Declared Value Charge

Origin Agent Charge

Other

Total Charges

SERVICES — CHECK ONLY ONE BOX

☐ PRIORITY 1 (Overnight Document & Letter Over Your Packages)

☐ OVERNIGHT LETTER* (Our Packaging 9"x12½")

OVERNIGHT DELIVERY USING OUR PACKAGING

☐ Courier-Pak Overnight Envelope* 12" x 15½"

☐ Overnight Box 12½" x 17½" x 3" A ☐

☐ Overnight Tube 38" x 6" x 6" B ☐

* Declared Value Limit $100.

STANDARD AIR

☐ Delivery not later than second business day

SERVICE COMMITMENT

DELIVERY AND SPECIAL HANDLING — CHECK SERVICES REQUIRED

1 ☐ HOLD FOR PICK-UP (Fill in Section III at right)

2 ☐ DELIVER WEEKDAY (Not Available)

3 DELIVER SATURDAY (Extra charge) ☐

4 ☐ DANGEROUS GOODS (Not available for First and Standard Air Packages only. Extra charges)

5 ☐ CONSTANT SURVEILLANCE SERVICE (CSS) (Extra charges. Do not complete Section 5)

6 ☐ DRY ICE ____ Kgs

7 ☐ OTHER SPECIAL SERVICE

8 ☐

9 ☐ SATURDAY PICK-UP (Extra charge)

10 ☐

	PACKAGES	WEIGHT	YOUR DECLARED VALUE (See right)	OVER SIZE
		LBS		
		LBS		
		LBS		
		LBS		
Total	Total	Total		

Received At

1 ☐ Regular Stop

2 ☐ On-Call Stop

3 ☐ Drop Box 4 ☒ B.S.C. 5 ☐ Station

Federal Express Corp. Employee No.

Date/Time For Federal Express Use

YOUR DECLARED VALUE

DAMAGE OR LOSS

We are liable for the replacement value of your shipment to the extent of $100 per package, unless you declare a higher Declared Value for the full amount of the package. In the event of a claim, we will pay for the amount of your loss to the extent of the Declared Value, subject to the terms and conditions set forth in our Service Guide. Declared value restrictions are shown on the back of the Sender's Copy of this airbill. We make no expressed or implied warranties.

DELAY

There is always a risk of late delivery or non-delivery in the event of a late delivery Federal Express will refund the transportation charges paid. See back of Sender's Copy of this airbill for further information.

CONSEQUENTIAL DAMAGES

We will not be responsible for loss of profit or any other consequential damages, including but not limited to, special damages arising from the inability to use the package or any part of its contents, or for any delay in delivery, even if we are informed in advance of the possibility of such damages. Such damages are called consequential damages.

DO NOT SHIP CASH OR CURRENCY

Sender authorizes Federal Express to deliver this shipment without obtaining a delivery signature and shall indemnify and hold harmless Federal Express from any claims resulting therefrom.

Signature

Date

PART #15021 REV'D 5/92 PRINTED U.S.A. SP/DE

007

SENDER'S COPY/RETAIN FOR TRACE PURPOSES

00623

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

00624

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S. LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

00625

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

CHARLES M. BABB
MARK T. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARRIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
JAN FERGUSON

901 CONGRESS AVENUE
P. O. DRAWER 1967
AUSTIN, TEXAS 78767
512-473-8600
TELECOPIER
322-9274

RECEIVED OCT 1 3 1988

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

00628

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

00629

WENDELL S. LOOMIS
Attorney at Law
3707 F M 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 18, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rule 72

Dear Mr. Beck:

I have enclosed a copy of a letter sent to me from Sarah B. Duncan regarding a suggested change to Rule 72. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Sarah B.Duncan

Copy to LHS
Orig to file
8-12-88 lyk

Minton, Burton, Foster & Collins

Attorneys at Law, A Professional Corporation, 1100 Guadalupe, Austin, Texas 78701, (512) 476-4873

SCAC Subc
+ Agenda

August 8, 1988

Mr. Luther H. Soules III
Chairman, Supreme Court
Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205

Dear Mr. Soules:

In reviewing the 1988 amendments to the Texas Rules of Civil Procedure, I noticed that Rule 72 (copy enclosed) now requires that a copy of a pleading, plea, or motion be delivered only to "the adverse party," rather than to "all parties." With all due respect, I suggest that this amendment be reconsidered.

Even if a party is not an "adverse party" with respect to a particular pleading, plea, or motion, that party's interest may nonetheless be affected by the pleading, plea, or motion or by any disposition thereon. Under amended Rule 72, however, that party would not even receive notice of the filing of the pleading, plea, or motion or of any hearing or disposition thereon.

For instance, suppose one of several derivative plaintiffs fails to answer interrogatories propounded by one of several defendants, and a motion for sanctions is filed. Suppose further that the nonoffending plaintiffs rely upon the filing of the offending plaintiff's initial pleading in support of their assertion that the statute of limitations has not run on the plaintiffs' derivative claims. Under amended Rule 72, it would appear the court could, without notice to the nonoffending plaintiffs, strike the offending plaintiff's pleadings as sanctions for her abuse of the discovery process, thereby depriving the nonoffending plaintiffs of a defense to the defendants' plea of limitations. The nonoffending plaintiffs would have been effectively deprived of the opportunity to oppose the motion for sanctions, which so vitally affects their interests because they were not "adverse parties" as to that particular motion. Similarly, the other defendants, which would clearly have an interest in supporting the motion for sanctions, would have no notice of its filing or of any hearing thereon.

A similar situation is presented by the filing of a motion for leave to file a third-party claim. Although the plaintiff may not be an "adverse party" as to that particular motion, her interests may nonetheless be affected if the joinder of an additional party delays trial of the case, increases the amount of necessary discovery, etc. Despite the obvious potential for affecting the plaintiff's interests, Rule 72 would not require delivery of a copy of the motion to the plaintiff.

Since the rule already limits the number of copies required to be delivered in instances in which there are more than four parties entitled to receive a copy of the pleading, plea, or motion, the additional copying and mailing costs imposed by requiring delivery to "all parties" would not appear sufficiently substantial to justify the 1988 amendment to Rule 72.

Thank you for your attention to this matter.

Sincerely,

Sarah B. Duncan

Sarah B. Duncan
For the Firm

Rule 71. Misnomer of Pleading

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. [Pleadings shall be docketed as originally designated and shall remain identified as designated, unless the court orders redesignation. Upon court order filed with the clerk, the clerk shall modify the docket and all other clerk records to reflect redesignation.]

Rule 72. Filing Pleadings; Copy Delivered to All Parties or Attorneys

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to ~~all parties~~ [the adverse party] or ~~his~~ [their] attorney(s) of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

Comment: The amendment restores the rule to the pre-1984 version in that it now requires service only on the adverse party.

Rule 87. Determination of Motion to Transfer

1. Consideration of Motion. (No Change).

2. Burden of Establishing Venue.

(a) In General. A party who seeks to maintain venue of the action in a particular county in reliance upon ~~Section 1~~ [Section

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

Rule 21a

Agenda

June 8, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Proposed Changes to Rules 21a and 72
Texas Rules of Civil Procedure

Dear Sam:

Enclosed is a letter from Don L. Baker suggesting changes to Rules 21a and 72.

In the interest of time, I have drafted up proposed rules and am enclosing them, along with a copy of Federal Rule 5, to which Mr. Baker references.

Please look these over and, if you are unable to get a written report to me, be prepared to give an oral report at our June meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

Sam,
I do not believe
this is advised.

00635

The ambiguity can be resolved by specific amendments to Rules 4(d)(7) and 4(e), but the Committee is of the view that there is no reason why Rule 4(c) should not generally authorize service of process in all cases by anyone authorized to make service in the courts of general jurisdiction of the state in which the district court is held or in which service is made. The marshal continues to be the obvious, always effective officer for service of process.

EDITORIAL NOTES

Effective Date of 1983 Amendment. Amendment by Pub.L. 97–462 effective 45 days after Jan. 12, 1983, see section 4 of Pub.L. 97–462, set out as an Effective Date of 1963 Amendment note under section 2071 of this title.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **Same: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). Compare 2 Minn. Stat. (1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164 and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat. Ann. (Remington, 1932) §§ 244–249.

Note to Subdivision (d). Compare the present practice under former Equity Rule 12 (Issue of Subpoena—Time for Answer).

1963 AMENDMENT

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22–A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

Texas Rules of Civil Procedure

Rule 21a. Notice

Every notice required by these rules [or pleading subsequent to the original complaint], other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy of the notice or of the document to be served, as the case may be, to the party to be served, or his duly authorized agent, or his attorney of record, either in person or by ~~registered~~ [first-class] mail to his last known address, or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. It may be served by a party to the suit or his attorney of record, or by the proper sheriff, or constable, or by any other person competent to testify. A written statement by an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or document was not

received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. ~~When these rules provide for notice or service by registered mail, such notice or service may also be had by certified mail.~~

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

June 4, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Professor J. Patrick Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, Tx 78705

Re: Tex. R. Civ. P. 21a and 72

Dear Luke and Pat:

I am enclosing a letter from Mr. Don L. Baker, suggesting a change to Tex. R. Civ. P. 21a and 72.

Will you please place these matters on your Agenda for the next meeting so that they might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Don L. Baker
Law Offices of Baker & Price
812 San Antonio, Suite 400
Austin, Tx 78701-2223

Law Offices of Baker & Price A PROFESSIONAL CORPORATION 812 SAN ANTONIO SUITE 400 AUSTIN, TEXAS 78701-2223 512 476 6003

May 19, 1987

Honorable James P. Wallace
Justice, Supreme Court of Texas
Supreme Court Building
Austin, TX 78711

Re: Texas Rules of Civil Procedure 21a and 72

Dear Justice Wallace:

There appears to be a hiatus in the application of these two Rules relating to service of pleadings and notices. It's been my observation that for several years, the actual practice has varied significantly from place to place, from lawyer to lawyer, from case to case, and from the actual language of the Rules. Most of the time, it has not been a practical problem, but there have been some recent rulings in local trial courts which have brought the problem into focus.

The specific language of Rule 72 deals with pleadings, pleas and motions, but does not specifically address, deal with or define a "notice". Rule 72 authorizes service by mail, but does not specify whether the mail is to be first class or not, certified or not, registered or not.

Rule 21a specifically deals with "notice", the subject matter of the Rule being defined in the first phrase as "Every notice required by these Rules, . . .". Rule 21a does not appear to control pleadings, motions and pleas. Rule 21a provides for mail to be either by certified or registered mail, thus by implication precluding the first class mail. The Rule, however, does allow service in any other manner as the trial court may direct in its discretion, which presumably would clearly include first class mail.

For many years, it has been a widespread custom to send copies of pleadings to other parties and counsel in a case by first class mail. This is because first class mail is much less expensive, much less troublesome to the sender, much less troublesome to the receiver, and normally makes for better actual notice than the restricted delivery mail. However, it now appears that it is being argued locally that if a notice of setting for hearing on a

Law Offices of Baker & Prince A PROFESSIONAL CORPORATION 812 SAN ANTONIO SUITE 400 AUSTIN, TEXAS 78701-2223 512-476-6003

motion or pleading is included in the same document, then it is required to be sent by certified mail. Strangely enough, since Rule 21a does not apply to pleadings and there does not appear to be any other rule which expressly requires sending of a notice of a setting, it appears logically arguable that Rule 21a doesn't apply to anything. If there is a rule which says that a party must give notice to all other parties of each setting for hearing on a motion, I have not found that rule. Of course, we have done that for years, as have other attorneys.

In order to make the rules fit together logically, it would be my suggestion that appropriate language be used to amend these rules to provide that it is the responsibility of the moving party or the party filing any document with the court to send a copy to all other parties or their attorney of record. I suggest that the requirement also be expressly made that notice of any hearing or setting obtained or requested by any party similarly be sent.

Further, I suggest that the standard method of sending be by first class mail without the requirement of certified or registered mail unless the court shall order otherwise in a given case. The reasons for suggesting that first class mail is a better method include:

1. Actual receipt and actual knowledge of the contents are much more likely with first class mail than with certified mail because first class mail is delivered whether anyone chooses to sign for it or not. Actual knowledge is more likely by first class mail because there are many people who still believe the untrue folk wisdom that if you don't sign for the certified mail, then you are not on notice of and not bound by the contents of it. This means there are lots of folks who simply fail or refuse to sign for certified or registered mail.

2. Notice and knowledge will be received more quickly because there is no need to make a separate subsequent trip to the post office to obtain mail and sign for it since first class mail will be left at the address intended. It is increasingly the case that both spouses are employed outside the home and where notice is sent to a residential address, it is a large burden on people to take off work during the hours of the day when the post office is open and go to the post office to claim and sign for receiptable mail.

3. Where mail is going to law offices, the same may occasionally be true and even if not directly applicable, it is less trouble in the recipient's office to receive mail without the necessity of filling out extra forms and signing receipts to get the mail.

4. Expense to the sender is lessened because first class mail can normally be sent for 22 cents, whereas it will cost several times that much to send it by certified or registered mail. When a law office is sending hundreds of pieces of mail of this nature, this amounts to a significant expense.

5. The additional time required for receiving employees to sign for mail is an unnecessary expense item to the recipient and, therefore, an authorization of first class mail reduces expenses on both ends of the equation.

Service by first class mail has been the norm for many years in the federal procedure under Rule 5, Federal Rules of Civil Procedure. It would appear that it has not presented any significant problem and has worked well in the federal system. It does not make good sense to me for anyone to suggest that the lawyers of Texas are somehow less honest or that the courts of Texas are somehow less capable than those in the federal system. I would not expect to see any greater incidence of dishonesty by a sender in claiming it was sent when it was not or by a receiver in claiming that it was not received when it was.

Perhaps there are other considerations which I have not addressed. Perhaps there is more to this than I realize. In any event, I felt it appropriate to bring this to the attention of the court and of the Rules Committee in the hope that it might be appropriately addressed. Thank you for your consideration of these suggestions.

Very truly yours,

DON L. BAKER

DLB/lg

TRCP

Rule 73. Failure to ƒ*ı*r*n*i$*h* [Serve or Deliver] Copy of Pleadings *t*ø/*A*d*v*e*r*$e/*P*a*r*t*y*

If any party fails to *f*u*r*n*i*$*h* [serve or deliver] the *a*d*v*e*r*$e *p*a*r*t*y* [other parties] *w*i*t*h a copy of any pleading, [plea, or motion whenever required by these rules and] in accordance with *t*h*e*/*p*r*e*c*e*d*i*n*g*/*r*u*l*e [Rules 21a and 72 respectively], the court may in its discretion, ø*n* /*m*ø*t*i ø*n*/ order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the *a*d*v*e*r*$e/*p*a*r*t*y* [other parties] the amount of reasonable costs and expenses [including attorneys fees] incurred as a result of the failure, *i*n*c*l*u*d*i*n*g/*a*t*t*ø*r*n*e*y *f*e*e*$/ or make such other order with respect to the failure as may be just.

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rules 21, 21a, 72 and 73

Dear Mr. Beck:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 21, 21a, 72 and 73. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

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 73. Failure to Fu
to Adverse Pa

If any party fails to furnish the adverse party in accordance with the preceding rule, the court may order all or any part of such pleading stricken, dir be permitted to present grounds for relief or defens such party to pay to the adverse party the amount of incurred as a result of the failure, including attor order with respect to the failure as may be just.

II. Proposed Rule: Mark through deletions to existing rule with d

Rule 73. Failure to ~~Furnish~~ Serve or Deliver Copy

If any party fails to ~~furnish~~ serve or deliver the ~~adverse party~~ other parties ~~with~~ a copy of any pleading, plea, or motion whenever required by these rules and in accordance with ~~the preceding rule~~ Rules 21a and 72 respectively, the court may in its discretion ~~on motion,~~ order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the ~~adverse party~~ other parties the amount of reasonable costs and expenses including attorneys fees incurred as a result of the failure, ~~including attorney fees,~~ or make such other order with respect to the failure as may be just.

on notice and hearing

00645

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 73. Failure to Furnish Copy of Pleadings to Adverse Party

If any party fails to furnish the adverse party with a copy of any pleading in accordance with the preceding rule, the court may in its discretion, on motion, order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the adverse party the amount of reasonable costs and expenses incurred as a result of the failure, including attorney fees, or make such other order with respect to the failure as may be just.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 73. Failure to ~~Furnish~~ Serve or Deliver Copy of Pleadings ~~to Adverse Party~~

If any party fails to ~~furnish~~ serve or deliver the ~~adverse party~~ other parties ~~with~~ a copy of any pleading, plea, or motion whenever required by these rules and in accordance with ~~the preceding rule~~ Rules 21a and 72 respectively, the court may in its discretion, ~~on motion,~~ order all or any part of such pleading stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the ~~adverse party~~ other parties the amount of reasonable costs and expenses including attorneys fees incurred as a result of the failure, ~~including attorney fees,~~ or make such other order with respect to the failure as may be just.

on notice and hearing

00645

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

To promote efficiency and economy by keeping all parties informed of all developments in a case so that all interested parties may be heard at one time, thus avoiding unnecesary duplication of effort by the court and counsel and unwarranted expense to the parties.

Respectfully submitted,

Robert F. Watson
LAW, SNAKARD & GAMBILL
3200 Texas American Bank Bldg.
Fort Worth, Texas 76102

January 16, 1989

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rules 21, 21(a), 72 and 73

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Evelyn A. Avent, Secretary for the Committee on Administration of Justice regarding changes to Rules 21, 21(a), 72 and 73. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

STATE BAR OF TEXAS

HS H
SCAC Subc
+ Agenda

Copy to LH
Orig. to file
1-27-89
Tigh

January 23, 1989

To the Committee on Administration of Justice

From Evelyn A. Avent, Secretary

Enclosed are proposed changes in final form to Rules 21, 21a, 72 and 73 submitted by Robert F. Watson.

Also enclosed are proposed changes in final form to Rules 223 and 245 submitted by Charles Tighe.

These items will be on the Agenda for action at the March 11 meeting.

Evelyn A. Avent

Enclosures

00648

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 31, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rule 85(c)

Dear Mr. Beck:

I have enclosed a copy of a letter sent to me from Justice Barbara G. Culver regarding a suggested change to Rule 85(c). Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Mr. Joseph P. Kelly

Copy to file
Orig to file
8/30 Agenda

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

SCAC Rules Supp
Agenda.

May 3, 1988

Mr. Joseph P. Kelly
KELLY, STEPHENSON & MARR
200 First Victoria National Bank Bldg.
P.O. Box 1848
Victoria, Texas 77902-1848

Dear Mr. Kelly:

Thank you for your nice letter of April 18, 1988. I am enjoying my work here at the Supreme Court, and hope to keep my position as Justice after the outcome of the November 8 election.

I appreciate your concern regarding some problems in our law today. I am referring your letter to Justice William W. Kilgarlin who is our liason to the Supreme Court Advisory Committee on Rules.

Thank you again for your letter.

Very truly yours,

Barbara G Culver

Barbara G. Culver
Justice

BGC/ds
cc: W.W. Kilgarlin

KELLY, STEPHENSON & MARR
(SUCCESSOR TO GUITTARD & HENDERSON)
ATTORNEYS AT LAW
200 FIRST VICTORIA NATIONAL BANK BUILDING
P. O. BOX 1848
VICTORIA, TEXAS 77902-1848
(512) 573-4344

JOSEPH P. KELLY
D. R. STEPHENSON
BOARD CERTIFIED: COMMERCIAL, RESIDENTIAL, AND FARM & RANCH REAL ESTATE LAW
JACK W. MARR
BOARD CERTIFIED: FAMILY LAW
ANNA L. MISAK
MICHAEL MEIER
LISA J. HARTMAN
KEMPER STEPHEN WILLIAMS III

RICHARD HENDERSON
(OF COUNSEL)

April 18, 1988

Judge Barbara G. Culver
Justice, Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Judge Culver:

I appreciated receiving information concerning your background and history. I agree that you have come on to the bench of the Supreme Court at a time when court deliberations and judges have come under their most intense fire in my lifetime. It strongly parallels Orson Wells' statement that "there is no such thing as justice, merely luck and in some places, you are luckier than in others." The idea ~~of~~ being to go where luck is for you.

I sincerely hope that you will address what I consider to be a number of severely unfavorable things in our law today such as venue provisions that permit a defendant to be sued in a county to which he is a total stranger, and so are the facts of his case. Other instances where the discretion of the trial court is inordinately exercised in favor of one side of the docket or the other (these exist on both sides of the docket and should be eradicated).

In spite of all of this, I want to welcome you to the Supreme Court of the State of Texas and wish you every possible success.

With kind regards and best wishes, I remain

Yours very truly,

KELLY, STEPHENSON & MARR

Joseph P. Kelly

By: Joseph P. Kelly

JPK/dr

Rule 87. Determination of Motion to Transfer

1. **Consideration of Motion.** (No change.)

2. **Burden of Establishing Venue**

(a) (No change.)

(b) Cause of Action. It shall not be necessary for a claimant to prove the merit 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, ~~and~~ when the ~~claim and~~ venue allegations ~~are specifically denied~~, the ~~pleader~~ is required, by prima facie proof as provided in paragraph 3 of this rule, to support ~~his pleading~~ that the cau
taken as established by the pleadings, or a
cause of action, accrued in the county of
~~þŕǿǿf / á$ / þŕǿṽíδéδ / íñ / þáŕŕáģŕáþḧ / 3 / ǿf / ŧḧí$ /~~
seeks transfer to a county where the caus
thereof accrued, it shall be sufficient
plead that if a cause of action exists, th
or part thereof accrued in the specific co
is sought, and such allegation shall not c
that a cause of action in fact exists. A
~~$éé€ǩ$ / ŧǿ / ŧŕáñ$f€ŕ / á / ¢á$é / ŧǿ / á / ¢ǿṵñŧy / ẅḧ€ŕ~~
~~ǿŕ / þáŕŧ / ŧḧ€ŕ€ǿf / / á¢¢ŕṵ€δ~~ shall be required
pleading, by prima facie proof as provided
rule, that, if a cause of action exists,
accrued in the county to which transfer is

(c) (No change.)

Rule 87. Determination of Motion to Transfer

1. Consideration of Motion. (No change.)

2. Burden of Establishing Venue

(a) (No change.)

(b) Cause of Action. It shall not be necessary for a claimant to prove the 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 defendant ~~claim~~ and venue allegations ~~are specifically denied~~, the claimant is required, by prima facie proof as provided in paragraph 3 of this rule, to support his pleading that the cause of action ~~is~~ is taken as established by the pleadings, or a part ~~thereof~~ of such cause of action, accrued in the county of suit. ~~/by/pria/fact/ 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~~ But the defendant ~~who seeks/to/transfer/a/cause/to/a/county/where/the/cause/of/action/or/part/thereof/accrued/shall~~ shall be required to support his ~~motion~~ pleading, by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.

(c) (No change.)

3. **Proof**

(a) Affidavit and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact; provided, however, that no party shall ever be required to support by prima facie proof the existence ~~or absence~~ of a cause of action, or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence ~~or absence~~ of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(b) The Hearing. (No change.)

(c) (No change.)

4. **No Jury.** (No change.)

5. **No Rehearing.** (No change.)

6. (No change.)

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 13, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 87 and Rule 121
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find redlined versions of Rules 87 and 121. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

orig to hjh
Copy to LHS
3/1/88

From Judge Kilgarlin

Judge

The District & County Clerks have a monthly magazine in which could appear a brief note setting forth the true rule.

HH
RG Scott Jr.
+ Estrada

PAT GREGORY
PROBATE JUDGE
HARRIS COUNTY PROBATE COURT NO. 2
506 FAMILY LAW CENTER BLDG.
1115 CONGRESS AVENUE
HOUSTON, TEXAS 77002
PHONE 221-6090

February 17, 1988

Hon. Tom Phillips
Chief Justice
Texas Supreme Court
State Capitol
Austin, Texas 78711

Dear Mr. Chief Justice:

I am writing to you regarding some confusion that exists with Rule 99(c), Texas Rules of Court. Some attorneys around the State of Texas apparently read this section to require that it be added to citations to probate wills. I personally disagree, but the question was recently propounded to me by the County Clerks at their annual meeting. Section 33(c) of the Texas Probate Code prescribes the content of such citation. I believe this to be controlling, but the County Clerks need some direction from the Supreme Court.

I would appreciate your advice in this regard so that I may communicate the same to the County Clerks at our educational meetings. Thank you for your assistance.

Sincerely yours,

Pat Gregory

PAT GREGORY
Judge, Probate Court No. 2

PG/bm

tion and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk.

b. Form. The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

(Amended by orders of Oct. 10, 1945, eff. Feb. 1, 1946; July 15, 1987, eff. Jan. 1, 1988.)

Original note:

Source: Art. 2021.

Rule 100. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

Rule 101. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

Rule 102. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

Rule 103. Who May Serve

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

(Amended by orders of June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988.)

Source: New rule.

Change by amendment effective January 1, 1981: The rule is amended to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court.

COMMENT TO 1988 CHANGE: The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve Citation. Further, Sheriffs or Constables are not restricted to service in their county. The last sentence is added to avoid the necessity of motions and fees.

Rule 104. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

COMMENT TO 1988 CHANGE: Rule is rendered unnecessary due to amendments to Rule 103.

Rule 105. Duty of Officer or Person Receiving

The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

(Amended by orders of July 11, 1977, eff. Jan. 1, 1978; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2025, unchanged.

Change by amendment effective January 1, 1978: The spelling of the word "indorse" was corrected to "endorse".

Rule 106. Method of Service

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true

00657

§ 33. Issuance, Contents, Service, and Return of Citation, Notices, and Writs in Probate Matters

(a) **When Citation or Notice Necessary.** No person need be cited or otherwise given notice except in situations in which this Code expressly provides for citation or the giving of notice; provided, however, that even though this Code does not expressly provide for citation, or the issuance or return of notice in any probate matter, the court may, in its discretion, require that notice be given, and prescribe the form and manner of service and return thereof.

(b) **Issuance by the Clerk or by Personal Representative.** The county clerk shall issue necessary citations, writs, and process in probate matters, and all notices not required to be issued by personal representatives, without any order from the court, unless such order is required by a provision of this Code.

(c) **Contents of Citation, Writ, and Notice.** Citation and notices issued by the clerk shall be signed and sealed by him, and shall be styled "The State of Texas." Notices required to be given by a personal representative shall be in writing and shall be signed by the representative in his official capacity. All citations and notices shall be directed to the person or persons to be cited or notified, shall be dated, and shall state the style and number of the proceeding, the court in which it is pending, and shall describe generally the nature of the proceeding or matter to which the citation or notice relates. No precept directed to an officer is necessary. A citation or notice shall direct the person or persons cited or notified to appear by filing a written contest or answer, or to perform other acts required of him or them and shall state when and where such appearance or performance is required. No citation or notice shall be held to be defective because it contains a precept directed to an officer authorized to serve it. All writs and other process except citations and notices shall be directed "To any sheriff or constable within the State of Texas," but shall not be held defective because directed to the sheriff or any constable of a specific county if properly served within the named county by such officer.

(d) **Where No Specific Form of Notice, Service, or Return is Prescribed, or When Provisions Are Insufficient or Inadequate.** In all situations in which this Code requires that notice be given, or that a person be cited, and in which a specific method of giving such notice or of citing such person, or a specific method of service and return of such citation or notice is not given, or an insufficient or inadequate provision appears with respect to any of such matters, or when any interested person so requests, such notice or citation shall be issued,

00658

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 2, 1988

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Re: Tex. R. Civ. P. 99(c)

Dear Sam:

I have enclosed comments sent to me through Judge William W. Kilgarlin regarding Rule 99(c). Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

WHS - FYI
SBD

[Plaintiff's trial brief is available through the Offerings section at p. 126, courtesy of Mr. Pounian.]

[*Comment*: A separate action against Taylor was settled for $270,000.]

Service of Process

PROCEDURE

A corporation was not entitled to in forma pauperis status.

FDM Manufacturing Co. v. Scottsdale Insurance Co., 855 F.2d 213 (5th Cir. 1988).

Scottsdale issued a fire insurance policy on a building leased to FDM Manufacturing. After the building burned down, FDM sued Scottsdale to recover on the policy. The insurer successfully defended on the ground of arson.

FDM filed for an appeal and moved to proceed in forma pauperis under 28 U.S.C.A. §1915(a), which permits a "person" to file an action without payment of costs. After the trial court denied the motion on technical grounds, FDM renewed its request.

The Fifth Circuit Court of Appeals, in a case of first impression for the court, held that a corporation was not entitled to in forma pauperis (IFP) status under §1915(a). Looking to the statute's legislative history, the court observed that the original statute used the word "citizen," rather than "person." The stated reason for the change to "person" was to grant IFP status to aliens. Refusing to strain the meaning of the statute by implying that other groups should be included, the court left it to the legislature to make such a determination.

The court further noted that if a corporation had insufficient assets to pay costs, its stockholders would have sufficient interest to furnish security. For these reasons, the court concluded that there was no basis for allowing corporations IFP status.

Service of process through a facsimile machine was allowed under New York's civil procedure rules.

Calabrese v. Springer Personnel of N.Y., Inc., 534 N.Y.S.2d 83 (Civ. Ct. 1988).

A judge issued an order striking defendant's answer unless it responded to plaintiff's interrogatories within 20 days of service of a copy of its order. Plaintiff then transmitted a copy of the order to defendant by facsimile machine. Although defendant rejected the transmission as improper service on an attorney under New York's civil procedure rules, it sent the interrogatory responses, which arrived eight days late. Plaintiff rejected the late responses and noticed the case for inquest. Defendant moved to vacate the notice, arguing that plaintiff's improper service had not started the 20-day period running.

In holding that the fax transmission constituted proper service, the court noted that this method satisfied the statute's requirements that papers were to be left with a person in charge while the office was open or, if no one was in charge, in a conspicuous place. The court reasoned that an office was open when its fax machine was receiving a transmission and that delivery was complete if an operator was present at the time. Moreover, since a fax machine was visited regularly, it was likely to be in a conspicuous place.

Although plaintiff's method of service had been proper and the 20-day period had run, the court nevertheless extended defendant's time to respond, on the ground that it had been only several days late.

An appeal was ineffective because plaintiffs' motion for prejudgment interest was still pending.

Osterneck v. Ernst & Whinney, _____ U.S. _____, (Feb. 21, 1989) (available through Westlaw, No. 1989 WL 12292).

After a jury verdict against some defendants and in favor of others, plaintiffs moved for prejudgment interest. While that motion was pending, plaintiffs appealed the part of the judgment favoring defendants. The Eleventh Circuit Court of Appeals held that under Rule 59(e) of the Federal Rules of Civil Procedure, plaintiffs' motion for prejudgment interest had been a motion to alter or amend judgment. Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, an appeal filed while a Rule 59(e) motion is pending has no effect. The court therefore found that plaintiffs' appeal had been ineffective.

The Supreme Court affirmed, stating that rules 59(e) and 4(a)(4) work together to ensure the finality of judgments. The Court noted that under these rules, the filing of an effective appeal would have been prevented until the trial court had had a chance to consider all motions before a final judgment. Piecemeal appellate review would thereby be avoided.

The Court also refused to grant an exception to timely appeal requirements for "unique circumstances."

PRODUCTS LIABILITY

00660

ATLA *provides extensive coverage of products liability cases and issues in the* Products Liability Law Reporter. *Here are highlights from the April 1989 issue. More*

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

WRITER'S DIRECT DIAL NUMBER:

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 27, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 100
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of an article out of the ATLA L. Rep. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Stanton Pemberton

00661

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 103

3/1/88

Judge,

Here are the transcripts. I have with underlined those I recognize as most pertinent to "blanket authority." Note that the proposals to limit the authority to "a particular case" were not made a part of the adopted rules.

Best wishes,

Jack

CHAIRMAN SOULES: Page 58 of the supplement. We amended 103 to permit sheriffs and constables to serve throughout the State of Texas. Walter Rankin of Houston who has a lot of political influence caused this HB386 to get filed. Now, 386 doesn't say that a constable cannot serve outside his county and his contiguous counties. But it says he can serve in his county and in contiguous counties.

So, our rule only gives the constable broader jurisdiction than he gets here. And 386 does not preclude broader jurisdiction to the constable on its face. It gives him this county and the next county. And we say, yes, and the rest of the State of Texas, too.

The intent of this, as we understand it, was to restrict the constable to his county and his contiguous counties but it doesn't say that. We can do several things. We can -- under 20 -- we're going to get to this with Broadus in a minute. In 22.006 the Supreme Court has repealing power where it has rules that cover the subject matter of the statute.

Now, should we leave well enough alone here and just say this doesn't hurt what we did because

CHAIRMAN SOULES: 36?

MR. TINDALL: Okay. Let me show you what -- if you will, turn to page 36 for a minute. All of you -- I circulated this, I believe. Let me kind of review with you. Turn, if you will, to 103 for a minute on page 39 of the handout.

PROFESSOR DORSANEO: The handout?

MR. TINDALL: I mean, of the left-hand bound volume.

CHAIRMAN SOULES: The agenda.

MR. TINDALL: Yes. This gets a little tricky, but let me take you through the way I tried to do it. Rule 103, I believe, incorporates the decision of the committee last time. I've circulated it to you. And what it does is -- we've had this, I think, just about like this each time. It's any sheriff or constable that are not precinct or county limitations and anyone authorized by the Court over 18, and then we mandate service by mail, if requested, and then there is no requirement of a written motion and no fee for -- authorized for a person to serve. That's 103.

Then skip 104 for a minute and go to ~~106~~ 106.

CHAIRMAN SOULES: Okay. All in favor say "I." Unanimously rejected.

MR. TINDALL: All right. One final thing, I guess that's going do clear me up, is that Royce Coleman from Denton wrote about 103 changes. I think we've been through as much on Rule 103 as we want to deal with at this time. And I would move that his suggestion on Rule 103 be rejected.

MR. LOW: Second.

CHAIRMAN SOULES: These have all been -- these ideas have all been thoroughly discussed by this committee, have they not?

MR. TINDALL: This would be full service by anyone. And I think we have rejected that.

CHAIRMAN SOULES: Because we feel that there should be authorized and supervised people doing the job, and we have provided by rule that anybody who is authorized and supervised can do it, but we don't just want to open it to people that are not supervised. Is that essentially it?

MR. TINDALL: That's essentially it, yes.

CHAIRMAN SOULES: All right. The

PROFESSOR EDGAR: I'm not in favor of that.

MR. TINDALL: I'm not in favor of that. Luke, all I'm saying is that, you know, personal service is fine by anyone, but if you're going to leave it at the screen door with anyone over 16, then I think that's another issue that none of us have quarreled about.

MR. SPARKS (SAN ANGELO): See, Luke, that's what I'm trying to say. I'm for liberalizing direct service, but if you can't get direct, I still want the guy served. I don't want it stuck in his screen door.

MR. TINDALL: I'm not suggesting we liberalize the substituted service at last-known place of employment.

MR. SPARKS (EL PASO): What I'm going to do is, I'm going to draft a new Rule 103. If you look at Page 133, and the only difference I'm changing from Judge Marsh is when he says "a person specially appointed" to insert the word "by court order" to serve it. No affidavit; you can handle it in your petition if you want to. And that way, there's no affidavit, there's no motion and the Court can sign an order appointing a

person to serve petition. And then if anybody comes up with anything else, they can argue about it then.

CHAIRMAN SOULES: Where is that, Sam?

MR. SPARKS (EL PASO): It's on Page 133.

CHAIRMAN SOULES: 133, Rule 103, and what are you going to put in? You're going to delete the underscored and substitute something for it?

MR. SPARKS (EL PASO): No. If you look at the underscored, I'm going to say "to a person specially appointed by court order to serve it." not in rule as passed

JUDGE THOMAS: And then change 107 and make them return it under oath?

MR. SPARKS (EL PASO): Well, that was my next question. Do you want us to prepare a return under oath in that event?

PROFESSOR EDGAR: Yes.

MR. LOW: Either that or what Rusty was talking about.

PROFESSOR EDGAR: Sam, if I might ask a question. By "a person ~~specially appointed,~~" do you mean to include artificial persons in addition

to natural persons? Including process serving companies, is that your intention?

MR. SPARKS (EL PASO): You told me yesterday that "person" meant "corporation."

PROFESSOR EDGAR: That's right. But in other instances, we've used a private party or process serving company, at least, some of the proposed drafters have. And I'm wondering if you mean the word "persons" to include that class as well.

MR. SPARKS (EL PASO): I thought it would.

PROFESSOR EDGAR: Well then, why don't we say that then?

MR. BEARD: I would be opposed to that.

PROFESSOR EDGAR: But that's what we mean.

MR. BEARD: We use "adult person" here.

PROFESSOR EDGAR: Well then, we don't mean process serving companies. That's what I'm trying to find out.

MR. SPARKS (EL PASO): I think unless you change "person" though -- I was convinced

be "by any disinterested adult person."

MR. SPARKS (EL PASO): You don't really need "person." You need "disinterested adult."

CHAIRMAN SOULES: "Disinterested adult."

MR. TINDALL: "Authorized by court order."

CHAIRMAN SOULES: "Authorized by court order."

MR. TINDALL: Yes. "Authorized by court order."

CHAIRMAN SOULES: Now, we're going to have process servers trying to get blanket orders. Is that what we're intending to facilitate?

MR. LOW: I don't think that's --

CHAIRMAN SOULES: Okay. Then I think we need specially-appointed language in there.

PROFESSOR EDGAR: Specially authorized?

MR. TINDALL: If you're authorized, you're going to be by an order of the court.

CHAIRMAN SOULES: Now, what were you saying there, Harry? By any adult authorized by court order?

MR. TINDALL: Yes.

CHAIRMAN SOULES: "Any disinterested adult authorized by court order to serve."

PROFESSOR EDGAR: Well, now, the sentence starts out in the plural, "all the process," and now we're talking about "it."

MR. MCCONNICO: Just say "serve process."

CHAIRMAN SOULES: In a particular case?

MR. TINDALL: Yes. That kills off the idea of a standing order.

MR. SPARKS (EL PASO): I move for the adoption of that.

MR. TINDALL: I second it.

CHAIRMAN SOULES: "All process may be served by the sheriff or any constable of any county in which the party to be served is found or by any disinterested adult ~~authorized by court~~ order to serve process in a particular case or if by mail --"

not in particular case

MR. SPARKS (EL PASO): We've amended that already, so just stop this amendment right there.

CHAIRMAN SOULES: What did we amend it

to, though?

PROFESSOR EDWARDS: What you need to do is add the language we're going to add and add it to the last part of the sentence. Because, you see "if by mail, either of the county" refers back to the sheriff or constable.

So the language to be inserted should be inserted at the end of the sentence rather than the beginning of it.

CHAIRMAN SOULES: Let's go ahead. We may clean it up, but if we say "or if by mail, either by the sheriff or any constable of the county --"

"Service by registered or certified mail and citation by publication shall be made by the clerk."

MR. SPARKS (EL PASO): Yes, we've already made that change.

CHAIRMAN SOULES: Now, does everybody have the focus of this now?

MR. MCCONNICO: One question. Hadley, do you think the use of the word "adult" eliminates the professional process serving companies?

PROFESSOR EDGAR: No, but I think it

eliminates the company being designated. By "adults," you're talking about a human being. But it would not eliminate a person who is an employee of a process serving company. But it would still have to be in each particular case.

CHAIRMAN SOULES: All in favor of 103 as now proposed, show by hands. Okay. Those opposed? That's unanimous. And it's the version that we've worked on at the top of Page 133. And as I understand the tenor of subsequent conversations, you do not want to delete that language from 106b that we first talked about. You still want that as predicate to 16-year old service or any or manner; is that correct?

MR. SPARKS (EL PASO): Yes.

CHAIRMAN SOULES: Okay. So that will be changed.

PROFESSOR EDGAR: There's some confusing language here in this 103 we just looked at. It says, "either by the sheriff or constable of the county in which the case is a party." We don't mean that.

MR. MCCONNICO: Well, I thought that's what was changed and talked about.

MR. TINDALL: Could you read 103 as we

MR. TINDALL: All of you should have two 103s. If you don't have two 103s, raise your hand. There should be one that strikes "officer," and then one from Sam that just says -- I think you didn't change the caption.

MR. SPARKS (El Paso): That's right, I should have.

MR. TINDALL: And then there is a 107 I'm passing out.

MR. SPARKS (El Paso): Let me briefly go over what we have done. In November of '85, we changed 103 to require the district -- to require the clerk to send out the citation by certified mail mandatory upon the request of the attorney. That has been voted on. Then we got into the 103/106 area as to who can serve and who can do that, and I think the only real issue left on the 103 is the issue of professional process servers or who, in addition to a sheriff, constable or clerk, can accomplish the service.

And there are really two different proposals that come in. One is what I'm going to refer to as purely the federal, the federal rule, which allows anybody over 18 to serve without a court order. And then a lot of proposals came in to

allow anybody under the federal rule -- but having it on application of motion and order. So that's -- and then we had several that came in that specifically allowed professional process servers. But it seems to me, anybody over 18 years of age, whether they be appointed by motion and order, would take care of that, too.

So I really think the only thing remaining on Rule 103 is whether or not you want service by anybody over 18 years of age, and, if so, do you want a motion and an order, or do you want it just like the federal rules? Most of the people that have looked at this rule favor the adoption of the federal practice not requiring a motion or order.

MR. REASONER: I move we adopt the federal practice.

MR. TINDALL: Well, which one is that? I drafted mine a little bit different --

MR. SPARKS (El Paso): It's yours.

MR. TINDALL: It's mine. Okay.

MR. REASONER: It's the one where you don't have to get a motion or order for anybody over 18.

MR. TINDALL: That's right. But you can't have an -- without an order of the court,

it. I thought that Sam indicated that was a live issue.

CHAIRMAN SOULES: Okay.

MR. SPARKS (El Paso): I thought it was, but then we're looking at the double-spaced version of 103.

JUDGE THOMAS: Well, actually, yours didn't call for a motion in the double-spaced version.

MR. TINDALL: No, mine does not call for a motion. I thought the consensus of the committee was you wouldn't have to have a motion to get private service. You had to have an order of the court --

CHAIRMAN SOULES: Order of the court, that's right.

MR. TINDALL: -- without having to go and present a written motion for it.

CHAIRMAN SOULES: That's correct.

MR. TINDALL: I wrote here, "The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for the issuance of such order."

CHAIRMAN SOULES: That's correct.

MR. TINDALL: So it's just like an

one.

PROFESSOR EDGAR: If this is what we mean to say -- well, first of all, we're talking here about personal service, aren't we?

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: Why don't we say "All process may be personally served by any sheriff or constable or by any person not a party who is not less than 18 years old -- 18 years of age and appointed by motion and order."

MR. WELLS: It doesn't take a motion.

PROFESSOR EDGAR: Well, okay. You've striken "motion" -- "and is appointed by order."

CHAIRMAN SOULES: "Authorized by written court order."

PROFESSOR EDGAR: "Authorized by written order."

MR. REASONER: That's redundant, isn't it?

CHAIRMAN SOULES: Well, "personally served," I think is, too. Why not "personally served"?

PROFESSOR EDGAR: "May be personally served by any sheriff or constable."

CHAIRMAN SOULES: Does that add

about citation.

CHAIRMAN SOULES: But that's the way it is now done and you're going to --

MR. TINDALL: That's right. And we're going to address that --

CHAIRMAN SOULES: You're going to look at that for --

MR. TINDALL: We have in our county a precept, which I am told exists in no other county. You talk to a lawyer in Dallas, and they have never heard of a precept. Do you have them in Lubbock, Hadley -- precepts?

PROFESSOR EDGAR: Oh, we speak of little else there, Harry.

MR. TINDALL: A precept -- I don't quite know what that creature is, but Ray Hardy issues them frequently.

PROFESSOR EDGAR: What is it?

MR. TINDALL: It's a show cause. We call them precepts, but -- so I don't know what all that whole area of process includes -- injunctions, TROs, show causes. I mean, that's sort of a lot of loose language.

PROFESSOR DORSANEO: All process is a command to act.

by hands. Opposed? That's unanimously approved.

PROFESSOR DORSANEO: Do you have any changes for Rule 106 recommended, Harry, that conforms?

MR. TINDALL: I'm going to defer to Sam Sparks. I did not address 106, but I think we've got a rule suggestion pending in the Supreme Court right now on 106, do we not, Sam, that would delete the -- 106 deals with a whole host of other issues that we have not really addressed here in 103 and 107 about authorizing individuals to serve papers. It deals with -- if you have attempted service, then you might try to go ahead and leave it at the doorstep at the place of business. And it goes into other issues that we have not really addressed here.

PROFESSOR DORSANEO: But 106 is -- the three rules that work together are 103 -- at least most of the time -- 103, 106, and 107. And the meat in the coconut is in 106.

MR. TINDALL: Well, for the difficult defendant who you truly cannot find, the sheriff has been out, and we can't find, we want to leave it on his door.

PROFESSOR DORSANEO: That's the second

MR. TINDALL: That's right.

PROFESSOR DORSANEO: -- but would give you a different way to do it by tacking it on their door or leaving it with their kids, et cetera. Now, that would work. And I would move the changes in Rule 106 by changing in the introduction in 106a the word "officer" to "person," and by eliminating in 106b(1) the words "by an officer or by any disinterested adult named in the court's order."

MR. TINDALL: All right, I would -- Luke, let me -- and I think that covers it. Do you not agree, Bill?

PROFESSOR DORSANEO: Yeah. The only thing I'm worried about is whether we need to go back and rethink 107 about this -- there was an additional requirement in 106b about this authorized -- this disinterested person being named in the order, you see? There's a requirement there, not only that there be an order but that the order have the name of the person rather than the XYZ Publication Process Serving Company.

MR. TINDALL: I understand, yeah. Let's take one at a time. The first thing -- I

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 21a, 103 and 120(a)
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 21a, and 103. Also enclosed please find a copy of a letter from Robert F. Watson regarding Rule 120(a). Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Stanton Pemberton
Mr. Robert F. Watson

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

rules

The Forty-third Judicial District Court

Weatherford, Texas 76086

JAMES MULLIN
JUDGE

May 3, 1989

Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

RE: Rule 103 -- Service of Process by Individuals
Need for Changes, Etc.

Gentlemen:

Permit me to offer a couple of observations and suggestions concerning Rule 103, insofar as it authorizes individuals to serve citations, etc., after written Order authorizing same. Perhaps you know all of this, but I feel some obligation to speak up to be sure that it is called to your attention.

First, it seems inappropriate to deny the District Clerk (the County) the right to charge a fee for this service. The 1988 change has drastically increased our paperwork. My suggestion would be $5.00 per Order (i.e. $5.00 per citation).

Second, I am concerned as to the responsibility of the Court in evaluating these requests. The rule provides no criteria as to the sort of person who may serve the Order. This appears to put the District Court in the position of having no authority to deny any request. What we have done (and what several other Courts have done) is to establish some ad hoc rules such as requiring a drivers' license, street address, etc. This situation could be improved in various ways. For example, the authorization could be handled by someone in Austin, who would make a genuine effort to keep up with all these people and perhaps issue an annual license. That would consume some time and would be some trouble, but as it is now we're the ones that are having to do it without any authorization to charge for the work or any guidance as to what may be required of someone seeking to serve papers.

Another practical problem is that many people we have never before even heard of are now serving papers. If some question comes up a year from now about whether the papers were properly served, I seriously doubt anybody will know how to find these people. Does anybody care about that? I care, because I don't want the dignity or credibility of this Court to suffer on account of a slip-shod procedure. Notice of pending litigation

is a keystone to the integrity of the judgment that is eventually entered. Up to now we have had no complaints of ficticious return or irregular service. But I have a hunch that it will come up before long.

The next problem I'd like to mention is that we have had requests for Texas and foreign corporations to be designated as being authorized to serve papers. This carries the matter to an extreme that illustrates the underlying problem. I have no information about the corporation, do not know who owns it or runs it, and do not know whether it will be in existance a year or five years from now. Does anyone care? If the Supreme Court tells us that any Notary Public may serve papers or anyone with a drivers' license may serve papers, I can live with that procedure. But when you ask me to sign an Order authorizing these unknown persons and unknown corporations to serve papers, it puts the monkey on my back to a certain extent.

This is a good example of a situation in which a uniform state procedure would benefit everyone concerned. It is my understanding that local procedures are beginning to vary drastically. They will continue in that direction until the Supreme Court clarifies or improves the rule. I ask you to consider doing that.

Yours very truly,

Jim Mullin

James O. Mullin
District Judge

JOM/mbm

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

May 9, 1989

Honorable James Mullin, Judge
43rd Judicial District Court
County Courthouse
Weatherford, Texas 76086

Dear Judge Mullin:

Your letter to the court about Rule 103, Texas Rules of Civil Procedure, has been given to me for reply.

Because I keep getting phone calls about it and how it works, I have followed this Rule with more attention than I desired.

Your comment that there is variation from county to county is, I believe correct. Perhaps this is a problem. Your comment in the third paragraph of your letter that the District Court has no authority to deny any request of a person to serve citation is, I believe, clearly not correct. In fact, many judges will not sign any orders authorizing persons other than deputy sheriffs and constables to serve citation.

Other judges, so I am told, will sign an order which authorizes John Smith to serve citation in the case of Jones v. Brown, i.e., a separate order for each case. Still other judges, I am told, will sign an order authorizing John Smith to serve any citation which issues from that judge's court. In the latter two cases, the judge will presumably have satisfied himself of the character, credentials, training and whatever of the person authorized to serve. I agree that this can be time consuming.

I agree that, when we come to the bottom line, you have to decide who is going to accomplish service, and you may not always have time to make those decisions. There are at least two bills now pending before the Legislature, one backed by those sheriffs and constables who want service to be their exclusive duty and one backed by the private process servers. It is my understanding that this latter bill would place certification or licensing under the Secretary of State. Perhaps this bill would satisfy your concerns, though I hasten to add that I have not read either.

As I am sure you know, this business of serving citation lends itself to being a political football. Some sheriffs and constables cling tenatiously to service of process and I am sure some do it well. I am told that others are not interested in doing it and more or less welcomed Rule 103. Your comments in your letter on how the Rule has drastically increased your paperwork suggest either that your sheriff and constables are not interested or have not in the past provided the kind of service which has satisfied your local bar.

Finally, your letter will go to the Court's liaison Judge on the Advisory Committee on Rules, Justice Hecht, for consideration by that body.

Thank you for sharing your thoughts and concerns with this Court.

Sincerely,

William L. Willis
Executive Assistant

WLW/ked

Rule 106. Method of Service.

(a) (No change.)

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place ~~of~~ of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempting under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) (No change.)

(2) (No change.)

Amendment

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

February 9, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rules 21(a), and 106(b)

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Judge Michol O'Connor regarding changes to Rule 21(a) and a copy of a letter from Professor Dorsaneo regarding changes to Rule 106(b). Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

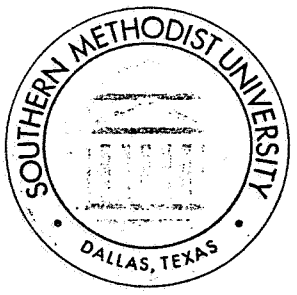
Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Michol O'Connor

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW



February 2, 1989

HJH -
Scan Sub
Copy
Scan Agenda
Xc Rossini

Luther H. Soules III
Soules & Wallace
Republic of Texas Plaza
175 East Houston St.
San Antonio, Texas 78205 2230

Re: Tex. R. Civ. P. 106(b)

Dear Luke,

Another monster lurks below the surface in typographical form. Please note that the rule referenced above as published by West does contain the mistake addressed in Mr. Rossini's enclosed letter.

Best wishes,

Bill

William V. Dorsaneo, III

WVD/ss

00689

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

Rubinstein & Perry
ATTORNEYS • AT • LAW

A Partnership Of Professional Corporations

AUSTIN
DALLAS
FOSTER CITY
LOS ANGELES

Russell H. Perry (1908-1988)

3232 LINCOLN PLAZA
500 NORTH AKARD STREET
DALLAS. TEXAS 75201
(214) 740-4600
TELECOPY (214) 740-4646

January 31, 1989

Professor William Dorsaneo
Southern Methodist University
School of Law
3315 Daniel St.
Dallas, Texas 75275-0116

Re: Texas Rule of Civil Procedure 106 subpart b

Dear Professor Dorsaneo:

Just a note to inform you of a typographic error in Tex. R. Civ. P. 106(b) in case it has not been otherwise brought to your attention. The rule currently states that an affidavit must state the location of the "defendant's usual place of business or usual place or abode"; this should probably read usual place of abode. Given the strictness with which the courts interpret this rule, many defaults could currently be subject to reversal based on "usual place of abode" affidavits.

Thank you.

Sincerely,

Murray J. Rossini
SMU School of Law
Class of 1986

MJR/abk

00690

Rule 107. Return of Citation

(No change.)

(No change.)

No default judgment shall be granted in any cause until the citation[, or process under Rule 108a,] with proof of service as provided by this rule [or by Rule 108a], or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

Orig to file 5-3-88 tgl

GEORGE M. THURMOND
District Judge
P. O. Drawer 1089
Del Rio, Texas 78841 - 1089
512 774-3611 - Ext. 231

JOHN R. PRICE
Official Court Reporter
P. O. Box 1156
Del Rio, Texas 78841 - 1156
512 774-3611 - Ext. 233

BLANCA S. BRIONES
Court Coordinator-Administrator
P. O. Drawer 1089
Del Rio, Texas 78841 - 1089
512 774-3611 - Ext. 232

SIXTY-THIRD JUDICIAL
DISTRICT OF TEXAS

COUNTIES COMPRISING
63RD JUDICIAL DISTRICT:

EDWARDS (ROCKSPRINGS)
KINNEY (BRACKETTVILLE)
TERRELL (SANDERSON)
VAL VERDE (DEL RIO)

3/4
HJ H
SCAC Subc
+ Agenda.

April 19, 1988

Mr. Doak Bishop
Committe on Administration of Justice
2800 Momentum Place
Dallas, TX 75201

RE: Amendment to Rule 107

Dear Doak;

I propose the following amendment to Rule 107, to clearly provide that a default judgment can be obtained where the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108a. The amendatory language I propose is underlined.

> "No default judgment shall be granted in any cause until the citation, or process under Rule 108a, with proof of service as provided by this rule or by Rule 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment."

I have reservations about adding these references to Rule 108a to any wording in the first paragraph of Rule 107, which concerns the return of citation. Rule 108a (2) concerns proof of service of foreign process, and in my opinion quite adequately covers the subject.

This will be part of the Rules 1 - 165a subcommittees report to our May 7th final meeting.

Yours truly,

George M. Thurmond
District Judge

cc: Don Dean
Tom Goggan
Evelyn Avent

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 3, 1988

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Re: Amendment to Rule 107

Dear Sam:

Please find enclosed a copy of a letter sent to Doak Bishop from Judge George M. Thurmond regarding an amendment to Rule 107. Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

00693

157

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
JEB C. SANFORD
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

TELEPHONE
(512) 224-9144

TELECOPIER
(512) 224-7073

May 26, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: COAJ Proposals
TRCP 101, 107, 157

Dear Sam:

The Committee on Administration of Justice met on May 16, 1987. I have enclosed drafts of the proposed new rules/rule amendments that they approved that fall within your subcommittee, and will be including same in our June agenda.

These drafts are included for your information only, and no further drafting is required unless you feel it is necessary.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
encl/as

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 21, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 107

Dear Luke and Doak:

I am enclosing a letter from Mr. D. Fred Micks of Galveston, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. D. Fred Micks
Martin, Cruse, Micks, Garza & Bunce
1100 Rosenberg
Galveston, TX 77550

00695

TRCP 107

MARTIN, CRUSE, MICKS, GARZA & BUNCE
ATTORNEYS AT LAW
1100 ROSENBERG
GALVESTON, TEXAS 77550

GEORGE D. MARTIN
LEONARD A. CRUSE*
D. FRED MICKS*
CARLOS GARZA
ROBERT E. BUNCE

LESLIE DEAN GUHL
JOHN A. ELLISOR, JR.

*BOARD CERTIFIED PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

GALVESTON
(409) 765-5705
HOUSTON
(713) 488-7929

September 16, 1987

Re: Order Amending Texas Rules of Civil Procedure

Ms. Mary Wakefield
Clerk of the Supreme Court
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Ms. Wakefield:

In reviewing the Order of the Supreme Court of Texas Adopting and Amending the Texas Rules of Civil Procedure effective January 1, 1988, as such Order was published in the September 1987 issue of the Texas Bar Journal, I noticed what may be a misprint.

At amended Rule 107, isn't the first reference to Rule 106 intended to be a reference to Rule 103.

Very truly yours,

D. Fred Micks

DFM: clr

00696

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 21a, 103 and 120(a)
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 21a, and 103. Also enclosed please find a copy of a letter from Robert F. Watson regarding Rule 120(a). Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Stanton Pemberton
Mr. Robert F. Watson

LAW OFFICES OF
LAW, SNAKARD & GAMBILL
A PROFESSIONAL CORPORATION
3200 TEXAS AMERICAN BANK BUILDING
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102
AREA 817 335-7373
METRO 429-2991
TELECOPY 332-7473
DIRECT DIAL NUMBER:
878-6374

THOS. H. LAW
BAYARD H. FRIEDMAN
ROBERT M. RANDOLPH
WILLIAM M. TILLEY, JR.
SAMUEL A. DENNY
WALTER S. FORTNEY
ROBERT F. WATSON
KENT D. KIBBIE
JOE SHANNON, JR.
DENNIS R. SWIFT
MARVIN CHAMPLIN
JAY S. GARRETT
G. THOMAS BOSWELL
JAMES W. SCHELL
WILLIAM F. McCANN
MICHAEL L. MALONE
ALAN WILSON
WALKER FRIEDMAN
ROBERT W. BLAIR

ED HUDDLESTON
JONATHAN G. KERR
VERNON E. REW, JR.
A. BURCH WALDRON, III
GARY L. INGRAM
JOHN W. McNEY
LARRY BRACKEN
H. ALLEN PENNINGTON, JR.
JAMES C. GORDON
GEORGE PARKER YOUNG
STEVEN D. GOLDSTON
PAMELA ARNOLD BASSEL
LINDA K. GOEHMAN
CAROL WARE DAVIDSON
DABNEY D. BASSEL
ELIZABETH P. STURDIVANT
HUGH A. SIMPSON
LYNN M. JOHNSON
JOHN L. BECKHAM

RICK WEAVER
KATHERYN M. MILLWEE
W. BRADLEY PARKER
ED FARRAR
ROBERT C. BEASLEY
B. BLAKE COX
KELLEY B. HILL
KENNETH N. STRINGER
MARK S. PFEIFFER
BONNIE VON ROEDER
STEVEN M. SMITH
MICHAEL P. SCHUTT
JOSEPH C. SCHMITT
MICHAEL T. COOKE
LEE F. CHRISTIE
*JOHN A. KOBER
KERN A. LEWIS

JOHN E. KOEMEL, JR.
BRENDA LOUDERMILK
KENT R. SMITH
TODD P. KELLY
JAMES H. CHEATHAM IV
JAY K. RUTHERFORD
STEPHEN G. WILCOX
M. ELAINE BUCCIERI

OF COUNSEL

RICE M. TILLEY
ROBERT F. SNAKARD
LAWTON G. GAMBILL
HARRY HOPKINS

*LICENSED IN A STATE OTHER THAN TEXAS

May 15, 1989

5/16 HJH, Sc/Ac Subc + Agenda.

FEDERAL EXPRESS

Mr. Luther H. Soules, III
Advisory Committee Liaison
10th Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78705-2230

Re: TRCP Rule 120a. Special Appearance

Xc Watson

Dear Luther:

As you know, because the proposed amendment to Rule 120a was considered for the first time by the subcommittee on Rules 1-165a at the meeting on Saturday, there has been no opportunity to have the entire committee consider and vote on any such amendment. However, the subcommittee suggests that the following language be added to paragraph "2" of Rule 120a at the end of that paragraph:

> In deciding any such motion, the Court may consider deposition transcripts, interrogatory answers, other discovery responses, pleadings, admissions, affidavits, stipulations of the parties, authenticated or certified public records as well as oral testimony.

With the exception of the reference to "oral testimony", the remaining language is borrowed from Rule 166a(c). The subcommittee unanimously concluded that the trial court should be able to consider the information listed above in addition to oral testi-

mony when deciding this jurisdictional issue. If we can be of any further assistance in this matter please let us know.

Sincerely,

Robert F. Watson, Chairman
Subcommittee-TRCP Rules 1-165a.

RFW/pg#6
TRCP.1

cc: Mr. Thomas S. Goggan, III
416 Littlefield Road
Austin, Texas 78701

Judge Don M. Dean
P. O. Box 9158
Amarillo, Texas 79105

Mr. Jack Tidwell
P. O. Drawer 1311
Odessa, Texas 79760

Mr. Jeffrey C. Elliott
P. O. Box 1049
Texarkana, Texas 75504-1049

Mr. Tom Garner, Jr.
P. O. Drawer J
Port Lavaca, Texas 77979

Judge Stanton B. Pemberton, Chairman
Committee on Administration of Justice
Bell County Courthouse
P. O. Box 747
Belton, Texas 76513-0969

Evelyn A. Avent
Secretary, Committee on Administration of Justice
State Bar of Texas
P. O. Box 12487
Austin, Texas 78711

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 11, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 120a
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find suggested changes to Rule 120a. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Justice Stanton Pemberton

00700

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Another project that will be taken up by the Supreme Court in the coming year is the preparation of model local rules for the district courts around the state. We have been asked for our input and we will need to establish a subcommittee to undertake this project.

I will appoint subcommittees, and chairmen of these subcommittees, in the near future. If you have a strong interest in serving on a particular subcommittee, please contact me as soon as possible at: Hughes & Luce, 1000 Dallas Building, Dallas, Texas 75201.

Some of the specific projects that I have in mind for our consideration this year include the following:

1. Consider amendment of the Committee's Bylaws to permit a quorum to consist of 1/3 of our members instead of a majority. In the past, this has not been a problem, but only beca ignored it.

2. Consider clarifying the 30 an Rule 168 to make application uniform.

3. Consider the continued viabilit Try Title rules.

4. Consider amendment of the rule clear) that affidavits can be u ruling upon discovery disputes.

5. Consider amending the rules procedures to be followed b privilege and relevancy obje discovery requests.

6. Consider amendment of Rule 12(of affidavits on the jurisdicti

7. Consider the adoption of a Committee requiring the subm written report in support of change so that the Committee reviewed by the Supreme Court along with the proposed change.

11 to 5 request
Email appointment

4/10

H J H,
CAJ
Send a
Letter of Hearst

Another project that will be taken up by the Supreme Court in the coming year is the preparation of model local rules for the district courts around the state. We have been asked for our input and we will need to establish a subcommittee to undertake this project.

I will appoint subcommittees, and chairmen of these subcommittees, in the near future. If you have a strong interest in serving on a particular subcommittee, please contact me as soon as possible at: Hughes & Luce, 1000 Dallas Building, Dallas, Texas 75201.

Some of the specific projects that I have in mind for our consideration this year include the following:

1. Consider amendment of the Committee's Bylaws to permit a quorum to consist of 1/3 of our members instead of a majority. In the past, this has not been a problem, but only because we have always ignored it.

2. Consider clarifying the 30 answer requirement in Rule 168 to make application of the rule more uniform.

3. Consider the continued viability of the Trespass to Try Title rules.

4. Consider amendment of the rules to permit (or make clear) that affidavits can be used by the courts in ruling upon discovery disputes.

5. Consider amending the rules to make clear the procedures to be followed by each party when privilege and relevancy objections are made to discovery requests.

6. Consider amendment of Rule 120a to permit the use of affidavits on the jurisdictional issue.

7. Consider the adoption of a practice for our Committee requiring the submission of a brief written report in support of each proposed rule change so that the Committee's reasoning can be reviewed by the Supreme Court Advisory Committee along with the proposed change.

4/10

HJH,
COAJ
Sam Sparks
Orsinger
Dorsaneo
Hatchett

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) Commencement. An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) (No change)

(2) Petition. The petition shall include this information and be in this form:

(A) (No change)

(B) If any judge, court, tribunal or other person or entity in the discharge of duties of a public character is [illegible] required by law to be made a party, the petition shall disclose the names of the parties to the cause below and the real parties in interest, if any, [illegible] whose interests would be directly affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the judge, court, tribunal, or other person or entity acting in the discharge of duties of a public character, name as petitioner and respondent the parties to the cause below who would be affected by the proceeding, according to their respective alignment in the Rule 121 matter. The body of the petition shall state the name and address of each petitioner and respondent, including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character, and each party to the cause below who would be affected by the proceeding, and real party in interest [illegible] whose interest would be

directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of a public character.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 13, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Changes to Rule 87 and Rule 121
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find redlined versions of Rules 87 and 121. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

00704

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) Commencement. An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) (No change)

(2) Petition. The petition shall include this information and be in this form:

(A) (No change)

(B) If any judge, court, tribunal or other person or entity [respondent] in the discharge of duties of a public character is ~~named as petitioner or respondent~~ in the petition, ~~it [the petition]~~ shall ~~also~~ disclose the names of the parties to the cause below and the real parties in interest, if any, ~~[or the party]~~ whose interests would be directly affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the ~~actual petitioner or respondent~~, name as ~~petitioner~~ or respondent the parties to the cause below who would be affected by the proceeding, according to their respective alignment in the matter. The petition shall state the name and address of each petitioner and respondent and each party to the cause below who would be affected by the proceeding, and real party in interest ~~[and party]~~ whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of a public character.

Copy to LHS
Orig. to file
4-12-88 hjh

CLARK, GORIN, RAGLAND & MANGRUM
ATTORNEYS AT LAW
218 NORTH 6TH STREET
P.O. BOX 239
WACO, TEXAS 76703

AREA CODE 817
752-9267

GEORGE CLARK
OF COUNSEL

LEONARD L. GORIN
OF COUNSEL

TOM L. RAGLAND
CERTIFIED SPECIALIST
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

BOYD MANGRUM
CERTIFIED SPECIALIST
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

KIM B. YOUNG
CERTIFIED SPECIALIST
ESTATE PLANNING AND PROBATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

SHERYL S. SWANTON

ALLEN D. WRIGHT

HJH,
Supreme Court Advisory Committee
Agenda
Xc to LHS.

April 11, 1988

Mr. Luther H. Soules, III
Attorney at Law
800 Milam Bldg.
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee;
Section 31.007, Civil Practice and Remedies Code;
Section 51.604, Government Code

Dear Luke:

I enclose copies of the above Statutes which appear to me to be in conflict with the Texas Rules of Civil Procedure.

I don't understand the purpose of Section 31.007, Civil Practice and Remedies Code, but it appears to be in conflict with the duties of the District Clerk. See generally Section 51.301, of the Government Code.

Section 51.604 of the Government Code seems to be in general conflict with Section 6 of the Texas Rules of Civil Procedure, beginning with Rule 125, and specifically Rule 216 regarding the amount of jury fees and the time in which they must be paid.

The following questions occur to me:

Are the above Statutes in conflict with the Rules of Procedure?

Did the recent amendment to the Rules of Procedure repeal those Statutes?

If not, should the Statutes be repealed?

I see a potential for some serious problems, especially between Section 51.603 and Rule 216. I recently filed a suit in Harris County. I calculated the court cost deposit in accordance with Section 51.317, Government Code and Rule 216 and sent along my check. The clerk refused to file the petition until I sent an additional $10.00 for a jury fee as required by Section 51.604.

Fortunately, I did not have a limitations problem and the harm

was more in the nature of annoyance. However, had the statute of limitations run on my cause of action while the Plaintiff's Original Petition was resting in the clerk's office of Harris County, the problem would have become real and substantial.

If you think this situation needs to be addressed by this committee, or the Supreme Court without intervention of the committee, I trust you will foward this along to the appropriate sub-committee, or to Justice Kilgarlin.

Sincerely,

Tom L. Ragland

TLR/dub
Enclosure

§ 51.603. Destruction of Records

A district clerk or a county clerk may destroy by shredding any records, ballots, stubs, lists, or papers that the clerk is authorized or required to destroy by burning.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.

Historical Note

Prior Law:

Acts 1971, 62nd Leg., p. 2452, ch. 792.
Vernon's Ann.Civ.St. art. 1901a.

§ 51.604. Jury Fee in Certain Counties

Text of section as added by Acts 1987, 70th Leg., ch. 897, § 1

(a) This section applies only to counties with a population of two million or more.

(b) The district clerk shall collect a $20 jury fee for each civil case in district court in which a person applies for a jury trial. The clerk of a county court or statutory county court shall collect a $17 jury fee for each civil case in those courts in which a person applies for a jury trial. The clerk shall note the payment of the fee on the court's docket sheet.

(c) The fee required by this section must be paid by the person applying for a jury trial not later than the 10th day before the jury trial is scheduled to begin.

(d) The fee required by this section is in addition to the jury fee required by Rule 216, Texas Rules of Civil Procedure, and any other fee allowed by law or rule.

Added by Acts 1987, 70th Leg., ch. 897, § 1, eff. June 19, 1987.

For text of section as added by Acts 1987, 70th Leg., ch. 345, § 1, effective January 1, 1988, see § 51.604, post

Historical Note

Section 2 of Acts 1987, 70th Leg., ch. 897 provides:

"This Act applies only to fees for jury trial for cases for which a person applies for a jury trial on or after the effective date of this Act. The fees for jury trials for which the application was made before the effective date of this Act are governed by the law in existence on the date the application was made, and that law is continued in effect for that purpose."

§ 51.604. Continuing Education

Text of section as added by Acts 1987, 70th Leg., ch. 345, § 1, effective January 1, 1988

(a) Whenever the word "clerk" is used in this section, it shall refer to a county clerk, a district clerk, or a county and district clerk.

PRACTICE AND REMEDIES CODE

SECTION 3. Chapter 31, Civil Practice and Remedies Code, is amended by adding Section 31.007 to read as follows:

Section 31.007. PARTIES RESPONSIBLE FOR ACCOUNTING OF OWN COSTS:

(a) Each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, if the judgment is to provide for the adjudication 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.

(b) A judge of any court may include in any order or judgment all 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) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and

(4) such other costs and fees as may be permitted by these rules and state statutes.

SECTION 4. This Act takes effect September 1, 1987, and applies only to actions filed on or after that date.

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

April 19, 1988

Professor J. Hadley Edgar
Texas Tech University School of Law
P.O. Box 4030
Lubbock, Texas 79409

RE: Tex. R. Civ. P. ~~216~~ 125

Dear Hadley:

Enclosed please find a copy of a letter I received from Tom L. Ragland regarding Rule 216. Please be prepared to report on this matter at our next SCAC meeting. I will include this matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luke Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Mr. Tom L. Ragland

00710

RULE 136. Briefs of Respondents and Others.

(a) Time and Place of Filing. (No change)

(b) Form. (No change)

(c) Objections to Jurisdiction. (No change)

(d) Reply and Cross-Points. (No change)

(e) Reliance on Prior Brief. (No change)

(f) Amendments. (No change)

(c) Extensions of Time. An extension of time may be granted for late filing in the Supreme Court of respondent's brief if a motion reasonably explaining the need therefor is filed with the Supreme Court not later than fifteen days after the last date for filing the brief.

MICHOL O'CONNOR
P. O. BOX 25337
HOUSTON, TEXAS 77265
(713) 665-3950

August 17, 1987

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

Re: Extensions to time to file respondent's brief and to file a motion for rehearing in the Supreme Court.

Dear Luke,

The Texas Rules of Appellate Procedure do not have any provision for extension of time to file the respondent's brief or to file the motion for rehearing in the Supreme Court. The last time I needed an extension of time to file a motion for rehearing in the Supreme Court, one of the clerks told me that the Court grants the motions even though there is no provision for them. In order to be safe, I filed a skeleton motion for rehearing and then amended it.

I suggest that we amend Rule 136, "Briefs of Respondents and Other," and Rule 190, "Motion for Rehearing," to provide for extensions. I have enclosed drafts of the two proposals.

I appreciated getting copies of the new rules. I needed them for a paper for the appellate program in October. Thanks again.

Yours truly,

Michol O'Connor
MO'C/mb

Enclosure

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 31, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

Re: Proposed Change to Rule 145

Dear Mr. Beck:

I have enclosed a copy of a letter sent to me from Justice William W. Kilgarlin regarding a suggested change to Rule 145. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Honorable Antonio A. Zardenetta

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

August 17, 1988

Hon. Antonio A. Zardenetta
111th Judicial District
Laredo, Texas 78040

Dear Judge Zardenetta:

I am in receipt of your letter of May 19, 1988 regarding the proposed changes to the Rules of Civil Procedure, and I appreciate your taking the time to write.

I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

Antonio A. Zardenetta
DISTRICT JUDGE
111TH JUDICIAL DISTRICT
LAREDO, TEXAS 78040
AC 512 / 727-7272

May 19, 1988

Hon. William Kilgarlin
Associate Justice
Supreme Court of Texas
Supreme Court Building
Austin, TX 78701

Mr. Doak R. Bishop, Chairman
State Bar Committee Administration
of Justice Committee
2800 Momentum Place
1717 Main
Dallas, TX 75201

Re: Advisory Committee on the Rules of Civil and Appellate Procedure
Texas Rules of Civil Procedure 145 Affidavit of Inability
Texas Rules of Appellate Procedure 40--Appeal in Civil Cases
Texas Rules of Appellate Procedure 53(j)--Free Statement of Facts

Dear Judge Kilgarlin and Mr. Bishop:

I have encountered a problem with regard to Texas Rules of Civil Procedure 145, Affidavit of Inability, and Texas Rules of Appellate Procedure No. 40 Appeal in Civil Cases, and No. 53(j), Free Statement of Facts; all, of course, with regard to Civil Proceedings. Recently, my Court Reporter prepared a Statement of Facts for an Indigent Party whom the Court determined to be Indigent, after a hearing for that purpose, by virtue of Texas Appellate Procedure Rule 40. The cost of the Statement was substantial. The Court Reporter's request for payment was rejected by the County, as per Texas Appellate Procedure Rule 53(j). This past week, we had another similar situation, and I can readily foresee numerous other cases proceeding in the same fashion, either because of T.R.C.P. 145, or that rule, if construed together with Texas Rules of Appellate Procedure Nos. 40 and 53(j).

I do not mean, by any means, to deprive parties who are genuinely indigent of their just and lawful right to access to our courts. I am, however, having a more difficult time comprehending the inequity, to say the least, of compensation for services rendered to reporters in criminal proceedings but not for civil litigation. Also, does the Pauper's Affidavit, under Rule 145, serve as a the basis, in whole or in part, for the Appellant's alleged indigency for the hearing called for under Appellate Procedure Rule 40, or may that indigency hearing proceed anew with the burden of proof, as called for under the rule? If it does, then, under Appellate Procedure Rule 40, the Court Reporter would conceivably be contesting that Affidavit, and/or others, for the first time. But, irregardless, if indigency is established, the result is the same--Appellate Procedure Rule 53(j) denies the Reporter any compensation for what can easily be voluminous and costly Statements of Facts.

Another query is whether, under T.R.C.P. 145, the Court can compel payment of court costs, including those of the Indigent Party, by any non-indigent party, including the Defendant, before Judgment; or only by the prevailing party, after Judgment and in the latter instance, that would include the indigent party, assuming a substantial monetary award was granted to cover court costs. If the Court can, prejudgment, compel payment of court costs by any non-indigent party, the County, through the District Clerk, could conceivably and as a matter of course and procedure, derive some of these costs, otherwise unpaid by the indigent party(ies). And the same would be true if these costs were to be paid by the prevailing party, whether the Indigent or the Defendant, thereby assuring the payment of court costs and the indigent party's(ies') access rights to our courts.

Under rule of Appellate Procedure 40, must Counsel for the alleged Indigent Party certify by affidavit, or otherwise, that he/she is providing legal services on a Pro Bono basis, or on a contingency, as a factor for the Court to consider under the Rule 40 hearing?

Enclosed please find copies of my Court Reporter's letter to our County Auditor, my letter to our Presiding Administrative Judge and our County Judge and our State Legislators, a copy of our Presiding Judge's letter to the Hon. John Hill and his letters to Ms. Anna Donovan, our Court Reporter, all dealing with this dilemma.

As a practical matter, until this problem can be fairly addressed and resolved, I believe there would be no other recourse for a Court other than to allow his/her Official Court Reporter out-of-court time to prepare and timely file the Indigent Party's Statement of Facts while engaging a Deputy Court Reporter to provide in-court services; in either case, the county to pay for these expenses.

Please favor me with your comments and suggestions, so that we may act in the best interests of a due administration of justice for all concerned.

Sincerely,

ANTONIO A. ZARDENETTA

Z/yo
Enclosure

XC: Hon. Manuel R. Flores
Hon. Elma T. Salinas Ender
Hon. Raul Vasquez
Hon. Andres "Andy" Ramos
Hon. Manuel Gutierrez
Ms. Maria Elena Quintanilla
Mr. Emilio Martinez
Mr. Armando X. Lopez
Ms. Rebecca Garza
Ms. Trine Guerrero
Ms. Anna Donovan
Ms. Bettina Williams
Ms. Rene King

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 12, 1987

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Mr. Doak Bishop
Administration of Justice Committee
Hughes & Luce
1000 Dallas Building
Dallas, Texas 75201

Re: Tex. R. Civ. P. 145

Dear Sam and Doak:

I enclose herewith a copy of a letter I received from Mr. Robert Byrd, Executive Director of Gulf Coast Legal Foundation, regarding Rule 145, praising the change made in this Rule. I will include this matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
enclosure

(713) 522-5383

GULF COAST LEGAL FOUNDATION

5009 CAROLINE • HOUSTON, TEXAS 77004

September 18, 1987

COPY

9/21
Tom,
SCAC SubC
Doak Bishop
Agenda
Usual Hts

Luther Soules III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

Last year I wrote, or spoke with you concerning my work on GCLF's effort to write a new Rule 145. [Rule 145 deals with the procedure for filing lawsuits In Forma Pauperis.] Those efforts, with your participation, the help of the Legal Services to the Poor--Civil Matters Committee of the State Bar, and the help of members of the Supreme Court Advisory Committee, were successful.

A copy of the new rule is enclosed with this letter.

This new rule will do good things. This will be especially true for our family law clients who have been subjected to physical abuse.

I want to thank you for helping Gulf Coast Legal Foundation address this important need. During the process I was impressed by the concern for the indigent that I encountered. This success illustrates the good we can do when the Judiciary, the State Bar Association, the Houston Bar Association, the District Clerk's office, GCLF and all interested parties work together.

An achievement like this is the "sweeter" because we know we all share in its accomplishments.

Respectfully,

Robert L. Byrd

Robert L. Byrd
Executive Director

RLB:SDA
enclosure

00719

xc: Chief Justice John Hill
Justis William Kilgarlin
William Willis, Executive Assistant
Pat Hazel, Member, Supreme Court Advisory Committee
Janet Evans, Member, Supreme Court Advisory Committee
Prof. Frank Newton, Dean, Texas Tech School of Law
Judge Thomas J. Stovall
Judge Frank Evans
Judge Michael O'Brien
Judge Charles Dean Huckabee
Ray Hardy, District Clerk-Harris County
Mike Driscoll, County Attorney
Reginald Hirsch, Past President - GCLF Board of Directors
Prof. Joseph Hensley, President-Elect - CGLF Board of Directors
John Eikenburg, Past President - Houston Bar Association

Rule 145. Affidavit of Inability

In lieu of filing security for costs of an original action, a party who is unable to afford said costs shall file an affidavit as herein described. A "party" who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Said affidavit, and the party's action, shall be processed by the clerk in the manner prescribed by this rule.

1. Procedure. Upon the filing of the affidavit, the clerk shall docket the action, issue citation and provide such other customary services as are provided any party. After service of citation, the defendant may contest the affidavit by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court shall find at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement) is able to afford costs, the party shall pay the costs of the action. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.

2. Affidavit. The affidavit shall contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a Notary Public.

3. Attorney's Certification. If the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency, said attorney may file an affidavit to that effect to assist the court in understanding the financial condition of the party.

Change by amendment effective January 1, 1988.

Comment. The purpose of this rule is to allow indigents to file suit and have citation issued based solely on an affidavit of indigency filed with the suit.

* * *

OFFICE PHONE
(817) 939-3521, EXT. 214

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

HJH
50 Sub Cs
agenda

March 8, 1988

R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Attached is a copy of a letter from Professor Louis Muldrow concerning both Rule 165a and Rule 279. Perhaps it could be included in the material to be distributed at our Saturday meeting.

Yours truly,

Stanton B. Pemberton

SBP/pm

cc: Evelyn A. Avent
SECRETARY TO COMMITTEE
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Charles Matthews
VICE CHAIRMAN
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Luther H. Soules, Chairman,
Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Professor Jeremy Wicker
School of Law
Texas Tech University
Luboock, Texas 79409-2171

Professor Louis S. Muldrow
School of Law
Baylor University
Waco, Texas 76798

Judge George Thurmond, Chairman of
Subcommittee for Rules 1-165a
P.O. Box 103
Del Rio, Texas 78841

Members of Subcommittee:

Charles Boston
FULBRIGHT AND JAWORSKI
1301 McKinney Street
Houston, Texas 77010

George G. Brin
BRIN AND BRIN
1202 3rd Street
Corpus Christi, Texas 78404

John E. Collins
Suite 220, 3500 Oak Lawn
Dallas, Texas 75219

Charles Tighe
COTTON, BLEDSOE, TIGHE AND DAWSON
P.O. Box 2776
Midland, Texas 79705

00722

BAYLOR UNIVERSITY
SCHOOL OF LAW
Louis S. Muldrow • Professor
Waco, Texas 76798 • (817) 755-3611

March 7, 1988

Hon. Stan Pemberton
169th District Court
P.O. Box 747
Belton, Texas 76513

Re: T.R.C.P.

Dear Judge:

This confirms our conversation about Rules 165a and 279.

Rule 279:

Prior to the Jan. 1, 1988 amendment, R. 279 stated, in the last paragraph:

> "A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict. . . . ."

This meant no evidence, since it relates only to insufficient to warrant submission. It does not relate to sufficiency of evidence to support the jury answer to the issue. The court decides whether to submit or not on the basis of "some" evidence; and must submit, even though the answer made may be against the weight or not supported by factually sufficient evidence. McDonald, § 12.08.

The 1988 amendment states:

> "A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict. . . ."

I object to this because "factual insufficiency" is never a valid complaint to the submission of an issue. Only to the answer. Thus, in telling the lawyer that he "may" so object for the first time after verdict, the rule suggests that (1) it is a valid objection which (2) may be made for the first time after verdict. The lawyer may be led to believe that he or she may also complain on that basis at the objections to the charge, when, in fact, that would be a spurious objection which will contribute to "numerous and unfounded" objections.

Rule 165a:

See attached copies of former and current 165a.

The former rule allowed the court to dismiss (1) for failure to appear for hearing or trial, the setting of which the party had notice, and, (2) for failing to set the case or take other affirmative action after receiving notice of the court's intent to dismiss. The first required no advance notice of intent to dismiss, while the second required such notice. McDonald, § 17.18.2-(b), and cases cited.

The 1988 deletion of the latter part of the first sentence now, it seems to me, when considered with the second sentence, suggests that the court may have to give notice for all dismissals.

Also, it seems to me that the reinstatement standard ("not intentional or the result of conscious indifference") is easier than keeping the case on the docket ("good cause" - which usually means no negligence); so that one is better off allowing the case to be dismissed, and then seeking reinstatement.

Yours very truly,

Louis

Louis S. Muldrow

LSM/lsl

P.S. Pardon The corrections!

the liability for attorney fees, sanctions, or other costs.

(Amended by orders of July 22, 1975, eff. Jan. 1, 1976; Dec. 5, 1983, eff. April 1, 1984.)

Source: R.C.S. Art. 2182, unchanged.

Changes by amendment effective January 1, 1976: The rule permits non-suit up to time the plaintiff rests his case.

Change by amendment effective April 1, 1984: The last sentence is new and prevents the avoidance of certain sanctions by a non-suit.

Rule 165. Abandonment

A party who abandons any part of his claim or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried.

Source: Texas Rule 33 (for District and County Courts).

Rule 165a. Dismissal for Want of Prosecution

1. Dismissal. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief or his attorney to appear for any hearing or trial of which the party or attorney had notice, or on failure of the party or his attorney to request a hearing or take other action specified by the court within fifteen days after the mailing of notice of the court's intention to dismiss the case for want of prosecution. Notice of the court's intention to dismiss shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

2. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

3. Cumulative Remedies. This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedure and timetable is applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

(Added by order of Oct. 3, 1972, eff. Feb. 1, 1973. Amended by orders of July 22, 1975, eff. Jan. 1, 1976; Dec. 5, 1983.)

Note: This is a new rule effective February 1, 1973.

Change by amendment effective January 1, 1976: The words "or docket call" are deleted after the word "trial" in the first sentence.

Change by amendment effective January 1, 1984: The rule is rewritten to provide a statewide rule for dismissal and reinstatement of cases.

Editorial note: Notwithstanding the language contained in the above note which was appended to the amendment of this rule by the order of December 5, 1983, par. 2 of said order provides:

"That the amendments, new rules, and repeals of rules shall become effective on April 1, 1984."

SECTION 8. PRE-TRIAL PROCEDURE

Rule 166. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All dilatory pleas and all motions and exceptions relating to a suit pending;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments to the pleadings;

(d) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

00725

such corporation and judgment shall be rendered as though the same were not dissolved.

Source: Art. 1390 (part), unchanged.

Rule 161. Where Some Defendants Not Served

When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not so served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by statute. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liability, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered.

(Amended by orders of Dec. 5, 1983, eff. April 1, 1984; April 24, 1984, eff. Oct. 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2087.

Change by amendment effective April 1, 1984: Textual changes.

Rule 162. Dismissal or Non-Suit

At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.

Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

(Amended by orders of Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2089, unchanged.

Change by amendment effective April 1, 1984: The rule is rewritten.

COMMENT TO 1988 CHANGE: The purpose of this rule is to [illegible] a definite time after which a party may not voluntarily dismiss [illegible] suit the cause of action. In addition, these amendments will [illegible] any pending motions for sanctions or attorney's fees [illegible] are filed before the motion for non-suit or dismissal.

Rule 163. Dismissal As To Parties Served, Etc.

When it will not prejudice another party, the plaintiff may dismiss his suit as to one or more of several parties who were served with process, or who have answered, but no such dismissal shall in any case, be allowed as to a principal obligor, except in the cases provided for by statute.

(Amended by orders of Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2090, with minor textual changes.

Change by amendment effective April 1, 1984: Textual changes.

Rule 164. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

Rule 165. Abandonment

A party who abandons any part of his claim or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried.

Source: Texas Rule 33 (for District and County Courts).

Rule 165a. Dismissal for Want of Prosecution

Current

1. **Failure to Appear.** A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, filing of all pleadings, the making of a response or supplemental responses to discovery and other pretrial matters. The case may be continued thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

00726

2. Non-Compliance With Time Standards. Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.

3. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

4. Cumulative Remedies. This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

(Added by order of Oct. 3, 1972, eff. Feb. 1, 1973. Amended by orders of July 22, 1975, eff. Jan. 1, 1976; Dec. 5, 1983; July 15, 1987, eff. Jan. 1, 1988.)

Note: This is a new rule effective February 1, 1973.

Change by amendment effective January 1, 1976: The words "or docket call" are deleted after the word "trial" in the first sentence.

Change by amendment effective January 1, 1984: The rule is rewritten to provide a statewide rule for dismissal and reinstatement of cases.

Editorial note: Notwithstanding the language contained in above note which was appended to the amendment of this rule the order of December 5, 1983, par. 2 of said order provid

"That the amendments, new rules, and repeals of rules sha become effective on April 1, 1984."

SECTION 8. PRE-TRIAL PROCEDURE

Rule 166. Pre-Trial Procedure; Formulati Issues

In any action, the court may in its discretio direct the attorneys for the parties and the parti or their duly authorized agents to appear before for a conference to consider:

(a) All dilatory pleas and all motions and exce tions relating to a suit pending;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments t the pleadings;

(d) The possibility of obtaining admissions of fac and of documents which will avoid unnecessar proof;

(e) The limitation of the number of expert wi nesses;

(f) The advisability of a preliminary reference o issues to a master or auditor for findings to be use as evidence when the trial is to be by jury.

(g) Such other matters as may aid in the disposi tion of the action. The court shall make an orde which recites the action taken at the pre-trial con ference, the amendments allowed to the pleadings the time within which same may be filed, and the agreements made by the parties as to any of th matters considered, and which limits the issues fo trial to those not disposed of by admissions or agreements of counsel; and such order when en tered shall control the subsequent course of th action, unless modified at the trial to prevent man fest injustice. The court in its discretion may estab lish by rule a pre-trial calendar on which actions may be placed for consideration as above provide and may either confine the calendar to jury action or extend it to all actions.

(Amended by order of July 26, 1960, eff. Jan. 1, 1961.

Source: Federal Rule 16.

Change: Subsection 1[(a)] has been added. The court has bee given the power to compel the appearance of the parties or their agents as well as the attorneys. Reference to an auditor is also authorized.

Change by amendment effective January 1, 1961: Requiremen that court's order at pre-trial conference allowing amendment show "the time within which same may be filed."

00727

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 10, 1988

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

Re: Tex. R. Civ. P. 165a

Dear Sam:

I have enclosed a copy of a letter sent to me through Judge Stanton B. Pemberton regarding Rule 165a. Please prepare to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

00728

Rule 166a. Summary Judgment

(a) (No change)

(b) (No change)

(c) (No change)

(d) Appendixes, References and Oth

Otherwise on File.

Discovery not on file with the cle
for summary judgment purposes if notice,
es or specific references, is served on a
twenty-one (21) days before the hearing
used to support the summary judgment; or
days before the hearing if such proofs
the summary judgment.

~~(d)~~ **(e) Case Not Fully Adjudica**

motion under this rule judgment is not
case or for all the relief asked and a
court at the hearing of the motion, by
and the evidence before it and by interr
practicable ascertain what material fact-
tial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so

Clerk approved

Rule 166a. Summary Judgment

(a) (No change)

(b) (No change)

(c) (No change)

(d) Appendixes, References and Other Use of Discovery Not Otherwise on File.

Discovery not on file with the clerk may be used as proofs for summary judgment purposes if notice, in the form of appendixes or specific references, is served on all parties: (i) at least twenty-one (21) days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven (7) days before the hearing if such proofs are to be used to oppose the summary judgment.

~~(d)~~ **(e) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so

specified shall be deemed established, and the trial shall be conducted.

(e) (f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(f) (g) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) (h) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of reasonable expenses which the filing of the affidavits

caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Comment: This amendment provides a mechanism for using non-filed discovery in summary judgment practice. Paragraphs (d) through (g) are renumbered (e) through (h).

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 13, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 166a, 169, and 182
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please redlined versions of rules 166a, 169 and 182. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 166 (a) (d)

CASE NOT FULLY ADJUDICATED ON MOTION

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and the trial as necessary, the Court at its hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ~~if practicable~~ ascertain what material facts exist without substantial controversy and are not controverted by the respondent's affidavit and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy **and are not controverted by the respondent's affidavit,** including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings on the action as are just. Upon the trial of the action of the facts so specified shall be deemed established **and not tried** and the trial should be conducted accordingly, **but only on the facts controverted by the affidavit. If the only fact controverted are the amount of the attorney's fees then the movant may waive those attorney's fees at the summary judgment hearing or submission, or not waive those fees, then the only issue tried to the Court or Jury shall be the amount of attorney's fees.**

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 26, 1988

Mr. J. Grady Randle
Ross, Banks, May, Cron & Cavin
Twentieth Floor, Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046

Dear Mr. Randle:

Your letter of July 19 to Chief Justice Phillips has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

to Judge Kilgarlin

ROSS, BANKS, MAY, CRON & CAVIN
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
TWENTIETH FLOOR, COASTAL TOWER
NINE GREENWAY PLAZA
HOUSTON, TEXAS 77046
(713) 626-1200

J. GRADY RANDLE

July 19, 1988

Chief Justice Tom Phillips
Texas Supreme Court
Austin, Texas

Dear Judge Phillips:

I learned much from your talk recently at the Houston Club. I appreciate the concerns of the Court on updating the rules and helping the trial Courts move their dockets. I have a suggestion.

The Court of Appeals and trial Court seem reluctant to grant summary judgments since it is so easy to overturn on appeal. If the Court would strengthen the rule and make it harder to overturn, I think this would help alleviate the fear of granting summary judgments or at least increase the judge's ability to grant partial summary judgments, thereby effectively increasing the use of issue preclusion.

I have enclosed a copy of a proposed amendment to Rules 166 (a) (d).

Thank you for your time and consideration.

Very truly yours,

J. Grady Randle

JGR:lt
Enclosure

00735

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Texas Rules of Civil Procedure Regarding Discovery

Dear Bill:

Enclosed herewith please find a copy of a letter forwarded to me by Justice Kilgarlin regarding discovery rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to LHS
Orig to file
9/27 Ltr

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 26, 1988

HSH
① COA's
② Discov Rules Subc
③ SCAC Agenda

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

Dear Luke:

Enclosed is a copy of a letter from Raymond North, as well as copy of my response.

I've heard others voice concern about mixing requests with interrogatories.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 26, 1988

Mr. Raymond E. North
Attorney at Law
Douglas Plaza Building
Suite 420
8226 Douglas Avenue
Dallas, Texas 75225

Dear Mr. North:

Your letter of August 4 to former Chief Justice John Hill has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

00738

8/8 I.F.

RAYMOND E. NORTH
ATTORNEY AND COUNSELOR
DOUGLAS PLAZA BLDG., SUITE 420
8226 DOUGLAS AVENUE
DALLAS, TEXAS 75225

(214) 691-8478

August 4, 1988

Mr. John L. Hill
Chief Justice
Supreme Court
State of Texas
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

Re: Rules of Civil Procedure

Dear Chief Justice Hill:

It appears to me that innovative lawyers try to use the Rules of Civil Procedure to the point of abusing them. Efforts to control this abuse merely present new challenges to the artful.

One such abuse that disturbs me is the practice of mixing Written Interrogatories in with Requests for Admissions. Being as Requests for Admissions are filed by the clerks, some clerks will file the mixed bag of questions with the Requests for Admissions interwoven among the Written Interrogatories. This way would-be ingenious attorney gets the Written Interrogatories filed in the Court papers notwithstanding the fact that Written Interrogatories are not to be filed.

Other clerks even in the same county refuse to file answers to these same questions because the answers are not just limited to the Requests for Admissions, but include answers to the Interrogatories as well as the answers to Requests for Admissions.

While I realize the Court did not ask for my opinion, it is nevertheless my opinion that if the court is going to make separate rules of procedure, to-wit; to file or not to file for different types of discovery, then the rules need to require that they not be comingled, but rather require that Written Interrogatories be self contained in one document separate and apart from Requests for Admissions.

Enclosed please find a copy of the note from the clerk, which we received in this situation.

Sincerely,

Raymond E. North

00739

N/w
Enclosure
cc: Robert M. Campbell
cc: Franklin S. Spears
cc: C. L. Ray
cc: James P. Wallace
cc: Ted Z. Robertson
cc: William W. Kilgarlin
cc: Raul A. Gonzalez
cc: Oscar H. Mauzy

DALLAS COUNTY
DISTRICT CLERK
BILL LONG

1836-1986

June 24, 1987

TO: CIVIL DEPUTY CLERKS

FROM: KAY HOWARD

RE: AMENDED LISTING OF DISCOVERY PLEADINGS

**********THE THE FOLLOWING PLEADINGS WILL**********
NOT BE FILED BY THE CLERK AS OF
JULY 1, 1987
****

NOTICE OF DEPOSITIONS

INTERROGATORIES

REQUEST FOR PRODUCTION

ANSWERS TO INTERROGS

= RESPONSES TO INTERROGS

RESPONSES TO REQUEST FOR PRODUCTION

OBJECTIONS TO AND RESPONSES TO ADMISSIONS SHOULD CONTINUE TO BE FILED WITH THE CLERK.

~~See attached Rules 167, 168, and 169~~

RECEIVED
AUG 01 '8
[illegible]OND E. NORTH

Please file Admis with the court separate from Interrogs & Prod

00741

Government Center Dallas, Texas 75202 749-8421

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

Rule 166b. Forms and Scope of Discovery;
Protective Orders; Supplementation of Responses

1. Forms of Discovery. No change.

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. No change.

b. Documents and Tangible Things. No change.

c. Land. No change..

d. Potential Parties and Witnesses. No change.

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was

acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the ~~expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness.~~ [consulting expert's opinions or impressions have been reviewed by a testifying expert.]

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when ~~it forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness~~ [the consulting expert's opinions or impressions have been reviewed by a testifying expert].

(3) Determination of Status. No change.

(4) Reduction of Report to Tangible Form. No change.

f. Indemnity, Insuring and Settlement Agreements. No change.

g. Statements. No change.

00743

h. Medical Records; Medical Authorization. No change.

3. Exemptions. No change.

4. Presentation of Objections. No change.

5. Protective Orders. No change.

6. Duty to Supplement. No Change.

Comment on proposed amendment:

To eliminate the contradiction between Rule 166b 2.e (1) and (2) and corresponding Rule 166b 3.e, Rule 166b 2.e (1) and (2) have been modified. As modified, Rule 166b 2.e (1) and (2) now make discoverable the impressions and opinions of a consulting expert if a testifying expert had reviewed those opinions and material, regardless of whether or not the opinions and material formed a basis for the opinion of a testifying expert. The suggested revisions keep consistent the intent of Rule 166b 2.e (1) and (2) and Rule 166b 3.e with regard to consulting experts.

00744

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180
[illegible]

May 3, 1988

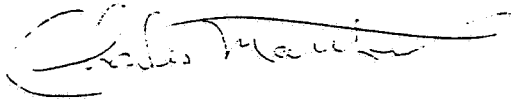
Re: Texas Rules of Civil Procedure -
Rule 166(b)-2(e)
Rules 167 and 168

Mr. R. Doak Bishop
Committee on Administration of Justice
2800 Momentum Place
Dallas, Texas 75201

Dear Doak:

Enclosed are suggested revisions of Rules 166(b)-2(e), 167 and 168. Copies of the rules with the modifications are being distributed to all members of the committee. This rule should be considered at our meeting on May 7.

Very truly yours,



CWM:ch
Enclosure

c: Ms. Evelyn A. Avent
Mr. Luther H. Soules
Members of the Adminstration
of Justice Committee

00745

HUGHES & LUCE
2800 MOMENTUM PLACE
1717 MAIN STREET
DALLAS, TEXAS 75201

(214) 939-5500
TELECOPIER (214) 939-6100
TELEX 730836

1500 UNITED BANK TOWER
AUSTIN, TEXAS 78701
(512) 482-6800
TELECOPIER (512) 474-4258

March 14, 1988

Direct Dial Number
(214) 939-5421

Mr. Charles Mathews
Exxon Company
Room 1895
P. O. Box 2180
Houston, Texas 77001

Dear Charles:

Justice Kilgarlin of the Texas Supreme Court attended our March 12th meeting and made several suggestions for the discovery rules. First, he asked us to look into the differences between Rules 167 and 168 and to conform them. In Rule 168, there is a discussion of a waiver of objections to interrogatories. There is no such discussion of waiver in Rule 167, and perhaps there should be. Also, one of the rules states that it is not necessary to file such discovery requests, but the other includes no such statement. It probably should. Requests for Admissions under Rule 169 are still required to be filed. Justice Kilgarlin brought up the question of whether or not notices of depositions should be filed or are required to be filed under the new rules. This needs to be addressed. Finally, in Rule 166(b)(3) there is something left out before the word "communications" in part of the rule. Professor Bill Dorsaneo of the SMU Law School is aware of this problem and could discuss it with you. Please have your Committee review these rules and have written reports to us in time to take final action at the May 7th meeting.

Respectfully,

R. Doak Bishop

RDB/ls:1028

00746

RECEIVED
MAR 17 1988
C. W. MATTHEWS

c. Witness Statements. The written statements of potential witnesses and parties, ɨf /ŧĥɇ /ʂŧȧŧɇɱɇńŧ /ẁȧʂ [when] made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made ɨń [a part of] the pending litigation, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. [For purpose of this paragraph a photograph is not a statement.]

d. Party Communications. With the exception of discoverable communications prepared by or for experts, ȧńd/ǿŧĥɇŕ/ɗɨʂɕǿẏ/ɇŕȧẏɭɇ communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, ẁĥɇń ɱȧɗɇ/ʂɱƀʂɇɕɱɱɇńŧ /ŧǿ /ŧĥɇ/ǿɕɕɱŕɇńɕɇ /ǿŕ /ŧŕȧńʂȧɕŧɨǿń/ɱƥǿń/ẁĥɨɕń/ŧĥɇ ʂɱɨŧ/ɨʂ/ƥȧʂɇɗ/ȧńd/ɨń/ȧńŧɨɕɨƥȧŧɨǿń/ǿf/ŧĥɇ/ƥŕǿʂɇɕɱŧɨǿń/ǿŕ/ɗɇfɇńʂɇ ǿf/ŧĥɇ/ɕɭȧɨɱʂ/ɱȧɗɇ/ȧ/ƥȧŕŧ/ǿf/ŧĥɇ/ƥɇńɗɨńɠ/ɭɨŧɨɠȧŧɨǿń/ [when made subsequent to the occurrence or transaction upon which the suit is based, and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made ɨń [a part of] the pending litigation.] For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. Any matter protected from disclosure by any other privilege.

Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempt from discovery by subparagraphs c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

Amend Rejected

[(d)] Determination of Objections. [Either an objection by a party to discovery shall preserve the objection or motion pending any subsequent hearing for further support or action by the party. Any hearing set for reasonable time set for hearing any discovery motion.] In responding [objecting] to an inspection request within the scope of paragraph 2, [the party] a party [seeking] to obtain discovery on the basis of an exemption or privilege, must specifically plead the particular privilege from discovery relied upon and [at or prior hearing] produce [any] evidence [necessary to] [The Court shall determine on the basis of the pleadings, any stipulations, affidavits and attachments as may be filed by the parties at the hearing, and no oral testimony shall be received unless pleaded in support of relevancy of the discovery as established by the pleading unless controverted by a response served in advance of the hearing that specifically controverted in advance of the hearing a party seeking discovery has the burden to establish relevancy. Except for relevancy, the party resisting discovery has the burden on all other issues.] If the trial court determines that an IN CAMERA inspection [in camera preview by the Court] of some or all of the documents [discovery] is necessary, the objecting party [shall, at the hearing,] must segregate and produce the documents [discovery to the court in a sealed wrapper or by in camera oral answers]. The court's ruling, the documents furnished and any transcript of the hearing shall be preserved for any subsequent review of the court's determination. When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an in camera inspection of the individual documents [a preview of the particular discovery] before ruling on the objection. [Objections served after the date on which responses are to be served are waived unless an extension of time is obtained by agreement or order of the court or good cause is shown for the failure to objection within such period.

COMMENT: The amendments to Section 3 standardize language for the same meaning. The amendments to Section 4 expressly dispense with the necessity to file more than objections to preserve discovery complaints pending any subsequent hearing in order to avoid unnecessary time and expense to parties and time of the courts in all instances where no party ever requests a hearing on the objection. Provisions are made for the conduct of the

4. [Protection] Determination of Objections. [Either an objection or a motion by a party to discovery shall preserve the subject matter of the objection or motion pending any subsequent hearing, without further support or action by the party. Any party may at any reasonable time set for hearing any discovery objection or motion.] In resisting [objecting] to an appropriate discovery request within the scope of paragraph 2, clearly asserting a party who seeks [seeking] to exclude any matter from discovery on the basis of an exemption or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and [at or prior to any hearing shall] produce [any] evidence [necessary to] supporting such claim in the pleadings of any stipulations, or such affidavits and attachments as may be filed by the parties prior to the hearing. Matters pleaded in support of relevancy of the discovery shall be taken as established by the pleading unless specifically controverted by a response served in advance of the hearing. To the extent specifically controverted in advance of the hearing a party seeking discovery has the burden to establish relevancy. Except for relevancy, the party resisting discovery has the burden on all other issues.] If the trial court determines that an IN CAMERA inspection [in camera preview by the Court] of some or all of the documents [discovery] is necessary, the objecting party [shall, at the hearing,] must segregate and produce the documents [discovery to the court in a sealed wrapper or by in camera oral answers]. The court's ruling concerning the need for an in camera inspection by the court and the basis for objection, whether undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights [a preview of the particular discovery] before ruling on the objection. [Objections served after the date on which responses are to be served are waived unless an extension of time is obtained by agreement or order of the court or good cause is shown for the failure to objection within such period.

COMMENT: The amendments to Section 3 standardize language for the same meaning. The amendments to Section 4 expressly dispense with the necessity to file more than objections to preserve discovery complaints pending any subsequent hearing in order to avoid unnecessary time and expense to parties and time of the courts in all instances where no party ever requests a hearing on the objection. Provisions are made for the conduct of the

discovery hearing, the respective burdens on the parties, and the preclusion of live testimony except such oral deposition responses as may be previewed in camera by the Court. The last sentence added to Section 4 was previously the second sentence of Rule 168(6) and was moved to apply to all discovery objections.

LAW OFFICES

SOULES & WALLACE
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 25, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 16b
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a redlined version of Rule 166b. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 24, 1989

Honorable Nathan L. Hecht
Justice, Fifth Circuit Court of Appeals
600 Commerce Street
Dallas County Courthouse
Dallas, Texas 75202

Dear Justice Hecht:

Enclosed is a proposal for revision of Rule 166b which rule was the subject of a recent opinion McKinney v. National Union Fire Ins. Co. of Pittsburgh, 32 Tex. Supp. ctj. 306 (1989) in which you dissented. This proposal will substantially "downsize" the enormous amount of needless discovery work being done in the trial courts. An enormous amount of wasted paper pushing and time and motion goes into current practices required to avoid waiver.

This proposal would eliminate the need to have any hearing unless one party or another wanted the hearing, and would cause an objection standing alone to protect against waiver.

Further, this will generate discovery hearings, similar to venue hearings, based solely on paper, and not requiring the time and expense of live witnesses, court reporters, etc. This should substantially speed up the process because of the expedited nature of oral submission on written papers as opposed to the taking of live testimony in open court. Additionally, this defines the burdens of the parties, i.e., relevance on the discovering party (General Motors v. Lawrence, and Jampole v. Touchy) and all other burdens are on the party resisting discovery, but like pleadings in venue cases, pleadings related to relevance would be taken as establishing the matter in the pleadings unless specially controverted. It is hoped that this rule will significantly reduce the time and costs to litigants of

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

needless discovery "make-work" and relieve undue burden in the system of justice.

Very truly yours,

Luther H. Soules, III

LHS:rms
c:®mis®hecht1.ltr
Enclosure

cc: Chief Justice Thomas R. Phillips
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Mr. Willaim V. Dorsaneo,
Chair: Standing Sub-Committee on Discovery
2311 Cedar Springs Road, Suite 300
Dallas, Texas 75201

Law Offices
Scott, Douglass & Luton
Twelfth Floor
First City Bank Building
Austin, Texas 78701
512 476-6337

Houston Office
4th Floor
Republic Bank Center
700 Louisiana Street
Houston, Texas 77002
713/228-6337

April 13, 1989

Mr. Luther H. Soules III
10th Floor
Republic of Texas Plaza
175 E. Houston Street
San Antonio, TX 78205-2230

Re: Texas Supreme Court Advisory Committee Rules on Discovery

Dear Luke:

Enclosed is a letter that I received from my friend and fellow Austin practitioner, David Chamberlain. The letter is self-explanatory. I told David that the supreme court addressed, although not to his satisfaction, some of his concerns this past week in McKinney v. National Union Fire Insurance Company of Pittsburgh, PA, 32 Tex. Sup. C.J. 306.

Very truly yours,

Steve

Steve McConnico

SM:mkl
Enclosure
cc: David Chamberlain

LEA & CHAMBERLAIN
ATTORNEYS & COUNSELORS AT LAW
301 CONGRESS AVENUE
EIGHTEENTH FLOOR
AUSTIN, TEXAS 78701

RECEIVED
Ans'd.....

DAVID E. CHAMBERLAIN

(512) 474-9124
TELECOPIER (512) 474-8582

April 4, 1989

Steve McConnico
12th Floor, First City Bank Building
Austin, Texas 78701

Re: Rules of Civil Procedure Advisory Committee

Dear Steve:

I have just about had it, and you are the only one that I could think of to write to at this time. I hope that the advisory committee will look into the problems the bar is having with discovery practice.

Almost without exception, every set of written interrogatories, requests for production and requests for admissions that I receive now has objectionable requests. The new game is to ask for attorney work product, confidential attorney-client communications and other absolutely privileged materials in the hope that the responding party will let thirty days pass without objecting to same.

I am getting sick and tired of having to file these objections along with a motion for protective order and set same for hearing. Although I attempt to get an agreement out of the opposing side by way of agreed order, ninety percent of the time it doesn't work.

The propounding party should have the duty to obtain the hearing if he finds the objections to be unmeritorious. This would avoid having to clutter the court's docket with a bunch of unnecessary discovery hearings.

All of this is a waste of both sides' time and money, and I believe both the plaintiff's and defense bar is finally sick and tired of it. I hope you will take this up with the committee and find a better way to handle discovery matters in the future.

With best personal regards, I am

Very truly yours,

David E. Chamberlain

DEC/bes

Copy to LHS
Orig. to file
12/30/88 lyh

GER882

FISHER, GALLAGHER, PERRIN & LEWIS
ATTORNEYS AT LAW
70th FLOOR
ALLIED BANK PLAZA
1000 LOUISIANA
HOUSTON, TEXAS 77002
(713) 654-4433

MICHAEL T. GALLAGHER
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

12/30
HJP
COPS
SDC SDC
Ogletree

December 16, 1988

RE: Designation of Experts - Rule 166b

To Supreme Court Advisory Committee
Supreme Court of Texas
200 West 14th Street
Austin, Texas 78701

Ladies and Gentlemen:

Rule 166b should be amended to provide for designation of experts only after completion of deposition of defendants and fact witnesses.

Designation of experts, particularly in malpractice cases, prior to the completion of discovery relative to the factual context in which the alleged negligence occurred imposes an unreasonably harsh burden upon the plaintiff. As currently written, it does not serve the ends of justice nor expedite trials.

Sincerely,

Michael T. Gallagher

MTG:ger

Honorable Luther H. Soules, III
Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Texas 78205

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

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

Mr. Frank L. Branson
Law Offices of Frank L. Branson, P.C.
Highland Park National Bank Bldg.
Penthouse Suite
4514 Cole Avenue
Dallas, Texas 75201

Ms. Elaine A. G. Carlson
5318 Western Hills Drive
Austin, Texas 78731

Mr. Solomon Casseb, Jr.
Casseb, Strong & Pearl, Inc.
127 East Travis Street
San Antonio, Texas 78205

Mr. John E. Collins
3500 Oak Lawn Ave., Suite 220
Dallas, Texas 75219-4343

Mr. Vester T. Hughes, Jr.
Hughes & Luce
1000 Mercantile Dallas Building
Dallas, Texas 75201

Mr. Charles Morris
Morris, Craven & Sulak
1010 Brown Building
Austin, Texas 78701

Mr. John M. O'Quinn
O'Quinn, Hagans & Wettman
3200 Texas Commerce Tower
Houston, Texas 77002

Honorable Jack Pope
2803 Stratford Drive
Austin, Texas 78746

Mr. Tom L. Ragland
Clark, Gorin, Ragland & Mangrum
P.O. Box 239
Waco, Texas 76703

Mr. Harry M. Reasoner
Vinson & Elkins
3000 1st City Tower
Houston, Texas 77002-6760

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

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

Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

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

Professor Newell Blakely
Univ. of Houston Law Center
4800 Calhoun Road
Houston, Texas 77004

Mr. Tom H. Davis
Byrd, Davis & Eisenberg
P.O. Box 4917
Austin, Texas 78765

Professor William V. Dorsaneo, III
Southern Methodist University
Dallas, Texas 75275

Professor J. Hadley Edgar
Texas Tech University School of Law
P.O. Box 4030
Lubbock, Texas 79409

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

Mr. Michael A. Harchell
Ramey, Flock, Hutchins, Jeffus, Crawford & Harper
P.O. Box 629
Tyler, Texas 75710-0629

Mr. Charles F. Herring, Jr.
Small, Craig & Werkenthin
P.O. Box 2023
Austin, Texas 78768

Mr. Franklin Jones, Jr.
Jones, Jones, Baldwin, Curry & Roth, Inc.
P.O. Drawer 1249
Marshall, Texas 75670

Mr. Gilbert I. Low
Orgain, Bell & Tucker
Beaumont Savings Bldg.
Beaumont, Texas 77701

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Fl., First City Bank Bldg.
Austin, Texas 78701-2494

Mr. Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi, Texas 78403

Honorable Raul Rivera
Judge, 288th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway Drive
Houston, Texas 77056

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

Mr. Sam D. Sparks
Webb, Stokes & Sparks
P.O. Box 1271
San Angelo, Texas 76902

Honorable William W. Kilgarlin
Justice, The Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Honorable Sam Houston Clinton
Judge, Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

Chief Justice Austin McCloud
Tenth Court of Appeals
P.O. Box 271
Eastland, Texas 76448

Judge Stan Pemberton
Presiding Judge, 169th Dist. Ct.
P.O. Box 747
Belton, Texas 76513

Professor Thomas Black
St. Mary's Univeristy, School of Law
One Camino Santa Maria
San Antonio, Texas 78284

cc:

Honorable Thomas R. Phillips, Chief Justice
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable Franklin E. Spears
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable C. L. Ray
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable James P. Wallace
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable Ted Z. Robertson
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable Raul A. Gonzales
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable Oscar M. Mauzy
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

Honorable Barbara G. Culver
Texas Supreme Court
14th and Colorado
Capitol Station
P.O. Box 12248
Austin, Texas 78711

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

January 4, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Texas Rules of Civil Procedure 166b - Designation of Experts

Dear Bill:

Enclosed herewith please find a copy of a letter sent to me by Michael T. Gallagher regarding proposed changes to Rule 166b. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

Also enclosed please find a copy of a form which I suggest we use for requesting rule changes.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

00763

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

December 28, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Texas Rules of Civil Procedure 166b(3)(d) and 167a

Dear Bill:

Enclosed herewith please find a copy of a letter sent to me by Harry L. Tindall regarding proposed changes to Rules 166b(3)(d) and 167a. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Franklin S. Spears

Rules 167a and 166b(3)(d)

TINDALL & FOSTER
ATTORNEYS AT LAW
2801 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-3094
TELEPHONE (713) 229-8733
TELECOPIER (713) 228-1303

HARRY L. TINDALL*
CHARLES C. FOSTER**
PATRICK W. DUGAN**
KENNETH JAMES HARDER
LYDIA G. TAMEZ
JANICE E. PARDUE
GARY E. ENDELMAN

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION
*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

12/20 HJT Send Subc + Agenda + Copy

December 16, 1988

Luther H. Soules, III
Republic of Texas Plaza, 10th Floor
175 East Houston St.
San Antonio, Texas 78205-2230

Re: Proposed amendment to Rule 167a

Dear Luke:

As a follow-up to my letter of December 1, 1988, I am enclosing with this letter a proposed amendment to Rule 167a to broaden the scope of those persons who may conduct physical or mental examinations. The revision would read as follows:

"(a) Order for Examination. When the mental or physical condition (including the blood group or tissue type) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the ~~action~~ case is pending may order the party or the person in his custody or legal control, to submit to a physical or mental examination by: (1) a physician or professional as described in Rules 509 and 510, Texas Rules of Civil Evidence; or (2) for paternity testing purposes only, any other person appointed by the court as an expert. ~~to produce for examination the person in his custody or legal control~~. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

"(b) Report of ~~Examining Physician~~ Examiner.

"(1) If requested by the party against whom an order is made under this rule of the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the ~~examining physician~~ examiner

setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if ~~a physician~~ the examiner fails or refuses to make a report the court may exclude his testimony if offered at the trial.

"(2) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an ~~examining physician~~ examiner or the taking of a deposition of the ~~physician~~ examiner in accordance with the provisions of any other rule.

"(3) [no change] "

I am also enclosing a proposed amendment to Rule 166b(3)(d). I look forward to hearing from you.

Sincerely,

Harry L. Tindall

/ms

Proposal for Amending Rule 166b(3)(d)

Rule 166b(3)(d), Texas Rules of Civil Procedure, as amended is amended to read as follows:

"d. Party Communications. With the exception of discoverable communications prepared by or for experts, and other discoverable communications, communications between agents, ~~or~~ representatives, or ~~the~~ employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the claims made a part of the pending litigation. For the purposes of this paragraph, a photograph is not a communication."

COMMENT

The proposed change is technical only and is to correct what is believed to have been a typographical omission from the 1987 amendment.

LAW OFFICES

LUTHER H. SOULES III

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Tex. R. Civ. P. 166b and 215

Dear Bill:

I have enclosed a copy of a letter sent to me by Justice William W. Kilgarlin regarding Tex. R. Civ. P. 166b and 215. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Mr. Sid S. Stover

Copy to LHS
Orig. to file
9-16-88 bjk

THE SUPREME COURT OF TEXAS

HIEF JUSTICE
THOMAS R. PHILLIPS

STICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 15, 1988

Mr. Sid S. Stover
Seale, Stover, Coffield,
Gatlin & Bisbey
P. O. Box 480
Jasper, Texas 75951

Dear Mr. Stover:

Your letter of August 17, 1988 to Chief Justice Phillips has been forwarded to me.

I understand your concern with Tex. R. Civ. P. 166b and 215 as to pretrial identification. Your concerns will be presented to the Supreme Court Advisory Committee, the body that recommends Rules changes.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

send a copy to Kilgarlin for response

SEALE, STOVER, COFFIELD, GATLIN & BISBEY

JOHN H. SEALE
SID S. STOVER
MARCH H. COFFIELD
GARY H. GATLIN
BLAIR A. BISBEY *
*LICENSED IN TEXAS & LOUISIANA

ATTORNEYS-AT-LAW
P. O. BOX 480
JASPER, TEXAS
75951

(409) 384-3466

August 17, 1988

then send this letter

Dear Mr. Stover:
Thank you for your letter of August 17, 1988. I appreciate your taking the time to express your concerns regarding our rules. I have referred your letter to Justice Kilgarlin, who is primarily responsible for developing our pretrial rules amendments to our court.

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

Dear Justice Phillips:

As a trial lawyer, I am becoming more and more concerned about the discovery requirements involved in the trial of lawsuits. In particular, I am concerned about a trial judge not having any discretion to admit the testimony of a witness not named thirty days in advance of trial in answer to interrogatories. All this Rule is doing is creating lawsuits against lawyers. If a lawyer has an active trial docket there is no way he can keep from slipping up on that interrogatory at some point. The evidence frequently changes within thirty days from trial. I know of many occasions where new doctors are added thirty days prior to trial, the doctor deposed by both sides, everyone is aware of what he will say, and then the case has to be put off because his testimony cannot be used. I feel it is ridiculous not to make the side opposing the admission of testimony to show surprise or some sort of harm before that testimony can be admitted.

We have come from trial by ambush, through a relatively sane period of trials, back into trial by ambush. Who do I talk to to express my concern about the trial judge's lack of discretion in these questions? A lawyer with four cases can probably comply with these Rules and not have to worry. Of course he cannot make a living either.

Looking forward to hearing from you, I am

Very truly yours,

Sid S. Stover

SSS:mp
cc: Texas Trial Lawyers Association
1220 Colorado Street
Austin, Texas 78701-3852

Thank you for your interest in the improvement of the administration of justice in the courts of Texas. VH

00770

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Tex. R. Civ. P. 166(b), 168, and 169

Dear Bill:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 166(b), 168 and 169. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

TRCP

Rule 166b

c. Witness Statements. The written statements of potential witnesses and parties, ~~if the statements was~~ [when] made
:e or transaction upon which the suit
with the prosecution, investigation,
.ar suit, or in anticipation of the
the claims made ~~in~~ [a part of] the
:hat persons, whether parties or not,
, upon request, copies of statements
:oncerning the action or its subject
: possession, custody, or control of
n statements" includes (i) a written
e adopted or approved by the person
ographic, mechanical, electrical or
any transcription thereof which is a
.l of a statement made by the person
d. [For purpose of this paragraph a
.]

When adopted

d. Party Communications. With the exception of discoverable communications prepared by or for experts, ~~and/or their discovery~~ communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, ~~when made/submitted to the~~

c. Witness Statements. The written statements of potential witnesses and parties, ~~if the statements was~~ [when] made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made ~~in~~ [a part of] the pending litigation, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. [For purpose of this paragraph a photograph is not a statement.]

d. Party Communications. With the exception of discoverable communications prepared by or for experts, ~~and/or/discovery~~ communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, ~~when made/submitted/to/the/counsel/or/transaction/upon/which/the~~

suit is based, and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims ma pending litigation.] For the purpose photograph is not a communication.

e. Other Privileged Information. from disclosure by any other privilege.

Upon a showing that the party seeking tial need of the materials and that the p undue hardship to obtain the substanti materials by other means, a party may ob materials otherwise exempt from discovery d of this paragraph 3. Nothing in this construed to render non-discoverable the id any potential party, any person having facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection, without further support or action by the party.

suit is based and in connection with the prosecution of the claims made in the pending litigation. For the purpose of this paragraph, a photograph is not a communication.

INSERT from 369

e. Other Privileged Information. Any matter protected from disclosure by any other privilege.

Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempt from discovery by subparagraphs c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection, without further support or action by the party.

suit is based, and in connection with the prosecution or defense of the particular suit, or in preparation for prosecution or defense of the claims made a part of the pending litigation.] For the purpose of this paragraph 3, a photograph is not a communication.

INSERT for

e. Other Privileged Information. A party may withhold information otherwise discoverable from disclosure by any other privilege.

Upon a showing that the party seeking discovery has substantial need of the materials and that the party would suffer undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of materials otherwise exempt from discovery by subparagraphs a, b, c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection, without further support or action by the party.

C:\DW4\SCAC\044.DOC\HJH

Any party may at any reasonable time [set for hearing] any objection or motion pertaining thereto.] [In responding [objecting] to an appropriate discovery request within the scope of paragraph 2, directly addressed to the matter, a party who seeks [seeking] to exclude any matter from discovery on the basis of an exemption or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and [at or prior to any hearing shall] produce [any] evidence [necessary to] supporting such claim [either] in the form of affidavits or live testimony.] presented at the hearing requested by either party. When a party's objection concerns the discoverability of documents and is based on a specific immunity or exemption claimed by a party, the objecting party must segregate and produce the documents [discovery to the court in a sealed wrapper or in camera preview by the Court] of some or all of the documents [discovery] is necessary, the objecting party must segregate and produce the documents [discovery to the court in a sealed wrapper or in camera oral answers]. The court's order concerning the need for an inspection shall specify a reasonable time, place and manner for making the inspection. When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection of the individual documents [a preview of the particular discovery] before ruling on the objection. [Objections served after the date on which

answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

COMMENT: The amendments to Section 3 standardize language for the same meaning. The amendments to Section 4 expressly dispense with the necessity to file more than objections to preserve discovery complaints pending any subsequent hearing in order to avoid unnecessary time and expense to parties and time of the courts in all instances where no party ever requests a hearing on the objection. The last sentence added to Section 4 was previously the second sentence of Rule 168(6) and was moved to apply to all discovery objections.

The failure of a party to obtain a ruling on an objection to discovery or motion for protective order the objection or motion. (or does not waive)

10-2

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

Rule 166b. Forms and Scope of Discovery;
Protective Orders; Supplementation of Responses

1. Forms of Discovery. No change.

2. Scope of Discovery. No change.

3. Exemptions. The following matters are protected from disclosure by privilege:

a. Work Product. No change.

b. Experts. No change.

c. Witness Statements. No change.

d. Party Communications. ~~With the exception of discoverable communications prepared by or for experts, and other discoverable communications,~~ [Communications] between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the claims made a part of the pending litigation. [This exemption does not include communications prepared by or for experts that are otherwise discoverable.] For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. No change.

4. Presentation of Objections. No change.

5. Protective Orders. No change.

6. Duty to Supplement. No Change.

Comment on Proposed Amendment:

There has been confusion over the meaning of the phrase "and other discoverable communications" of Rule 166b 3.d as published by West Publishing Company in its current Texas Rules of Civil Procedure handbook. To eliminate this confusion, the rule has been redrafted and deletes the confusing phrase. As modified, the intent of the rule with regard to communications between employees of a party is now clear. To further improve upon the language of the rule, it is suggested that the provision with regard to experts be separately stated at the end of the rule.

00777

Copy to LHS
Orig to file
4-25-88 - lfh

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180
CHARLES W. MATTHEWS
ASSOCIATE GENERAL ATTORNEY

April 22, 1988

Re: Texas Rules of Civil Procedure 166 b-3(d) and 169

Mr. R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Enclosed are suggested revisions of Rules 166 b-3(d) and 169. Copies of the rules with the modifications are being distributed to all members of the committee. These rules should be considered at our meeting on May 7.

Very truly yours,

Charles W. Matthews

CWM:cv
Enclosure

c: Ms. Evelyn A. Avent
Mr. Luther H. Soules
Members of the Adminstration of Justice Committee

COTTON, BLEDSOE, TIGHE & DAWSON
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 300 UNITED BANK BUILDING
500 WEST ILLINOIS
MIDLAND, TEXAS 79701

TELEPHONE (915) 684-5782
P. O. BOX 2776 ZIP 79702

CLAYDESTA OFFICE
SUITE 5550
CLAYDESTA NATIONAL BANK BLDG.
6 DESTA DRIVE
MIDLAND, TEXAS 79705
TELEPHONE (915) 684-5782

ROBERT C. BLEDSOE
CHARLES L. TIGHE
ROBERT H. DAWSON
TEVIS HERD
RICHARD T. McMILLAN
JOHN A. WOODSIDE
CORBY CONSIDINE
BARRY N. BECK
ALLEN D. CUMMINGS
ROBERT K. WHITT
ALAN H. MEYERS
MAX E. WRIGHT
RUSSELL N. MULLINS

OF COUNSEL
WM. M. COTTON
ROBERT K. HUDSON
ROBERT W. FULLER

MARK S. CARDER
RICK D. DAVIS, JR.
CRAIG L. EVANS
SCOTT P. HAZEN
BILL J. HOWARD
TERRY W. RHOADS
SUSAN R. RICHARDSON
RICK G. STRANGE
JULIA E. VAUGHAN
SCOTT A. WILLIAMS
W. BRUCE WILLIAMS
JERRY D. ZANT

January 15, 1988

Mr. Charles Matthews
Exxon Co., Room 1895
P. O. Box 2180
Houston, Texas 77001

Dear Charles:

One of our trial lawyers, Bruce Williams, has called my attention to the fact that there appears to be an error in the West publication of the Texas Rules of Civil Procedure concerning Rule 166b, 3(d), which commences with, "Party Communications. With the exception of discoverable communications prepared by or for experts and other discoverable communications, ..." The underlined phrase does not appear in the same portion of that same rule as it apparently was adopted according to the Supreme Court of Texas order set out in the September, 1987, issue of the Texas Bar Journal at page 857. The same portion of subparagraph (d) there reads, "Party Communication. With the exception of discoverable communications prepared by or for experts, communications . . .," and both versions of the Rule are identical thereafter.

It appears to us that the inclusion of that phrase does cause, and will cause, a good bit of confusion, and it would be helpful, if this is simply a mistake, for West to correct the error. If you think it inappropriate for your committee to pursue this matter, I will pursue it with West Publishing Company, to whom a copy of this letter is being directed.

Very truly yours,

Charles Tighe

CT:pag
cc: West Publishing Company
500 West Kellogg Blvd.
P. O. Box 64526
St. Paul, Minnesota 55164-9979

RECEIVED
JAN 19 1988
C. W. MATTHEWS

bcc: Evelyn Aven

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

February 2, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 166b-3(d)

Dear Luke and Doak:

I am enclosing a letter from Mr. John B. Wilson of Dallas, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. John B. Wilson
Wilson, Williams & Molberg
2214 Main Street
Dallas, Tx 75201-4324

RECEIVED
FEB 8 1988
C. W. MATTHEWS

00780

WILSON, WILLIAMS & MOLBERG
Attorneys and Counselors
2214 MAIN STREET
DALLAS, TEXAS 75201-4324

JOHN B. WILSON, P.C. *
ROGER G. WILLIAMS, P.C. *
KENNETH H. MOLBERG, P.C.
CARMEN S. MITCHELL
JOHN E. WALL, JR.
S. LYNN BLAKEMAN

* BOARD CERTIFIED—PERSONAL INJURY TRIAL SPECIALIST
TEXAS BOARD OF LEGAL SPECIALIZATION

(214) 748-5276
Telex 4931115
WWM UI

January 26, 1988

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

Re: Rule 166b 3d

Dear Justice Wallace:

I enclose a copy of a letter I have written to the Honorable Merrill Hartman, Judge of the 192nd Judicial District Court in Dallas, concerning confusion that existed during a hearing on a Motion for Protective Order, as to the accuracy of the language of Rule 166b 3d as published by the West Publishing Company in its current handbook.

I trust that I am correct in representing to Judge Hartman that the language of the handbook is accurate, and if not, I would appreciate you letting me and Judge Hartman know about it.

Kind regards.

Respectfully,

John B. Wilson

JBW:akf

Enclosure

WILSON, WILLIAMS & MOLBERG
Attorneys and Counselors
2214 MAIN STREET
DALLAS, TEXAS 75201-4324

JOHN B. WILSON, P.C. *
ROGER G. WILLIAMS, P.C. *
KENNETH H. MOLBERG, P.C.
CARMEN S. MITCHELL
JOHN E. WALL, JR.
S. LYNN BLAKEMAN

* BOARD CERTIFIED—PERSONAL INJURY TRIAL SPECIALIST
TEXAS BOARD OF LEGAL SPECIALIZATION

(214) 748-5276
Telex 4931115
WWM UI

January 26, 1988

Honorable Merrill Hartman, Judge
192nd Judicial District Court
6th Floor, Courthouse
Dallas, Texas 75202

Re: Rule 166b 3d

Dear Judge Hartman:

I would like to take this opportunity to thank you and compliment you for the fair and expeditious manner in which you conducted the Montgomery trial. Carmen Mitchell and I were both considerably impressed.

During the hearing on Defendant's Motion for Protective Order in the case of Annie Mae Montgomery vs. DISD, there was a question as to the accuracy of the language of Rule 166b 3d as contained in the West Publishing Company handbook, "Texas Rules of Court."

I asked my son, Mark Wilson, to inquire, and he checked with the publishers and with the office of Justice Wallace at the Texas Supreme Court.

He advises that there have been at least four different versions of Rule 166b approved since March, 1987, and he assures me that upon representation from both the publisher and Justice Wallace's offices, the version contained in the West Publishing Company handbook cited above is correct, and I have compared that with the latest version that we have been able to find, which is that found in 733-734 S.W.2d, at page LII.

I agree with your concern regarding the language as published, since the text following "party communications" is not a complete sentence. However, if that language is read together with the title of the subsection and the introductory language of Subsection 3, "The following matters are protected from disclosure by privilege", sense can be made of Subsection 3d.

I would think that some revision would be helpful, but absent that, I think I have now arrived at an understanding of the intent expressed in the current language.

Kind regards.

Respectfully,

John B. Wilson

cc: Honorable James P. Wallace, Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

orig to HJH 2/2/88
✓ Copy to LHS

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASST
WILLIAM L. WILLIS

ADMINISTRATIVE ASST.
MARY ANN DEFIBAUGH

February 2, 1988

hjh
Gonzalez

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 166b-3(d)

Dear Luke and Doak:

I am enclosing a letter from Mr. John B. Wilson of Dallas, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. John B. Wilson
Wilson, Williams & Molberg
2214 Main Street
Dallas, Tx 75201-4324

00784

WILSON, WILLIAMS & MOLBERG
Attorneys and Counselors
2214 MAIN STREET
DALLAS, TEXAS 75201-4324

JOHN B. WILSON, P.C. *
ROGER G. WILLIAMS, P.C. *
KENNETH H. MOLBERG, P.C.
CARMEN S. MITCHELL
JOHN E. WALL, JR.
S. LYNN BLAKEMAN

* BOARD CERTIFIED—PERSONAL INJURY TRIAL SPECIALIST
TEXAS BOARD OF LEGAL SPECIALIZATION

(214) 748-5276
Telex 4931115
WWM UI

January 26, 1988

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

Re: Rule 166b 3d

Dear Justice Wallace: --

I enclose a copy of a letter I have written to the Honorable Merrill Hartman, Judge of the 192nd Judicial District Court in Dallas, concerning confusion that existed during a hearing on a Motion for Protective Order, as to the accuracy of the language of Rule 166b 3d as published by the West Publishing Company in its current handbook.

I trust that I am correct in representing to Judge Hartman that the language of the handbook is accurate, and if not, I would appreciate you letting me and Judge Hartman know about it.

Kind regards.

Respectfully,

John B. Wilson

JBW:akf

Enclosure

WILSON, WILLIAMS & MOLBERG
Attorneys and Counselors
2214 MAIN STREET
DALLAS, TEXAS 75201-4324

JOHN B. WILSON, P.C. *
ROGER G. WILLIAMS, P.C. *
KENNETH H. MOLBERG, P.C.
CARMEN S. MITCHELL
JOHN E. WALL, JR.
S. LYNN BLAKEMAN

* BOARD CERTIFIED—PERSONAL INJURY TRIAL SPECIALIST
TEXAS BOARD OF LEGAL SPECIALIZATION

(214) 748-5276
Telex 4931115
WWM UI

January 26, 1988

Honorable Merrill Hartman, Judge
192nd Judicial District Court
6th Floor, Courthouse
Dallas, Texas 75202

Re: Rule 166b 3d

Dear Judge Hartman:

I would like to take this opportunity to thank you and compliment you for the fair and expeditious manner in which you conducted the Montgomery trial. Carmen Mitchell and I were both considerably impressed.

During the hearing on Defendant's Motion for Protective Order in the case of Annie Mae Montgomery vs. DISD, there was a question as to the accuracy of the language of Rule 166b 3d as contained in the West Publishing Company handbook, "Texas Rules of Court."

I asked my son, Mark Wilson, to inquire, and he checked with the publishers and with the office of Justice Wallace at the Texas Supreme Court.

He advises that there have been at least four different versions of Rule 166b approved since March, 1987, and he assures me that upon representation from both the publisher and Justice Wallace's offices, the version contained in the West Publishing Company handbook cited above is correct, and I have compared that with the latest version that we have been able to find, which is that found in 733-734 S.W.2d, at page LII.

I agree with your concern regarding the language as published, since the text following "party communications" is not a complete sentence. However, if that language is read together with the title of the subsection and the introductory language of Subsection 3, "The following matters are protected from disclosure by privilege", sense can be made of Subsection 3d.

I would think that some revision would be helpful, but absent that, I think I have now arrived at an understanding of the intent expressed in the current language.

Kind regards.

Respectfully,

John B. Wilson

cc: Honorable James P. Wallace, Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

HJH -
Agenda

January 22, 1988

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

Re: Party Communication Exemption Under
Tex. R. Civ. P. 166b(3)(d).

Dear Luke,

As indicated in the attached letter, David Hicks noticed that paragraph 3(d) of Rule 166b would be worded more clearly if the word "communications" appeared between the second comma and the word "between."

I do not share his concerns about the magnitude of the problem because the title of the subparagraph could be read into the place where the word is missing. This makes sense because the title conveys the subparagraph's subject, i.e. what it is about. That is what is missing between the second comma and the word "between." Eventually, however, we should recommend the adjustment suggested by Mr. Hicks.

Sincerely,

Bill (wvm)

William V. Dorsaneo III

WVDIII:vm

Enc.

SCHOOL OF LAW
SOUTHERN METHODIST UNIVERSITY / DALLAS, TEXAS 75275-0116 / 214 • 692-3249

VINSON & ELKINS
ATTORNEYS AT LAW
2020 LTV CENTER
2001 ROSS AVENUE
DALLAS, TEXAS 75201-2916
TELEPHONE 214 979-6600

3300 FIRST CITY TOWER
1001 FANNIN
HOUSTON, TEXAS 77002-6760
TELEPHONE 713 651-2222
CABLE VINELKINS-TELEX 762146

THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVE. N.W.
WASHINGTON, D.C. 20004-1007
TELEPHONE 202 639-6500 TELEX 89680

FIRST CITY CENTRE
816 CONGRESS AVENUE
AUSTIN, TEXAS 78701-2496
TELEPHONE 512 495-8400

47 CHARLES ST., BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 01 441 491-7236
CABLE VINELKINS LONDON W1-TELEX 24140

January 14, 1988

Professor William V. Dorsaneo, III
Southern Methodist University
School of Law
Dallas, Texas 75275

Re: Party Communications Privilege Under
Tex.R.Civ.P. 166b3(d)

Dear Professor Dorsaneo:

As you requested, this letter memorializes our telephone conversation today about a significant omission from the language of the amended rule on party communications privilege. Because of the omission, the new language read literally excepts from the privilege the very communications intended by the Court and your committee to be protected from disclosure during discovery: communications between agents or representatives or employees of a party made subsequent to the occurrence upon which the suit is based and in anticipation of prosecuting or defending claims made part of the pending litigation. The rule currently reads: "The following matters are protected from disclosure by privilege: d. Party Communications. With the exception of discoverable communications prepared by or for experts, and other discoverable communications, between agent or representatives or the employees of a party ...." The word "communications" should appear between the second comma and the word "between."

Thank you for your clarification of the Court's intent to maintain the party communications privilege. At your convenience, please send to me at the above address any committee reports or other documentation reflecting that intent.

Very truly yours,

David Hicks

0772:dbl
\pdh\166b3.ltr

THE LAW OFFICES OF
FRANK L. BRANSON, P.C.
PENTHOUSE SUITE
HIGHLAND PARK NATIONAL
BANK BUILDING
4514 COLE AVENUE
DALLAS, TEXAS 75205

FRANK L. BRANSON
PAUL N. GOLD
DEBBIE DUDLEY BRANSON
SCOTT M. LEWIS
RICHARD K. BERGER
GEORGE (TEX) QUESADA

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

September 15, 1987

Luther H. Soules, III
Soules, Reed & Butts
800 Milam Bldg.
San Antonio, Texas 78205

Re: Proposed Changes to Rule 166b

Dear Luke:

I want to call your attention to an apparent internal inconsistency in the amendments to Rule 166b. The conflicting language appears in subsections 166b(3)(b) "Experts" and 166b(3)(e) "Other Privileged Information."

Rule 166b(3)(b) retains the provision that a consulting expert's identity and work product become discoverable only if the consultant's work product "forms a basis" either in whole or in part of the opinions of an expert who will be called as a witness. The operative phrase, "forms a basis," necessarily implies that the testifying expert, in some manner, relies upon the consultant's work product.

I believe there is a potential problem, because Rule 166b(3)(e) has substituted "reviewed" for "relied upon." The two terms simply do not mean the same thing. I believe that "review" could be interpreted to require that the identity and work product of a consultant become discoverable merely if a testifying expert looked at or was shown the consultant's work product. Analogously, as an example of how this conflict could cause confusion, many attorneys (and judges) have taken the position regarding Rule 611, Tex. R. Evid., that if a witness merely "reviews," but does not refresh his recollection (i.e. rely upon) from a document, it is not discoverable. Of course Rule 611 clearly requires that the witness' recollection be refreshed from the document; however, this example points out the difficulties that can be anticipated by the loose wording of Rule 166b(3)(e).

It is unclear from the drafting of the rule what precise position the Supreme Court or the Advisory Committee wished to take regarding the discoverability of consultant's work product. Whatever concept was intended, it needs to be clearly and consistently stated in the rule, lest unnecessary anxiety and litigation in an already confusing area be created.

Thank you for your consideration.

Very truly yours,

PAUL N. GOLD

PNG/dd

HJH,
SCAC SubC
COAJ
SCAC Agenda

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

March 21, 1988

Professor Roger M. Baron
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002-7006

Dear Roger:

Thank you for calling to my attention the apparent discrepancy in Tex. R. Civ. P. 166b. Paragarphs 2e(1) and 2e(2) certainly appear to conflict with paragraph 3e. I certainly accept your letter in the helpful spirit with which it was obviously written.

By copy of this letter to Luke Soules, Advisory Committee Chairman, I am advising him of this inconsistency. I am sure he will take appropriate action.

Thank Elaine for me. She is a valued member of our Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc/encl: ✓Mr. Luke Soules

South Texas College of Law

ROGER M. BARON
Assistant Professor of Law
Jurisdictions Licensed: Missouri, Texas
Office Phone: (713) 659-8040 Ext. 343
Home Phone: (713) 367-5578

March 15, 1988

Honorable William W. Kilgarlin
Supreme Court of Texas
Austin, Texas 78711

RE: Discovery of Consulting Experts
(New Portions of Rule 166b)

Dear Justice Kilgarlin:

I write to you in your capacity as liaison with the Rules Committee. After viewing the video-tape recently distributed across Texas on the new rules, I was under the impression that opinions and materials by a consulting expert could be discovered if a testifying expert had "reviewed" those opinions and materials, regardless of whether or not the opinions or material formed a basis for the opinion of a testifying expert. New Rule 166b.3.e uses language which supports this. Corresponding Rules 166b.2.e(1) and 166b.2.e(2) do not make this distinction and these rules deal more directly with what is discoverable, as opposed to Rule 166b.3.e which is a negation of an exemption.

I spoke briefly with Professor Elaine Carlson about this apparent inconsistency and she suggested that I bring this to your attention. Please don't construe this correspondence as an effort to persuade the Committee or the Court one way or another. I just thought you should be aware of this.

Very truly yours,

ROGER M. BARON
Assistant Professor of Law

RMB:cs

00793

Office Address: Roger M. Baron
1303 San Jacinto Street. Houston. Texas 77002-7006 (713) 659-8040

Home Address:
95 S. High Oaks Circle
The Woodlands Texas 77380

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 28, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, TX 75275

RE: Tex. R. Civ. P. 166b

Dear Bill:

I have enclosed a copy of a letter sent to me through Justice William W. Kilgarlin regarding Rule 166b. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
cc: Justice William L. Kilgarlin
Mr. Doak Bishop

Kornegay-Carroll And Associates, Inc.

COURT REPORTERS 512/476-3967

106 E. SIXTH ST., SUITE 350 AUSTIN, TEXAS 78701

November 19, 1987

Soules, Reed & Butts
Mr. Luther Soules
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

Pursuant to our previous telephone conversation, please send me the "Proceedings File" for Rules 166 C and 206 of the Texas Rules of Civil Procedure regarding the recent rules changes.

Your prompt attention to my request will be appreciated.

After having had an opportunity to review the "Proceedings File", I look forward to meeting you and perhaps discussing the material in a constructive manner.

Yours Truly,

Wally R. Kornegay

Wally Kornegay

cc: Judge James P. Wallace

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 6, 1987

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

Re: Tex. R. Civ. P. 166c.

Dear Luke:

Enclosed is a memo regarding the amendment to Rule 166c. Please give me a call after you have reviewed the matter.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure

Yesterday, Peggy Liedtke, executive secretary of the Court Reporters Certification Board called to say that she received some inquiries about this new rule:

...

Rule 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 deposition transcript.

Change by amendment effective January 1, 1988.

Comment. This is a new rule which allows the parties to modify the existing procedures concerning depositions to fit the facts and situations of the individual case.

...

The Notion had been expressed that this will eleminate the necessity for certification of free lance court reporters.

The duties of the Board and the requirements for licensing are covered in chapter 52 of the Texas Government Code.

Section 52.001 contains key definitions:

(3) "Official court reporter" means the shorthand reporter appointed by a judge as the official court reporter.

(4) "Shorthand reporter" means a person who engages in shorthand reporting.

(5) "Shorthand reporting" means the practice of shorthand reporting for use in litigation in the courts of this state by making a verbatim record of an oral court proceeding, deposition, or proceeding before a grand jury, referee, or court commissioner using written symbols in shorthand, machine shorthand, or oral stenography.

Section 52.021 says that you cannot be appointed an official court reporter or engage in shorthand reporting unless you are certified as a shorthand reporter by the Supreme Court. Section 52.033 lists three - really four exceptions:

§ 52.033. Exemptions

This chapter does not apply to:

(1) a party to the litigation involved;

(2) the attorney of the party; or

(3) a full-time employee of a party or a party's attorney.

It appears that the new Rule 166c would allow, on written agreement of the parties, for a deposition to be taken by video camera, shorthand notes, a fast typist, tape recording with subsequent transcription, whatever the ingenuity of the parties may come up with. It seems to me that the real question is - under Rule 166c, can parties agree to the production of a deposition by the means defined in § 52.001(5) by a person not a certified court reporter and not a person covered by the § 52.033 exceptions? - A very narrow question.

Texas Government Code § 22.004(c) says: "So that the Supreme Court has full rulemaking power in civil actions, a rule adopted by the Supreme Court repeals all conflicting laws and parts of law governing practice and procedure in civil actions, but substantive law is not repealed" etc. I am not inclined to think that this gives authority which would permit Rule 166c to repeal any part of Chapter 52 of Texas Government Code. Rather, they should be read in harmony. - If a deposition is taken by "using written symbols in shorthand, machine shorthand, or oral stenography" by one not a party to the litigation, a party's attorney, or a full-time employee of one or the other - then the person must be a certified court reporter.

I do not think such a reading is any reason for the court reporters to burn the house down.

If you disagree, or have any thoughts or observations it would be appropriate for me to pass along to Peggy and her people - please let me know.

Thanks.

COA disapproves
& defers for
further study.

Rule 167a. Physical and Mental Examination of Persons.

(a) Order of Examination. When the mental or physical condition (including the blood group [or tissue type]) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the ~~action~~ [case] is pending may order the party [or the person in his custody or legal control], to submit to a physical or mental examination by[: (1)] a physician or [professional as described in Rules 509 and 510, Texas Rules of Civil Evidence; or (2) for paternity testing purposes only, any other person appointed by the court as an expert.] ~~to be examined by a physician or other person in his custody or under his control~~ The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time,place, manner, conditions, and scope of the examination and the person by whom it is to be made.

(b) Report of ~~Examining Physician~~ [Examiner].

(1) If requested by the party against whom an order is made under this rule of the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the ~~examining physician~~ [examiner] setting out his his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same conditions. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like

report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he us unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if ~~a physician~~ [the examiner] fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an ~~examining physician~~ [examiner] or the taking of a deposition of the ~~physician~~ [examiner] in accordance with the provisions of any other rule.

(3) (No change.)

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 167a. Physical and Mental Examination of Person

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the per son to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Psysician.

(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physican setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination,previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The Court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the Court may exclude his testimony if offered at the trial.

CO AJ wants to defer for further study and more adequate

II. **Proposed Rule:** Mark through deletions to existing rule with dashes; underline proposed new wording.

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Court in which the action is pending may order the party to submit to a physical examination by a physician or mental examination by a physician or licensed psychologist or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the exami nation and the person or persons by whom it is to be made.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or licensed psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The Court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or licensed psychologist fails or refuses to make a report the Court may exclude his testimony if offered at the trial.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

March 13, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 167(a) and (b)(1), Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copy of a letter sent to me by Kenneth D. Fuller regarding proposed changes to Rule 167(a) and (b)(1). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Mr. Kenneth D. Fuller
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

KOONS, RASOR, FULLER & McCURLEY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
2311 CEDAR SPRINGS ROAD, SUITE 300
DALLAS, TEXAS 75201
214/871-2727

WILLIAM C. KOONS
BOARD CERTIFIED-FAMILY LAW
AND CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
REBA GRAHAM RASOR
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
KENNETH D. FULLER
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
MIKE McCURLEY
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
ROBERT E. HOLMES JR.
BOARD CERTIFIED-FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
KEVIN R. FULLER

WILLIAM V. DORSANEO, III
OF COUNSEL
BOARD CERTIFIED-CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

3/6 HJH SCAC supp - COATS SCAC agenda

xc Dulles

February 28, 1989

Mr. Luther H. Soules III
Attorney at Law
Republic of Texas Plaza
10th Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Proposed Change to
Rule 167(a) and (b)(1)

Dear Luke:

Enclosed are the following:

1. Copy of letter from Kevin W. Karlson of the Texas Psychological Association regarding the Court's opinion in Coates v. Whittington, 31 Texas Supreme Court Journal 659 (1988) interpreting Rule 167(a) and (b)(1).

2. A request for new rule or change of existing Rules of Texas Civil Procedure.

I would request this proposed change be placed on the agenda for the next meeting of the Committee on May 26th and 27th .

I am convinced the proposed change has a great deal of merit. There are many situations in family law where this rule is customarily utilized. Quiet often there are insufficient funds for hiring of a psychiatrist or there would be undue delay in getting the parties in for consultation with, or evaluation by a psychiatrist. Many times a licensed psychologist would be able to accomplish the same task, however, under the present wording of the rule we do not have the advantage of the sanctions and safeguards of the rule as to licensed psychologist. The recommended amendment would cure this situation.

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

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

Ms. Elaine A. G. Carlson
South Texas College of Law
1301 San Jacinto, Suite 224

Mr. Solomon Casseb, Jr.
Casseb, Strong & Pearl, Inc.
127 East Travis Street
San Antonio, Texas 78205

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

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

Please confirm whether or not this is placed on the agenda. Whether or not it is desired that Dr. Karlson (who is an attorney) and/or any other member of the Texas Psychological Association should be asked to appear before the Committee.

Respectfully,

Kenneth D. Fulller

KDF/wv
Enclosures
cc: Dr. Kevin W. Karlson

TEXAS PSYCHOLOGICAL ASSOCIATION

OFFICERS

President
CHARLES T. McDONALD, Ph.D.
Austin

President-Elect
EMILY G. SUTTER, Ph.D.
Houston

Past-President
MICHAEL C. GOTTLIEB, Ph.D.
Dallas

Liaison Officer for Education & Communication
LYNN P. REHM, Ph.D.
Houston

Liason Officer for Organizational Affairs
ROYCE SCRIVNER, Ph.D.
Dallas

Liaison Officer for Professional Affairs
JOHN K. REID, Ph.D.
San Antonio

Liaison Officer for [illegible]ic Affairs
[illegible]OMAS H. COOK, Ph.D.
Dallas

Liaison Officer for Local Area Societies
SUSAN S. ERICKSON, Ph.D.
San Antonio

APA Council Representative
JOSEPH C. KOBOS, Ph.D.
San Antonio

Associate Member
SHIRLEY ENOS, M. Ed.
Austin

DIVISION DIRECTORS

CARLOS W. DAVIS, JR., Ph.D.
Applied Psychology
Dallas

BRENDA C. TEAS, M.S.
Psychological Associates
Houston

GAYLE PITCHER, Ph.D.
School Psychology
Houston

D. JEANNE CALLIHAN, Ph.D.
Trainers of Psychologists
San Antonio

Executive Director
MARGARET YOUNGQUIST

Administrative Secretary
[illegible]MI MEADOWS

[illegible]islative Consultant
DON CAVNESS

Legal Counsel
MARK J. HANNA

February 14, 1989

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

Dear Ken:

The Texas Psychological Association is the professional association representing more than 1900 psychologists in Texas. As Chairman of the Legislative Committee of the Texas Psychological Association it is my task to attempt to find remedies for legal difficulties being faced by psychologists in their professional practice. As the result of a recent Supreme Court case, Coates v. Whittington, 31 Texas Supreme Court Journal 659 (1988) Texas judges have been limited to appointing physicians for mental examinations under Rule 167a of the Texas Rules of Civil Procedure. The psychologists of Texas were extremely distressed by this ruling and have been adversely affected in that civil judges and even some family district judges have been reluctant to appoint psychologists to conduct mental examinations. The Texas Psychological Association filed an Amicus Curie brief along with a motion for re-hearing in this case, and the Supreme Court refused the motion for rehearing without comment. The Court did, however, invite proposals for a rule change. As a consequence, we are seeking to modify the Texas Rules of Civil Procedure to correct this difficulty.

It might be of interest to note that Congress has recently amended Rule 35 of the Federal Rules of Civil Procedure to correct a similar difficulty. The amendment to Rule 167a of the Texas Rules of Civil Procedure is a duplicate of the modification recently enacted by Congress into the Federal rules.

Rule 167a as currently constituted and as interpreted by the Texas Supreme Court in Coates v. Whittington has unreasonably restricted the rights of psychologists to practice in Texas. As a consequence of that unreasonable restriction, the Texas Psychological Association respectfully submits its recommendation for changes in the wording of Rule 167a. (See Attachment)

The Texas Psychological Association believes that this proposed wording will once again allow Rule 167a parallel construction to Rule 35 of the Federal

00806

6633 EAST HIGHWAY 290 SUITE 305 AUSTIN, TEXAS 78723 (512) 454-2449

Rules of Civil Procedure and once again accurately reflect the realities of practice for both the Texas Courts and of Texas mental health professionals. The Texas Psychological Association wishes to thank the Commission for its kind consideration in this matter. If we can be of any further assistance, please do not hesitate to call.

Sincerely,

Kevin Karlson/ph

Kevin W. Karlson, J.D., Ph.D.
Chair, Legislative Committee
Texas Psychological Association

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

December 28, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Texas Rules of Civil Procedure 166b(3)(d) and 167a

Dear Bill:

Enclosed herewith please find a copy of a letter sent to me by Harry L. Tindall regarding proposed changes to Rules 166b(3)(d) and 167a. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Franklin S. Spears

Rules 167a and 166b(3)(d)

TINDALL & FOSTER
ATTORNEYS AT LAW
2801 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-3094
TELEPHONE (713) 229-8733
TELECOPIER (713) 228-1303

HARRY L. TINDALL*
CHARLES C. FOSTER**
PATRICK W. DUGAN**
KENNETH JAMES HARDER
LYDIA G. TAMEZ
JANICE E. PARDUE
GARY E. ENDELMAN

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION
*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

12/28 HJH Scott Sub Co + Aguela + Cobb

December 16, 1988

Luther H. Soules, III
Republic of Texas Plaza, 10th Floor
175 East Houston St.
San Antonio, Texas 78205-2230

Re: Proposed amendment to Rule 167a

Dear Luke:

As a follow-up to my letter of December 1, 1988, I am enclosing with this letter a proposed amendment to Rule 167a to broaden the scope of those persons who may conduct physical or mental examinations. The revision would read as follows:

"(a) Order for Examination. When the mental or physical condition (including the blood group or tissue type) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the ~~action~~ case is pending may order the party or the person in his custody or legal control, to submit to a physical or mental examination by: (1) a physician or professional as described in Rules 509 and 510, Texas Rules of Civil Evidence; or (2) for paternity testing purposes only, any other person appointed by the court as an expert. ~~to produce for examination the person in his custody or legal control~~. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

"(b) Report of ~~Examining Physician~~ Examiner.

"(1) If requested by the party against whom an order is made under this rule of the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the ~~examining physician~~ examiner

setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if ~~a physician~~ the examiner fails or refuses to make a report the court may exclude his testimony if offered at the trial.

"(2) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an ~~examining physician~~ examiner or the taking of a deposition of the ~~physician~~ examiner in accordance with the provisions of any other rule.

"(3) [no change] "

I am also enclosing a proposed amendment to Rule 166b(3)(d). I look forward to hearing from you.

Sincerely,

Harry L. Tindall

/ms

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

Rule 167. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.

1. Procedure. No change.

2. Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. [Objections served after the date on which a response is to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.] The time for making a response may be shortened or lengthened by the court upon a showing of good cause.

3. Custody of Originals by Parties. No change.

4. Order. No change.

5. Nonparties. No change.

Comment on proposed amendment:

The purpose of the modification of Rule 167(2) is to provide for a waiver of objections provision so that Rule 167 and Rule 168 conform. Absent such a revision, it is unclear whether objections are waived under Rule 167, if not served on or before the date a response is to be served. The modification, as suggested, will not permit objections to be served after the date on which a response is to be served without agreement, order of the court or good cause. The amendment follows the similar provision of Rule 168.

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

May 3, 1988

Re: Texas Rules of Civil Procedure -
Rule 166(b)-2(e)
Rules 167 and 168

Mr. R. Doak Bishop
Committee on Administration of Justice
2800 Momentum Place
Dallas, Texas 75201

Dear Doak:

Enclosed are suggested revisions of Rules 166(b)-2(e), 167 and 168. Copies of the rules with the modifications are being distributed to all members of the committee. This rule should be considered at our meeting on May 7.

Very truly yours,

CWM:ch
Enclosure

c: Ms. Evelyn A. Avent
Mr. Luther H. Soules
Members of the Adminstration
of Justice Committee

00813

HUGHES & LUCE
2800 MOMENTUM PLACE
1717 MAIN STREET
DALLAS, TEXAS 75201

(214) 939-5500
TELECOPIER (214) 939-6100
TELEX 730836

1500 UNITED BANK TOWER
AUSTIN, TEXAS 78701
(512) 482-6800
TELECOPIER (512) 474-4258

March 14, 1988

Direct Dial Number
(214) 939-5421

Mr. Charles Mathews
Exxon Company
Room 1895
P. O. Box 2180
Houston, Texas 77001

Dear Charles:

Justice Kilgarlin of the Texas Supreme Court attended our March 12th meeting and made several suggestions for the discovery rules. First, he asked us to look into the differences between Rules 167 and 168 and to conform them. In Rule 168, there is a discussion of a waiver of objections to interrogatories. There is no such discussion of waiver in Rule 167, and perhaps there should be. Also, one of the rules states that it is not necessary to file such discovery requests, but the other includes no such statement. It probably should. Requests for Admissions under Rule 169 are still required to be filed. Justice Kilgarlin brought up the question of whether or not notices of depositions should be filed or are required to be filed under the new rules. This needs to be addressed. Finally, in Rule 166(b)(3) there is something left out before the word "communications" in part of the rule. Professor Bill Dorsaneo of the SMU Law School is aware of this problem and could discuss it with you. Please have your Committee review these rules and have written reports to us in time to take final action at the May 7th meeting.

Respectfully,

R. Doak Bishop

RDB/ls:1028

00814

RECEIVED
MAR 17 1988
C. W. MATTHEWS

Copy to LHS
Orig. to HSH
3/1/88

February 18, 1988

Mr. Luther H. Soules, III
SOULES, REED & BUTTS
800 Milam Building
San Antonio, Texas 78205

RE: Filing of Interrogatories

Dear Mr. Soules:

I viewed with interest your talk and paper on the 1988 changes in the Rules of Civil Procedure. One of our District Clerks, Marilou English of Refugio County, also attended your talk which I believe you made to all of the District Clerks. Recently a question came up concerning the necessity of filing interrogatories. Mrs. English was of the opinion that you believe that Rule 168 does not require the filing of interrogatories. Ray Hardy, District Clerk of Travis County, has published a guide which instructs his assistants to accept for filing interrogatories.

It seems to me that there are two (2) opposing arguments which are as follows:

1. The argument for filing. Rule 168 was not changed and does not say that interrogatories should not be filed. If the pre-1988 practice was to file interrogatories with the District Clerk there is nothing in Rule 168 to indicate a change from the prior procedure or practice.

2. The argument against filing. Rule 167 was very clearly changed and the policy of reducing the filing burden on the District Clerk should be applicable to interrogatories. It would not be burdensome for the attorneys to keep the interrogatories and the answers and if a dispute arose as to the sufficiency of an answer, it would be easier enough to offer and admit the documents into evidence at a hearing on a motion to complel discovery.

Please let me have your thoughts concerning this matter and if you have time, Mrs. English and I would very much appreciate your

response in writing. I think it is reassuring to the Clerks to have a document to present to attorneys should they appear in the Clerk's office and demand to file some instruments. Thank you for your service to the State Bar and the administration of justice.

Sincerely yours,

Marion E. Williams, Jr. Atty 2dB

Marion E. Williams, Jr.

MEW/hb

DICTATED BUT NOT READ BY MARION E. WILLIAMS, JR.

CC: Mrs. Marilou English, District Clerk
P. O. Box 736
Refugio, Texas 78377

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 12, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, TX 75275

RE: Tex. R. Civ. P. 167 and 168

Dear Bill:

I have enclosed comments sent to me through Justice Wallace from David M. Kendall regarding Rules 167 and 168. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct

8/26 Tim SCAC Sec'C & Orgwala

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

August 19, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
1000 Dallas Bldg.
Dallas, Tx 75201

Re: Tex. R. Civ. P. 167 and 168.

Dear Luke and Doak:

I am enclosing a letter from Mr. David M. Kendall in regard to the above rules.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. David M. Kendall
Thompson & Knight
1200 San Jacinto Center Town Lake
98 San Jacinto Blvd.
Austin, Tx 78701

00813

THOMPSON & KNIGHT
ATTORNEYS AND COUNSELORS
1200 SAN JACINTO CENTER TOWN LAKE
98 SAN JACINTO BOULEVARD
AUSTIN, TEXAS 78701
(512) 474-8211

TELECOPY
(512) 474-8216

3300 FIRST CITY CENTER
DALLAS, TEXAS 75201

July 28, 1987

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

Re: Rules 167 and 168, Texas Rules of Civil Procedure

Dear Judge Wallace:

I have no particular quarrel with the decisions of the Court in Peeples v. The Honorable Fourth Supreme Judicial District and Dominguez v. Thirteenth Court of Appeals. However, those decisions place an entirely new burden on litigants called on to answer interrogatories and to produce documents.

When the nature of our representation requires us to deal with clients who are not local and with whom we are not particularly well acquainted, it often becomes difficult, if not impossible, to file objections with evidence and/or documents within thirty days after service of the discovery.

I am aware that we can request an extension of time, but it occurs to me that that, in itself, is a form of protective order which would require documentation and proof.

If I can be of any assistance, please don't hesitate to call on me.

Yours very truly,

David M. Kendall

DMK:pm

00819

TRCP

Rule 168

6. Objections. On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. Objections served after the date on which answers are to be served will be waived unless an extension of time has been granted by agreement or order of the court or good cause is shown for failure to object within such period. Answers only to those interrogatories or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such add
as the court may direct. Either party m
to such objections at the earliest possib

COMMENTS: The previous second sentence
served after the date on which answers
waived unless an extension of time has be
or order of the court or good cause is s
object within such period," was and
discovery objections.

Uncontested

00820

C:\DW4\SCAC\044.DOC\HJH

TRCP

Rule 168

6. Objections. On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. Objections served after the date on which answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period," Answers only to those interrogatories or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the court may direct. Either party may request a hearing as to such objections at the earliest possible time.

COMMENTS: The previous second sentence which read, "Objections served after the date on which answers are to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period," was and is applicable to all discovery objections.

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Tex. R. Civ. P. 166(b), 168, and 169

Dear Bill:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 166(b), 168 and 169. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

Rule 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon the party.

1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court.

   [A party serving interrogatories or answers under this rule shall not file such interrogatories or answers with the clerk of the court unless the court upon motion, and for good cause, permits the same to be filed.]

2. Scope. No change.

3. Procedure. No change.

4. Time to Answer. No change.

5. Number of Interrogatories. No change.

6. Objections. No change.

Comment on proposed amendment:

Prior to the 1988 amendments to the Texas Rules of Civil Procedure, Rule 168 provided for the filing of interrogatories or answers with the clerk of the court. The 1988 amendment deleted that part of Rule 168 and accordingly, no longer imposed a filing requirement. The suggested modification will therefore not change the existing rule but merely clarify the intent of the amendment and expressly prohibit the filing of interrogatories or answers with the clerk of the court without court order. Also, the suggested modification of Rule 168 will conform this rule to the similar provision contained in Rule 167 with regard to the filing of interrogatories or answers with the clerk of the court.

00823

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

May 3, 1988

Re: Texas Rules of Civil Procedure -
Rule 166(b)-2(e)
Rules 167 and 168

Mr. R. Doak Bishop
Committee on Administration of Justice
2800 Momentum Place
Dallas, Texas 75201

Dear Doak:

Enclosed are suggested revisions of Rules 166(b)-2(e), 167 and 168. Copies of the rules with the modifications are being distributed to all members of the committee. This rule should be considered at our meeting on May 7.

Very truly yours,

CWM:ch
Enclosure

c: Ms. Evelyn A. Avent
Mr. Luther H. Soules
Members of the Adminstration
of Justice Committee

00824

HUGHES & LUCE
2800 MOMENTUM PLACE
1717 MAIN STREET
DALLAS, TEXAS 75201

(214) 939-5500
TELECOPIER (214) 939-6100
TELEX 730836

1500 UNITED BANK TOWER
AUSTIN, TEXAS 78701
(512) 482-6800
TELECOPIER (512) 474-4258

March 14, 1988

Direct Dial Number
(214) 939-5421

Mr. Charles Mathews
Exxon Company
Room 1895
P. O. Box 2180
Houston, Texas 77001

Dear Charles:

Justice Kilgarlin of the Texas Supreme Court attended our March 12th meeting and made several suggestions for the discovery rules. First, he asked us to look into the differences between Rules 167 and 168 and to conform them. In Rule 168, there is a discussion of a waiver of objections to interrogatories. There is no such discussion of waiver in Rule 167, and perhaps there should be. Also, one of the rules states that it is not necessary to file such discovery requests, but the other includes no such statement. It probably should. Requests for Admissions under Rule 169 are still required to be filed. Justice Kilgarlin brought up the question of whether or not notices of depositions should be filed or are required to be filed under the new rules. This needs to be addressed. Finally, in Rule 166(b)(3) there is something left out before the word "communications" in part of the rule. Professor Bill Dorsaneo of the SMU Law School is aware of this problem and could discuss it with you. Please have your Committee review these rules and have written reports to us in time to take final action at the May 7th meeting.

Respectfully,

R. Doak Bishop

RDB/ls:1028

00825

RECEIVED
MAR 17 1988
C. W. MATTHEWS

Copy to LHS
Orig. to HSH
3/1/88

February 18, 1988

Mr. Luther H. Soules, III
SOULES, REED & BUTTS
800 Milam Building
San Antonio, Texas 78205

RE: Filing of Interrogatories

Dear Mr. Soules:

I viewed with interest your talk and paper on the 1988 changes in the Rules of Civil Procedure. One of our District Clerks, Marilou English of Refugio County, also attended your talk which I believe you made to all of the District Clerks. Recently a question came up concerning the necessity of filing interrogatories. Mrs. English was of the opinion that you believe that Rule 168 does not require the filing of interrogatories. Ray Hardy, District Clerk of Travis County, has published a guide which instructs his assistants to accept for filing interrogatories.

It seems to me that there are two (2) opposing arguments which are as follows:

1. The argument for filing. Rule 168 was not changed and does not say that interrogatories should not be filed. If the pre-1988 practice was to file interrogatories with the District Clerk there is nothing in Rule 168 to indicate a change from the prior procedure or practice.

2. The argument against filing. Rule 167 was very clearly changed and the policy of reducing the filing burden on the District Clerk should be applicable to interrogatories. It would not be burdensome for the attorneys to keep the interrogatories and the answers and if a dispute arose as to the sufficiency of an answer, it would be easier enough to offer and admit the documents into evidence at a hearing on a motion to complel discovery.

Please let me have your thoughts concerning this matter and if you have time, Mrs. English and I would very much appreciate your

response in writing. I think it is reassuring to the Clerks to have a document to present to attorneys should they appear in the Clerk's office and demand to file some instruments. Thank you for your service to the State Bar and the administration of justice.

Sincerely yours,

Marion E. Williams, Jr. Eg 2B

Marion E. Williams, Jr.

MEW/hb

DICTATED BUT NOT READ BY MARION E. WILLIAMS, JR.

CC: Mrs. Marilou English, District Clerk
P. O. Box 736
Refugio, Texas 78377

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 12, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, TX 75275

RE: Tex. R. Civ. P. 167 and 168

Dear Bill:

I have enclosed comments sent to me through Justice Wallace from David M. Kendall regarding Rules 167 and 168. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct

00828

8/26 Tim SCAC Sup C & Gzuela

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

August 19, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
1000 Dallas Bldg.
Dallas, Tx 75201

Re: Tex. R. Civ. P. 167 and 168.

Dear Luke and Doak:

I am enclosing a letter from Mr. David M. Kendall in regard to the above rules.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. David M. Kendall
Thompson & Knight
1200 San Jacinto Center Town Lake
98 San Jacinto Blvd.
Austin, Tx 78701

00829

THOMPSON & KNIGHT
ATTORNEYS AND COUNSELORS
1200 SAN JACINTO CENTER TOWN LAKE
98 SAN JACINTO BOULEVARD
AUSTIN, TEXAS 78701
(512) 474-8211

TELECOPY
(512) 474-8216

3300 FIRST CITY CENTER
DALLAS, TEXAS 75201

July 28, 1987

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

Re: Rules 167 and 168, Texas Rules of Civil Procedure

Dear Judge Wallace:

I have no particular quarrel with the decisions of the Court in Peeples v. The Honorable Fourth Supreme Judicial District and Dominguez v. Thirteenth Court of Appeals. However, those decisions place an entirely new burden on litigants called on to answer interrogatories and to produce documents.

When the nature of our representation requires us to deal with clients who are not local and with whom we are not particularly well acquainted, it often becomes difficult, if not impossible, to file objections with evidence and/or documents within thirty days after service of the discovery.

I am aware that we can request an extension of time, but it occurs to me that that, in itself, is a form of protective order which would require documentation and proof.

If I can be of any assistance, please don't hesitate to call on me.

Yours very truly,

David M. Kendall

DMK:pm

00830

Rule 169. Request for Admission

1. Request for Admission. At any time after [commencement of the action] ŧĥę /ɗęfęńɗäńŧ /ĥäś /ɱäɗę /äppęäräńçę /ĭń /ŧĥę /çäµśę/ /ǿf ŧĭɱę/ŧĥęręfǿr/ĥäś/ęläpśęɗ, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, [or as otherwise agreed to by the parties,] the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court

Rule 169. Request for Admission

1. Request for Admission. At any time after [commencement of the action] ŧĥȩ /ɗȩfȩńɗäńŧ /ĥäś /ɱäɗȩ /äƿƿȩäŗäńƈȩ /ĭń /ŧĥȩ /ƈäɯśȩ/ /ȯŗ ŧĭɱȩ/ŧĥȩŗȩfȯŗ/ĥäś/ȩĺäƿśȩɗ, a party may serve upon any other party a written request for the admission, for action only, of the truth of any matters w 166b set forth in the request that re opinions of fact or of the application of the genuineness of any documents descr Copies of the documents shall be served they have been or are otherwise furnished inspection and copying. Whenever a part attorney of record, service of a request made on his attorney unless service on ordered by the court. A true copy of a r of a written answer or objection, toget service thereof as provided in Rule 21a, in the clerk's office by the party making

Each matter of which an admission separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, [or as otherwise agreed to by the parties,] the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court

Susan Mallard

shortens the time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five (45)~~ fifty (50) days after service of the citation and petition upon ~~him~~ that defendant. [No matter shall be deemed admitted unless the request contains a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within the time allowed by this rule and stated in the request.] If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. (No change.)

Comment on proposed amendment:

shortens the time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five (45)~~ fifty (50) days after service of the citation and petition upon

o matter shall be deemed admitted unless notice that the matters included in the dmitted if the recipient fails to answer e allowed by this rule and stated in the is made, the reason therefor shall be ll specifically deny the matter or set asons that the answering party cannot the matter. A denial shall fairly meet quested admission, and when good faith lify his answer or deny only a part of mission is requested, he shall specify and qualify or deny the remainder. An ve lack of information or knowledge as dmit or deny unless he states that he ry and that the information known or obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. (No change.)

Comment on proposed amendment:

The change in Rule 169 is designed to provide notice to recipients of requests for admission that failure to respond within the allowable time will result in the requests being deemed admitted without the necessity of a court order. This will prevent the potential for abuse of Rule 169 in actions involving pro se parties. The rule is also amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

The rule is also amended to permit service of Request for Admission at any time after commencement of the action but extend responses to no less than 50 days after service of citation and petition on the responsive parties.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 13, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 166a, 169, and 182
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please redlined versions of rules 166a, 169 and 182. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND
RESIDENTIAL REAL ESTATE LAW

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

February 3, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 169, Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copy of a letter sent to me by James L. Brister regarding proposed changes to Rule 169. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Mr. James L. Brister
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

LAW OFFICES
STUBBLEFIELD, BRISTER & SCHOOLCRAFT
A PROFESSIONAL CORPORATION

JAMES L. BRISTER
ALAN L. SCHOOLCRAFT
CHARLES R. STUBBLEFIELD

SISK-VAN VOORHIS PROFESSIONAL BUILDING
2117 PAT BOOKER ROAD, SUITE A
UNIVERSAL CITY, TEXAS 78148
(512) 659-1956

TELECOPIER (512) 659-6307

February 1, 1989

Mr. Luther H. Soules III
Attorney at Law
175 E. Houston Street
Republic of Texas Plaza
Tenth Floor
San Antonio, Texas 78205

Re: Proposed changes in rules

Dear Mr. Soules:

As I was in attendance of your presentation on the current rules during the seminar at San Antonio, I noted your suggestion regarding notification of potential problems to you for your advisory committee to investigate and remedy, if possible.

Recently I have had two (2) separate situations in which the rules do not seem to cover.

The first is that of the filing or non-filing of responses to discovery. As you know, the current discovery rules require that Interrogatories and Request for Production not be filed with the District Clerk, whereas the Request for Admissions and responses thereto, under Rule 169, require that they shall "be filed promptly in the Clerk's office." However, I have experienced the situation where the party requesting discovery has included the Interrogatories, Production Request, and Admission Request, in the same document. Of course, by answering them in the same document, you have thus created the situation that, on the one hand, the rules will not allow the filing of the discovery request and responses, and on the other hand, the discovery rules require filing of the discovery request. It would seem that a solution to this problem would be to amend Rule 169 to say that Request for Admissions and responses thereto must be submitted separately for response and cannot be included in other discovery requests.

The second situation which I have encountered on more than one occasion, is the taking of oral depositions in which other non-party witnesses are in attendance. Of course, the rule in a Court hearing allows the witnesses to be excluded. "The Rule" (Rule 614 of the Rules of Civil Evidence), in which the "Court"

shall order witnesses excluded so that they cannot hear the testimony of other witnesses. However, there is no rule to provide direction in this situation. On the other hand, the non-party witnesses can read the deposition after it is transcribed. Should "the Rules" be made applicable to oral depositions to exclude non-party witnesses?

I am very interested in assisting the Bar and Bench in improving the Rules of Civil Procedure. Please advise how I might participate with your Advisory Group as a member.

Thank you very much for your help in this matter.

Sincerely,

JAMES L. BRISTER

JLB/lkm

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Tex. R. Civ. P. 166(b), 168, and 169

Dear Bill:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 166(b), 168 and 169. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Rule 169. Requests for Admission

1. Request for Admission. ~~At any time after the defendant has made an appearance in the cause or after the defendant has claimed~~ A [A] party may serve upon [the plaintiff after the commencement of the action and upon] any other party [with or after the service of the citation and petition upon that party,] a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law or to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed

to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five (45)~~ [fifty (50)] days after service of the citation

If objection is made, the reason therefor
answer shall specifically deny the matter
l the reasons that the answering party
t or deny the matter. A denial shall
ice of the requested admission, and when
a party qualify his answer or deny only
which an admission is requested, he shall
as is true and qualify or deny the
party may not give lack of information
for failure to admit or deny unless he
ade reasonable inquiry and that the
ily obtainable by him is insufficient to
ny. A party who considers that a matter
requested presents a genuine issue for
round alone, object to the request; he
sions of paragraph 3 of Rule 215, deny

the matter or set forth reasons why he cannot admit or deny it.

COMMENT: The amendment conforms Rule 169 to all other discovery rules as to time for serving the discovery request and time for responses to defendants when such service is prior to answer day.

to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five (45)~~ [fifty (50)] days after service of the citation and petition upon him. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

COMMENT: The amendment conforms Rule 169 to all other discovery rules as to time for serving the discovery request and time for responses to defendants when such service is prior to answer day.

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

Rule 169. Requests for Admission

1. Request for Admission. At any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the

court may allow, [or as otherwise agreed to by the parties,] the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. [The request must contain a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within the time allowed by this rule and stated in the request.] If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which

an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. **Effect of Admission.** (No change.)

Comment on proposed amendment:

The change in Rule 169 is designed to provide notice to recipients of requests for admissions that failure to respond within the allowable time will result in the requests being deemed admitted without the necessity of a court order. This will prevent the potential for abuse of Rule 169 in actions involving pro se parties. The rule is also amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

Copy to LHS
Orig to file
4-25-88 - lgh

EXXON COMPANY, U.S.A.

POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180

CHARLES W MATTHEWS
ASSOCIATE GENERAL ATTORNEY

April 22, 1988

Re: Texas Rules of Civil Procedure 166 b-3(d) and 169

Mr. R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Enclosed are suggested revisions of Rules 166 b-3(d) and 169. Copies of the rules with the modifications are being distributed to all members of the committee. These rules should be considered at our meeting on May 7.

Very truly yours,

Charles Matthews

Charles W. Matthews

CWM:cv
Enclosure

c: Ms. Evelyn A. Avent
Mr. Luther H. Soules
Members of the Adminstration of Justice Committee

OFFICE PHONE
(817) 939-3521, EXT. 214

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

October 20, 1987

R. Doak Bishop, Chairman
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Rule 169

Judge Thomas R. Phillips, Vice-Chairman
Committee on Administration of Justice
280th District Court
3rd Floor; 301 Fannin Street
Houston, Texas 77002

Evelyn A. Avent, Secretary to Committee
7303 Wood Hollow Drive #208
Austin, Texas 78731

Charles Matthews
Chairman for Subcommittee for Rules 166-319 which includes 169
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Dear Friends:

I suggest that Rules 169 be amended to require that the party submitting the request for admissions state in such request that the recipient has thirty days to deny the admissions or they will be deemed admitted.

It has come to my attention that the use of Rule 169 admissions absent such proper notice is beginning to be utilized in actions against pro se defendants who of course have no conception of what period of time they have to respond.

Thanks for your consideration.

Yours truly,

Stan Pemberton

Stanton B. Pemberton

SBP/pm

cc: Luther H. Soules, Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

RECEIVED
OCT 28 1987
C. W. MATTHEWS

bcc: Judge Kilgarlin
Evelyn Avent

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASST.
WILLIAM L. WILLIS

ADMINISTRATIVE ASST.
MARY ANN DEFIBAUGH

March 10, 1988

Honorable Larry Warner
Carinhas & Chosy
Corporate Plaza, Suite 109
302 Kings Highway
Brownsville, Texas 78521

Re: Tex. R. Civ. P. 169.

Dear Larry:

Thank you for your letter of March 7, 1988, concerning Tex. R. Civ. P. 169. I am forwarding your letter to Luke Soules, who is Chairman of the Supreme Court Advisory Committee and to Doak Bishop, who is Chairman of the State Bar Committee on the Administration of Justice, with the request that they include this item in their agenda for their next meeting.

Although Judge William W. Kilgarlin is now the liaison to those two committees, having replaced me this month, it is always good to hear from the practicing bar and bench concerning problems with the rules. Our constant endeavor is to provide rules that are understandable and workable for those of you who are in the pits.

I hope the elections this week were generally to your satisfaction and I look forward to seeing you in the near future.

Sincerely,

James P. Wallace
Justice

JPW:fw
cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.

RECEIVED
MAR 17 1988
C. W. MATTHEWS

LAW OFFICES OF
CARINHAS & CHOSY
CORPORATE PLAZA, SUITE 109
302 KINGS HIGHWAY
BROWNSVILLE, TEXAS 78521

JACK G. CARINHAS, JR.
JOHN E. CHOSY
LARRY WARNER
DONALD R. SHULER, JR.

TELEPHONE: 512/542-9161
FAX: 512/542-3406

March 7, 1988

Justice James P. Wallace
Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

Please change the rule ordering that requests for admissions be automatically deemed admitted if not responded to within the appropriate time period.

There are two good reasons to do this:

1. The automatic character of the sanction will cause fair-minded judges who are chancellors at heart to find a way, however circuitous, to avoid the injustice which will sometimes result because of the inflexibility of the rule; and

2. The character of the law practice, at least for those of us "out in the country", has been adversely affected; we are now reduced to writing agreements that were formerly made over the telephone.

The second reason is more important. I have practiced law for nearly fifteen years. I have always made my deals over the telephone, and been able to rely on the honor of the other lawyers to keep their promises. It was a sad day indeed for me a week ago when, in an abundance of caution and even though a dear friend had agreed that I might have an additional twenty days to respond to his Requests for Admissions, that I wrote the agreement down and took it over to his office for him to sign. This may be the way they do things elsewhere, but I'll bet that Judge Gonzalez will tell you that it is not the way that lawyers in Weslaco have done things for the last forty years.

There is a corollary to the axiom that "Hard cases make bad law". It is the observation that equity intervenes to avert the injustice of the law's rigidity. Change the rule to give the trial judge some discretion. It is too inflexible and will lead to many unjust results.

I would appreciate your referring this to the rules committee and the favor of a response.

Sincerely yours,

Larry Warner
State Representative
District No. 38

LW:al

HUGHES & LUCE
2800 MOMENTUM PLACE
1717 MAIN STREET
DALLAS, TEXAS 75201

(214) 939-5500
TELECOPIER (214) 939-6100
TELEX 730836

1500 UNITED BANK TOWER
AUSTIN, TEXAS 78701
(512) 482-6800
TELECOPIER (512) 474-4258

March 14, 1988

Direct Dial Number
(214) 939-5421

Mr. Charles Mathews
Exxon Company
Room 1895
P. O. Box 2180
Houston, Texas 77001

Dear Charles:

Justice Kilgarlin of the Texas Supreme Court attended our March 12th meeting and made several suggestions for the discovery rules. First, he asked us to look into the differences between Rules 167 and 168 and to conform them. In Rule 168, there is a discussion of a waiver of objections to interrogatories. There is no such discussion of waiver in Rule 167, and perhaps there should be. Also, one of the rules states that it is not necessary to file such discovery requests, but the other includes no such statement. It probably should. Requests for Admissions under Rule 169 are still required to be filed. Justice Kilgarlin brought up the question of whether or not notices of depositions should be filed or are required to be filed under the new rules. This needs to be addressed. Finally, in Rule 166(b)(3) there is something left out before the word "communications" in part of the rule. Professor Bill Dorsaneo of the SMU Law School is aware of this problem and could discuss it with you. Please have your Committee review these rules and have written reports to us in time to take final action at the May 7th meeting.

Respectfully,

R. Doak Bishop

RDB/ls:1028

RECEIVED
MAR 17 1988
C. W. MATTHEWS

HJH, 3/14
SCAC SubC
& Agenda

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

March 10, 1988

Honorable Larry Warner
Carinhas & Chosy
Corporate Plaza, Suite 109
302 Kings Highway
Brownsville, Texas 78521

Re: Tex. R. Civ. P. 169.

Dear Larry:

Thank you for your letter of March 7, 1988, concerning Tex. R. Civ. P. 169. I am forwarding your letter to Luke Soules, who is Chairman of the Supreme Court Advisory Committee and to Doak Bishop, who is Chairman of the State Bar Committee on the Administration of Justice, with the request that they include this item in their agenda for their next meeting.

Although Judge William W. Kilgarlin is now the liaison to those two committees, having replaced me this month, it is always good to hear from the practicing bar and bench concerning problems with the rules. Our constant endeavor is to provide rules that are understandable and workable for those of you who are in the pits.

I hope the elections this week were generally to your satisfaction and I look forward to seeing you in the near future.

Sincerely,

James P. Wallace
Justice

JPW:fw
cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

00850

LAW OFFICES OF
CARINHAS & CHOSY
CORPORATE PLAZA, SUITE 109
302 KINGS HIGHWAY
BROWNSVILLE, TEXAS 78521

JACK G. CARINHAS, JR.
JOHN E. CHOSY
LARRY WARNER
DONALD R. SHULER, JR.

TELEPHONE: 512/542-9161
FAX: 512/542-3406

March 7, 1988

Justice James P. Wallace
Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

Please change the rule ordering that requests for admissions be automatically deemed admitted if not responded to within the appropriate time period.

There are two good reasons to do this:

1. The automatic character of the sanction will cause fair-minded judges who are chancellors at heart to find a way, however circuitous, to avoid the injustice which will sometimes result because of the inflexibility of the rule; and

2. The character of the law practice, at least for those of us "out in the country", has been adversely affected; we are now reduced to writing agreements that were formerly made over the telephone.

The second reason is more important. I have practiced law for nearly fifteen years. I have always made my deals over the telephone, and been able to rely on the honor of the other lawyers to keep their promises. It was a sad day indeed for me a week ago when, in an abundance of caution and even though a dear friend had agreed that I might have an additional twenty days to respond to his Requests for Admissions, that I wrote the agreement down and took it over to his office for him to sign. This may be the way they do things elsewhere, but I'll bet that Judge Gonzalez will tell you that it is not the way that lawyers in Weslaco have done things for the last forty years.

There is a corollary to the axiom that "Hard cases make bad law". It is the observation that equity intervenes to avert the injustice of the law's rigidity. Change the rule to give the trial judge some discretion. It is too inflexible and will lead to many unjust results.

I would appreciate your referring this to the rules committee and the favor of a response.

Sincerely yours,

Larry Warner
State Representative
District No. 38

LW:al

HJH, 3/11
SAC SubC
Agenda

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

March 10, 1988

Hon. Larry Warner
State Representative
Corporate Plaza, Suite 109
302 Kings Highway
Brownsville, Texas 78521

Dear Representative Warner:

I have received your letter of March 7th requesting that we change the rule regarding requests for admissions.

The Supreme Court develops its rules of procedure in a three-step process. First, the State Bar Committee on Administration of Justice makes proposals for changes in the rules, and these are submitted to the Court. We then refer those recommendations to our own Supreme Court Advisory Committee to make recommendations to the Court. Outstanding trial lawyers representing all geographical areas of the state and as many diverse areas of the practice of law as possible evaluate the many proposals we receive, such as yours. After considering reports from these committees, the Supreme Court adopts rules that we believe to be in the best interest of the administration of justice. In only a few instances that I can recall have we not followed recommendations that have come out of this process.

The practice of law is different in many areas of the state. I remember practicing in San Antonio when lawyers made oral agreements in requests for admissions, and I am aware of other areas where this is never done. The effort of the rule was to standardize the process throughout the state and eliminate the differences between the various geographical areas.

I will be frank to tell you that I am inclined to follow the recommendations of our Advisory Committee on the rules. I think we have a legitimate process that takes into account the practice of the different courts throughout the state; however, I will refer your letter to the Rules Committee for their consideration as you have requested.

Sincerely,

Franklin Spears
Justice

cc: Members of the Court

Hon. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
800 Milam Building
San Antonio, Texas 78205

Professor Pat Hazel, Chairman
Administration of Justice Committee
University of Texas School of Law
727 E. 26th Street
Austin, Texas 78705

LAW OFFICES OF
CARINHAS & CHOSY
CORPORATE PLAZA, SUITE 109
302 KINGS HIGHWAY
BROWNSVILLE, TEXAS 78521

JACK G. CARINHAS, JR.
JOHN E. CHOSY
LARRY WARNER
DONALD R. SHULER, JR.

TELEPHONE: 512/542-9161
FAX: 512/542-3406

March 7, 1988

Justice Franklin S. Spears
Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Spears:

Please change the rule ordering that requests for admissions be automatically deemed admitted if not responded to within the appropriate time period.

There are two good reasons to do this:

1. The automatic character of the sanction will cause fair-minded judges who are chancellors at heart to find a way, however circuitous, to avoid the injustice which will sometimes result because of the inflexibility of the rule; and

2. The character of the law practice, at least for those of us "out in the country", has been adversely affected; we are now reduced to writing agreements that were formerly made over the telephone.

The second reason is more important. I have practiced law for nearly fifteen years. I have always made my deals over the telephone, and been able to rely on the honor of the other lawyers to keep their promises. It was a sad day indeed for me a week ago when, in an abundance of caution and even though a dear friend had agreed that I might have an additional twenty days to respond to his Requests for Admissions, that I wrote the agreement down and took it over to his office for him to sign. This may be the way they do things elsewhere, but I'll bet that Judge Gonzalez will tell you that it is not the way that lawyers in Weslaco have done things for the last forty years.

There is a corollary to the axiom that "Hard cases make bad law". It is the observation that equity intervenes to avert the injustice of the law's rigidity. Change the rule to give the trial judge some discretion. It is too inflexible and will lead to many unjust results.

I would appreciate your referring this to the rules committee and the favor of a response.

Sincerely yours,

Larry Warner
State Representative, Dist. 38

LW:al

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 14, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas Texas 75275

Re: Tex. R. Civ. 169

Dear Bill:

I have enclosed comments sent to me through Justice Wallace and Justice Spears regarding Rule 169. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

Orig. to TCT

OFFICE PHONE
(817) 939-3521, EXT. 214

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

Tom -
SCAC Supp
+ Agenda.

October 20, 1987

R. Doak Bishop, Chairman
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Judge Thomas R. Phillips, Vice-Chairman
Committee on Administration of Justice
280th District Court
3rd Floor; 301 Fannin Street
Houston, Texas 77002

Evelyn A. Avent, Secretary to Committee
7303 Wood Hollow Drive #208
Austin, Texas 78731

Charles Matthews
Chairman for Subcommittee for Rules 166-319 which includes 169
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Dear Friends:

I suggest that Rules 169 be amended to require that the party submitting the request for admissions state in such request that the recipient has thirty days to deny the admissions or they will be deemed admitted.

It has come to my attention that the use of Rule 169 admissions absent such proper notice is beginning to be utilized in actions against pro se defendants who of course have no conception of what period of time they have to respond.

Thanks for your consideration.

Yours truly,

Stan Pemberton

Stanton B. Pemberton

SBP/pm

cc: Luther H. Soules, Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

00858

Rule 182. Judgment on Affirmance or Rendition

Text as amended by the Supreme Court effective January 1, 1988. See also text as adopted by the Court of Criminal Appeals, post.

(a) (No change.)

(b) **Damages for Delay.** Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may//~~shall~~ award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner. If there is no amount awarded to the prevailing respondent as money damages, then the court may award, as part of its judgment, each prevailing respondent an amount not to exceed ten times the total taxable costs as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations or error that have not been otherwise properly preserved or presented for review.

Comment: Deletes surplusage.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 13, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 166a, 169, and 182
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please redlined versions of rules 166a, 169 and 182. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 183. Interpreters

The court may//ψhєn/nєccєssαrγ/ appoint [an] interpreters [of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.]/ /ψhσ /mαy /bє /sυmmσnєd /in /thє /sαmє /mαnnєr /αs ψitnєssєs/ /αnd /shαll /bє /sυbjєct /tσ /thє /sαmє /pєnαltiєs /fσr disσbєdiєncє/

(A comment would also be added to Rule 604, Texas Rules of Civil Evidence, cross-referencing Rule 183.

Rule 183
See page 4

TINDALL & FOSTER
ATTORNEYS AT LAW
2801 TEXAS COMMERCE TOWER
HOUSTON, TEXAS 77002-3094
TELEPHONE (713) 229-8733
TELECOPIER (713) 228-1303

HARRY L TINDALL*
CHARLES C. FOSTER**
PATRICK W. DUGAN**
KENNETH JAMES HARDER
LYDIA G. TAMEZ
JANICE E. PARDUE
GARY E. ENDELMAN

BOARD CERTIFIED - TEXAS BOARD OF LEGAL SPECIALIZATION
*FAMILY LAW
**IMMIGRATION & NATIONALITY LAW

December 19, 1988

Newell Blakely
University of Houston Law Center
4600 Calhoun
Houston, Texas 77204-6371

Re: Proposals for amending Texas Rules of Civil Evidence and related rules

Dear Newell:

I am writing to make the following suggestions as amendments to the Texas Rules of Civil Evidence:

(1) I propose that Rule 705 be restored to its former version. It has become a much-abused practice for a party to call an expert witness and then to ask the expert witness on direct examination what facts or data they relied upon in forming their opinion. The expert is then given full opportunity to disclose to the jury on direct examination much hearsay which would otherwise be kept from the jury. I do not think this was the intended purpose of the current rule, and completely reverses the approach by the Federal Rules of Evidence and, from my research, is an approach taken in no other jurisdiction in the United States. I have read the commentary as contained in the University of Houston Law Review. The State Bar Evidence Committee's comment was that "creative" objections have been raised as to whether the basis of the expert opinion could be disclosed on direct examination. Frankly, I don't think its very creative under the former rule in that while the expert can disclose the sources of his information, he was not allowed to testify at length as to all of the hearsay data relied upon. The rule is further made confusing by the statement in Birchfield v. Texarkana Hospital, 747 S.W.2d 361 (Tex. 1987), wherein Justice Wallace said:

> "Ordinarily an expert witness should not be permitted to recound a hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion. Tex.R.Evid. 801, 802."

(2) I propose that Rule 902, Texas Rules of Civil Evidence, be amended by adding a new Subsection (12) to incorporate Section

18.001, Civil Practice and Remedies Code. Texas Rules of Civil Evidence, Rule 902(12) would read as follows:

Affidavit Concerning Cost and Necessity of Services

(a) Except to an action on a sworn account, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and that the service was necessary.

(b) The affidavit must:

(1) be taken before an officer with authority to administer oaths;

(2) be made by:

(A) the person who provided the service; or
(B) the person in charge of records showing the service provided and charge made; and

(3) include an itemized statement of the service and charge.

(c) The party offering the affidavit in evidence or the party's attorney must file the affidavit with the clerk of the court and serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.

(d) A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) not later than:

(A) 30 days after the day he receives a copy of the affidavit; and
(B) at least 14 days before the day

on which evidence is first presented at the trial of the case; or

(2) with leave of the court, at any time before the commencement of evidence at trial.

(e) The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

(f) A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) shall be sufficient if it follows this form, although this form shall not be exclusive and an affidavit which substantially complies with the provisions of this rule:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over the age of 18 years, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

"I am the custodian of records of _____. Attached hereto is/are _____ page(s) of records from _____. These said ____ pages of records are an itemized statement of the services and charges as shown on the record and are kept by _____ in the regular course of business and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record;

and the record was made at or near the time of the act, event, condition, opinion or diagnosis recorded or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals, and are incorporated herein."

"The charge for the service provided was reasonable at the time and place that the service was provided, and the service provided was necessary."

_____
Affiant

STATE OF TEXAS
COUNTY OF

SIGNED under oath before me on _____, 19__.

_____
Notary Public, State of Texas

_____
Printed Name of Notary

My Commission Expires:_____

The proposal is a literal adoption of the statutes with minor grammatical changes. The form affidavit has been added and is patterned after Rule 902(10).

(3) I propose amending Rule 183, Texas Rules of Civil Procedure, to be the same as Rule 43f, Federal Rules of Civil Procedure, which reads as follows:

"The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court."

The present rule speaks of summoning interpreters and punishing them, which, of course, is never done in real practice. A comment

would also be added to Rule 604, Texas Rules of Civil Evidence, cross-referencing Rule 183.

(4) I propose we repeal Rules 184 and 184a with a comment at the
Newell Blakely
Page 5
December 19, 1988
end of each repealed rule stating Rule 184 has been added to Texas Rules of Civil Evidence, Rule 202; and Rule 184a has been added to Texas Rules of Civil Evidence, Rule 203. There is no point in having these rules duplicated, even though they may be quasi-procedural. That logic could apply to numerous rules of evidence.

(5) Finally, I solicit your opinions regarding the relevance of Section 18.031, Civil Practice and Remedies Code. Is this needed?

I look forward to receiving your comments with respect to the above.

Sincerely,

Harry L. Tindall

/ms

cc: Luther Soules

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

Any person may be compelled to appear and give testimony by deposition in a civil action.

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) Time and Place. The time and pl
reasonable. The place of taking a depo
county of the witness' residence or, wh
regularly transacts business in perso
convenient place as may be directed by
cause is pending; provided, however, the
the person or persons designated by a
above may be taken in the court of suit s
of paragraph ~~4~~ [5] of Rule 166b. A n
person may be required to attend in the c
with a subpoena, or within one hundred
service, or at such other convenient
direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

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

Any person may be compelled to appear and give testimony by deposition in a civil action.

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the court of suit subject to the provisions of paragraph ~~4~~ [5] of Rule 166b. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ‡‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 201-5,
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copy of a letter sent to me by Justice William W. Kilgarlin regarding proposed changes to Rule 201-5. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND
RESIDENTIAL REAL ESTATE LAW

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

April 25, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

1. Enclosed is a memo discussing problems with Tex. R. App. P. 49(a) and 49(b). The memo concludes that the supreme court may not have the authority to review a supersedeas bond for excessiveness.

2. Tex. R. Civ. P. 687(e) still says 10 days on TRO's. It needs to conform with new Tex. R. Civ. P. 680.

3. Enclosed are the new rules for the Dallas CA. Please look over them and advise me if they can be approved.

4. Tex. R. Civ. P. 201-5 states that "depositions of a party . . . may be taken in the county of suit subject to the provisions of paragraph 4 of Rule 166b." I can't for the life of me see how Tex. R. Civ. P. 166b-4 is involved.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

Should be "5"

00869

Rule 201

~~HIS Info Copy~~

ST. MARY'S UNIVERSITY

HJH
SCAC Sec'y
CO AJ
Oglesby

February 10, 1988

Mr. Ted Doebbler
Administrative Office of the District Courts
301 San Jacinto, Room 100
Houston, Texas 77002

Dear Mr. Doebbler:

Thank you for your letter of February 5, 1988.

I believe the rule changes that you suggest should be addressed to the Supreme Court Advisory Committee rather than to the committee for Administration of Rules of Evidence which I chair. I therefore am forwarding your letter to Mr. Luther Soules who is chairman of the Supreme Court Advisory committee.

Yours very truly,

Thomas Black
Professor of Law

TB/db

cc: Mr. Luther H. Soules, III

It looks like Jim drumming you up some business.

TB

SCHOOL OF LAW
ONE CAMINO SANTA MARIA
SAN ANTONIO, TEXAS 78284-0400
(512) 436-3308

00870

Administrative Office of the District Courts

Harris County, Texas

Jack Thompson
COURT ADMINISTRATOR
Ted Doebbler
STAFF ATTORNEY

301 San Jacinto, Room 100
Houston, Texas 77002
713-221-6575

February 5, 1988

Mr. Thomas Black
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Dear Mr. Black:

The Administrative Judge of the District Courts Trying Criminal Cases, Hon. Charles J. Hearn, has asked me to write to you regarding Rules 208 and 201 of the Texas Rules of Civil Procedure.

It appears that the shorthand court reporters who are not assigned to any court are issuing subpoenas pursuant to Rule 208 to the Harris County Adult Probation Department, directing the department to produce any and all records regarding a probationer. The written questions in the deposition lay only a predicate as to the admissibility of those probation records in the pending civil suit regarding that probationer. The records are to be mailed back to the shorthand court reporter along with the answers to the written questions. It appears the shorthand court reporters want the records and nothing else. They are using Rule 208, Depositions Upon Written Questions, for just that purpose.

As a result of those subpoenas, I have been filing a Motion to Quash in the Civil Court in which the case is pending.

If the Judge or an officer assigned to a court issued a subpoena, a Motion to Quash would not be as necessary unless the records contain NCIC/TCIC information or other sensitive law enforcement data.

Even though your letter is requesting input regarding the Texas Rules of Evidence, we would appreciate any assistance you can provide in changing or amending Rules 208 and 201 of the Texas Rules of Civil Procedure.

Those changes or amendments hopefully would exempt all probation departments of the State of Texas and all law enforcement agency's records subpoenaed by a Notary Public or a shorthand court reporter. Those records should only be subpoenaed by an officer assigned to a court or a judge.

Very truly yours,

Ted Doebbler

TD:np

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

February 26, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, TX 75275

RE: Tex. R. Civ. P. 201 and 208

Dear Bill:

I have enclosed a copy of a letter sent to me through Thomas Black, regarding Rules 201 and 208. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
cc: Justice William L. Kilgarlin

Ought LHS 11-23-87

Kornegay-Carroll And Associates, Inc.

COURT REPORTERS 512/476-3967
106 E. SIXTH ST., SUITE 350 AUSTIN, TEXAS 78701

November 19, 1987

Soules, Reed & Butts
Mr. Luther Soules
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

Pursuant to our previous telephone conversation, please send me the "Proceedings File" for Rules 166 C and 206 of the Texas Rules of Civil Procedure regarding the recent rules changes.

Your prompt attention to my request will be appreciated.

After having had an opportunity to review the "Proceedings File", I look forward to meeting you and perhaps discussing the material in a constructive manner.

Yours Truly,

Wally R. Kornegay

Wally Kornegay

cc: Judge James P. Wallace

00874

Rule 206. Certification by Officer; Exhibits; Copies; Notice of Delivery

1. (No change.)

2. Delivery. Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition transcript, or a copy thereof in the event the original is not returned to the officer, and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver, or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition transcript and copies of all exhibits to the attorney or party who asked the first question appearing in the transcript, and shall give notice of delivery to all parties. The custodial attorney shall, upon reasonable request, make the original deposition transcript available for inspection ~~or/photocopying~~ by any other party to the suit. [Requests for copies of the deposition transcript shall be made directly to the officer who made the transcript.]

3. (No change.)

4. (No change.)

5. (No change.)

6. (No change.)

Uncontested

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSE

TELECOPIER
(512) 224-7073

December 22, 1987

Professor William V. Dorsaneo III
Southern Methodist University
Dallas Texas 75275

Re: Tex. R. Civ. 206(2)

Dear Bill:

I have enclosed comments sent to me through Justice Wallace regarding Rule 206(2). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice James P. Wallace

LHS Copy

Holly
Schedules
Attached

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

December 17, 1987

Mr. George E. Pletcher
Helm, Pletcher, Hogan, Bowen & Saunders
Attorneys at Law
2700 America Tower
2929 Allen Parkway at Waugh
Houston, Texas 77019-2120

Re: Texas Rules of Civil Procedure 206(2)

Dear George:

As recipient of the black bean correspondence on Rules of Procedure end up on my desk. I understand your concern about custody of the original deposition transcript as addressed in Rule 206(2). I don't personally recall what, if any, discussions your problem elicited on the part of the Advisory Committee.

I am forwarding a copy of your letter to Luke Soules, Chairman of the Supreme Court Advisory Committee. Both that Committee and the Committee On Administration of Justice, under the chairmanship of Doak Bishop, will study it.

Thanks for your interest in the never ending problems of the court rules. My best wishes for a Happy Holiday Season.

Sincerely yours,

James P. Wallace
Justice

JPW:fw
cc: Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

00877

Shirley M. Helm (1905-1986)
George E. Pletcher
Richard P. Hogan
J. Donald Bowen
Michael Y. Saunders
Stephen W. Hanks
John W. Odam
David R. Miller

Timothy H. Pletcher
John W. Tavormina

Albert P. Jones
of Counsel

TO Jim Wallace - for any suggested reply -

HELM
PLETCHER
HOGAN
BOWEN
&
SAUNDERS

Attorneys at Law

December 8, 1987

The Chief Justice of the Texas Supreme Court &
Associate Judges of the Texas Supreme Court
Supreme Court Building
Austin, Texas 78711

Re: Rule 206, Texas Rules of Civil Procedure

Dear Chief Justice Hill & Associate Members of the Supreme Court:

I'm very concerned about Rule 206, Section 2 of the Texas Rules of Civil Procedure effective January 1, 1988 with reference to the original of a deposition being delivered to the attorney or party who asked the first question and thereafter, "upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit."

Does this Rule mean that if I become custodian of an original deposition transcript I must permit that original to be removed from my office for copying? Does it mean I am obliged to copy the deposition and supply it to other parties? If I must surrender the original deposition to any other party what happens if it is lost or altered? What happens if an exhibit attached to the original is misplaced?

I would respectfully suggest that the Rule be left as is insofar as the obligation of the custodial attorney to permit any party to review the deposition but would suggest that if copying is to be done it must be done by the reporter who made the transcript. This would keep the chain of custody pure.

Very sincerely yours,

George E. Pletcher

George E. Pletcher

GEP:kfm

2700 America Tower
2929 Allen Parkway at Waugh
Houston, Texas 77019-2120
(713) 522-4550

00873

HELM
PLETCHER
HOGAN
BOWEN
&
SAUNDERS
Attorneys at Law

cc: Mr. Doak Bishop
Chairman
Texas State Bar Committee on the Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

Rule 208. Depositions Upon Written Questions.

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. [Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.] The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

60880

Chas approves

A party may in his notice name as the witness a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

2. Notice by Publication. No change.

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Objections. No change.

4. Deposition Officer; Interpreter. No change.

5. Officer to take Responses and Prepare Record. No change.

Comment on proposed amendment:

Rule 208 is silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court.

As modified, Rule 208 will conform to Rule 200 and permit the deposition on written questions of defendant prior to appearance date with permission of the court.

00882

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street • Austin, Texas 78705 • (512) 471-5151
Telecopier Number (512) 471-6988

September 11, 1987

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

Re: Texas Rule of Civil Procedure Rule 208

Dear Judge Wallace:

After discussing this with you on the telephone I decided it would be a good idea to write you because I found another question regarding this particular rule.

My first question regards Section 1 of the Rule. In your March 10, 1987, order you added to the first sentence the following: "Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant." The July order published in the September issue of the Bar Journal simply says: No change. Since this order supercedes the March 10 order, my question is did you really intend to leave it as it is so that a deposition on written questions can be taken before appearance day without leave of court?

My second question has to do with the first sentence of the last paragraph of the rule. As published in the Bar Journal it states the following: "The officer delivering the deposition shall give prompt notice of its filing to all parties." In every other place where you mention deposition you have stated "deposition transcript" rather than simply deposition. Also, since the depositions upon written questions are no longer to be filed I suspect you intended the word "filing" to be "delivery."

I simply noticed this as I was going through these rules in preparation for teaching. I haven't given this sort of fine-tooth look at the other rules.

Sincerely,

J. Patrick Hazel
Professor of Law and
Director, Tiny Gooch
Centennial Professorship
in Trial Practice

00883

EXXON COMPANY, U.S.A.
POST OFFICE BOX 2180 • HOUSTON, TEXAS 77252-2180
CHARLES W. MATTHEWS
ASSOCIATE GENERAL ATTORNEY

April 29, 1988

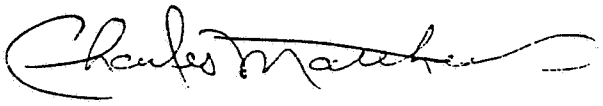
Re: Texas Rules of Civil Procedure - Rule 208

Mr. R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Enclosed is a suggested revision of Rule 208. A copy of the rule with the modifications is being distributed to all members of the committee. This rule should be considered at our meeting on May 7.

Very truly yours,



CWM:ch
Enclosure

c: Ms. Evelyn A. Avent
Mr. Luther H. Soules
Members of the Adminstration
of Justice Committee

A DIVISION OF EXXON CORPORATION

463-1340

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUG...

September 10, 1987

Tony,
Re TRAP 133
Xc TRCP 208
& TRCP 168

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

Re: Tex. R. App. P. 133.

Dear Luke:

The Court has determined that in order to clarify our change in procedure pursuant to S.B. 841, we need to amend Texas Rule of Appellate Procedure 133. It is the desire of the Court to change from "n.r.e." to "writ denied" and include within that category those cases where there is error in the CA judgment but the error is not of such magnitude as to effect the jurisprudence of the State.

I have prepared a suggested rule change by merely adding the language of the statute as shown on the attached copy. Would you run this by whomever you deem necessary and make any suggestions you have and get back to me. We presently plan January 1, 1988 as a requiem date for n.r.e. I believe we can squeeze that one rule into the Bar Journal in time to get the requested notice by January 1, 1988, however, it must be done by next week.

Also, Pat Hazel called regarding Rule 208. In paragraph one, we had included the provision that only with leave of court could depositions be taken prior to answer date of the defendant. In the final form as promulgated that sentence was omitted and for Rule 208(1) we showed "(No Change)." I could not find the reason for the deletion in my notes. Do you recall? Thanks for your help and I await your answer on T.R.A.P. 133.

Put back in.

Sincerely,

James P. Wallace
Justice

00885

cc: Professor William V. Dorsaneo, III
Southern Methodist University
Dallas, TX 75275

Mr. Russell McMains
McMains & Constant
P. O. Drawer 2846
Corpus Christi, TX 78403

As amended up to date
3/10/87

Texas Rules of Civil Procedure

Rule 208. Depositions Upon Written Questions

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

A party may in his notice name as the witness a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.

2. No Change

00887

Texas Rules of Civil Procedure

Rule 208. Depositions Upon Written Questions

1. No Change.

2. Notice by Publication. In all civil suits where it shall be shown to the court, by affidavit, that a party is beyond the jurisdiction of the court, or that he cannot be found, or has died since the commencement of the suit, and such death has been suggested at prior term of court, so that the notice and copy of written questions cannot be served upon him for the purpose of taking depositions, and such party has no attorney of record upon whom they can be served, or if he be deceased and all the persons entitled to claim by or through such deceased defendant have not made themselves parties to the suit, and are unknown, the party wishing to take depositions may file his ~~written--questions~~ [notice] in the court where the suit is pending, and the clerk of such court or justice of the peace shall thereupon cause a notice to be published in some newspaper in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, once each week for two (2) consecutive weeks, stating the number of the suit, the names of the original parties, in what court the suit is pending, name and residence of the witness to whom the written questions are propounded, and that a deposition will be taken on or after the fourteenth day after the first publication of such notice.

In suits where service of citation has been made by publication, and the defendant has not answered within the time prescribed by law, service of notice of depositions upon written questions may be made at any time after the day when the defendant is required to answer, by filing the notice and ~~questions~~ among the papers of the suit at least twenty days before such depositions are to be taken.

(3) No Change.

(4) No Change.

00888

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Rule 208
Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copy of a letter from Professor J. Patrick Hazel sent to Justice James E. Wallace regarding proposed changes to Rule 208. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street • Austin, Texas 78705 • (512) 471-5151
Telecopier Number (512) 471-6988

September 11, 1987

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

Re: Texas Rule of Civil Procedure Rule 208

Dear Judge Wallace:

After discussing this with you on the telephone I decided it would be a good idea to write you because I found another question regarding this particular rule.

My first question regards Section 1 of the Rule. In your March 10, 1987, order you added to the first sentence the following: "Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant." The July order published in the September issue of the Bar Journal simply says: No change. Since this order supercedes the March 10 order, my question is did you really intend to [illegible] it so that a deposition on written questions can be taken before appearance day without leave of court?

My second question has to do with the first sentence of the last paragraph of the rule. As published in the Bar Journal it states the following: "The officer delivering the deposition shall give prompt notice of its filing to all parties." In every other place where you mention deposition you have stated "deposition transcript" rather than simply deposition. Also, since the depositions upon written questions are no longer to be filed I suspect you intended the word "filing" to be "delivery."

I simply noticed this as I was going through these rules in preparation for teaching. I haven't given this sort of fine-tooth look at the other rules.

Sincerely,

J. Patrick Hazel
Professor of Law and
Director, Tiny Gooch
Centennial Professorship
in Trial Practice

4/P
HJD
Send Susan
CDAS
Send Agenda
Justice Hecht

00890

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

February 26, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, TX 75275

RE: Tex. R. Civ. P. 201 and 208

Dear Bill:

I have enclosed a copy of a letter sent to me through Thomas Black, regarding Rules 201 and 208. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
cc: Justice William L. Kilgarlin

ST. MARY'S UNIVERSITY

February 10, 1988

Mr. Ted Doebbler
Administrative Office of the District Courts
301 San Jacinto, Room 100
Houston, Texas 77002

Dear Mr. Doebbler:

Thank you for your letter of February 5, 1988.

I believe the rule changes that you suggest should be addressed to the Supreme Court Advisory Committee rather than to the committee for Administration of Rules of Evidence which I chair. I therefore am forwarding your letter to Mr. Luther Soules who is chairman of the Supreme Court Advisory committee.

Yours very truly,

Thomas Black
Professor of Law

TB/db

cc: Mr. Luther H. Soules, III

It looks like Jim drumming you up some business.

TB

SCHOOL OF LAW
ONE CAMINO SANTA MARIA
SAN ANTONIO, TEXAS 78284-0400
(512) 436-3308

00892

Administrative Office of the District Courts

Harris County, Texas

Jack Thompson
COURT ADMINISTRATOR
Ted Doebbler
STAFF ATTORNEY

301 San Jacinto, Room 100
Houston, Texas 77002
713-221-6575

February 5, 1988

Mr. Thomas Black
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78284

Dear Mr. Black:

The Administrative Judge of the District Courts Trying Criminal Cases, Hon. Charles J. Hearn, has asked me to write to you regarding Rules 208 and 201 of the Texas Rules of Civil Procedure.

It appears that the shorthand court reporters who are not assigned to any court are issuing subpoenas pursuant to Rule 208 to the Harris County Adult Probation Department, directing the department to produce any and all records regarding a probationer. The written questions in the deposition lay only a predicate as to the admissibility of those probation records in the pending civil suit regarding that probationer. The records are to be mailed back to the shorthand court reporter along with the answers to the written questions. It appears the shorthand court reporters want the records and nothing else. They are using Rule 208, Depositions-Upon Written Questions, for just that purpose.

As a result of those subpoenas, I have been filing a Motion to Quash in the Civil Court in which the case is pending.

If the Judge or an officer assigned to a court issued a subpoena, a Motion to Quash would not be as necessary unless the records contain NCIC/TCIC information or other sensitive law enforcement data.

Even though your letter is requesting input regarding the Texas Rules of Evidence, we would appreciate any assistance you can provide in changing or amending Rules 208 and 201 of the Texas Rules of Civil Procedure.

Those changes or amendments hopefully would exempt all probation departments of the State of Texas and all law enforcement agency's records subpoenaed by a Notary Public or a shorthand court reporter. Those records should only be subpoenaed by an officer assigned to a court or a judge.

Very truly yours,

Ted Doebbler

TD:np

Rule 215. Abuse of Discovery; Sanctions

1. (No change.)

2. (No change.)

3. Abuse in Discovery Process in Seeking, Making, or Resisting Discovery. [All motions to compel discovery and all motions for sanctions shall contain a certificate by the party filing same that efforts to resolve the discovery ~~abuse~~ dispute without the necessity of court intervention have been attempted and failed.] If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may impose any sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. (No change.)

5. (No change.)

6. (No change.)

Union adopted

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 14, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Texas Rule of Civil Procedure 215(3)

Dear Bill:

Enclosed herewith please find a copy of a letter forwarded to me by Justice Kilgarlin regarding Rule 215(3). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to LHS
Orig. to file
10-13-88 bjh

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

10/13/88
HJH,
COAS
SCAC Supc
✓ Agenda

October 6, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

On October 3, 1988, I attended the Houston Bar Association's "Evening With The Judiciary." The entire theme of the program was about sanctions and discovery abuse. Many concerns were voiced that lawyers no longer talk with each other in an effort to work out discovery matters. Instead, many immediately file a sanctions motions if there is as much as a one day delay in the making of a discovery response. I am inclined to agree with this position.

I would recommend that the Supreme Court Advisory Committee consider an amendment to Tex. R. Civ. P. 215-3 and insert as a new first sentence something on the following lines: "All motions to compel discovery and all motions for sanctions shall contain a certificate by the party filing same that efforts to resolve the discovery abuse without the necessity of court intervention have been attempted and failed." I am not wedded to the preceding language, but I think you can get the gist of the proposed rule amendment.

Sincerely,

William W. Kilgarlin

xc: Honorable David Hittner
U.S. District Judge
515 Rusk Avenue
Houston, Texas 77002

Honorable Ewing Werlein
President, Houston Bar Association
1300 Texas Commerce Bank Building
707 Travis
Houston, Texas 77002

00897

HJH. Discovery Subc 1508 & Docket at 2215

THE LAW OFFICES OF
FRANK L. BRANSON, P.C.
PENTHOUSE SUITE
HIGHLAND PARK NATIONAL
BANK BUILDING
4514 COLE AVENUE
DALLAS, TEXAS 75205

FRANK L. BRANSON
PAUL N. GOLD
DEBBIE DUDLEY BRANSON
RICHARD K. BERGER
GEORGE A. (TEX) QUESADA, JR.
JERRY M. WHITE

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

July 25th, 1988

Mr. Jim Sales
Fulbright & Jaworsky
1301 McKinney Street
Houston, Texas 77010

Mr. Darrell Jordan
Hughes & Luce
2800 Momentum Place
Dallas, Texas 75201

Gentlemen:

I am writing you in the wake of yet another publicized case of what seems to be a growing trend of discovery abuse. Specifically, I am referring to the article which appeared in the Dallas Times Herald this past week regarding en banc condemnation by the Northern District of Texas of "hardball" litigation practices.

It is not only in the Federal Courts that the erosion of professionalism has been observed. I am enclosing a recent case out of the Corpus Christi Court of Appeals, decrying the problem of "gamesmanship."

Although there are State Bar committees in place which advise the Texas Supreme Court on rules of procedure and evidence, I do not believe there is a committee specifically mandated to study the area of discovery abuse and recommend ways of eliminating, or at least deterring it.

I believe that there may be a real need to examine the present system to determine whether fine tuning adjustments can and should be made to stem abusive tactics. However, any approach to problem must cautiously avoid eviscerating the concept of "zealous advocacy," which is a cornerstone of our legal system.

If at anytime in the near future a committee to study discovery abuse is organized by the State Bar of Texas, I would appreciate being considered to serve on it.

Thank you for your consideration.

Very truly yours,

PAUL N. GOLD

PNG/dd

cc: David Perry
Luther Soules

FINA OIL AND CHEMICAL CO.
F/N/A American Petrofina of Texas, Relator,

v.

Honorable Homer SALINAS, Judge of the 92nd District Court of Hidalgo County, Texas, Respondent.

No. 13-85-079-CV.
Court of Appeals of Texas, Corpus Christi.
April 28, 1988.
Rehearing Denied May 19, 1988.

Party which sought in underlying action to compel production of documents sought a writ of mandamus directing trial court judge to set aside his order denying discovery of documents in underlying action. The Court of Appeals, Nye, C.J., held that trial court abused its discretion in denying discovery where party seeking to exclude documents from discovery failed to affirmatively plead the particular privilege, immunity or exclusion claimed, requested a hearing, or produced evidence substantiating the claim. Following conditional grant of writ, the documents were produced and the matter was mooted.

Writ denied.

1. Pretrial Procedure ⇐403

Denial of motion to compel production of documents was an abuse of discretion where party seeking to exclude documents from discovery failed to take any of the three prerequisite actions, which consisted of the affirmative burden to specifically plead the particular privilege, immunity or exclusion claimed, to request a hearing, and to produce evidence substantiating the claim.

2. Pretrial Procedure ⇐403

Party seeking to exclude documents from discovery in response to motion to compel production of documents waived privileges asserted to support exclusion by failing to timely respond to movant's first motion for production when it chose not to file response or to in any manner claim existence of any privilege prior to the day of the trial court hearing, at which time it came forward with no evidence to support claim privilege and produced no documents for in camera inspection. Vernon's Ann. Texas Rules Civ.Proc., Rule 167, subd. 2; Rules App.Proc., Rule 121.

Keith C. Livesay, Neil Norquest, Ewers, Toothaker & Abbott, McAllen, for relator.

John King, Law Offices of John King, Mike Mills, Clifton E. Slaten, Atlas & Hall, McAllen, Robert L. Guerra, Thornton, Summers, Biechlin & Dunham, McAllen, Paul Q. O'Leary, O'Leary, Dale & Malany, Brownsville, Marshall W. Graham, William J. McCarthy, William L. Pope, Roger W. Hughes, Adams, Graham, Jenkins, Graham & Hamby, Harlingen, for respondent.

Before NYE, C.J., and KENNEDY and BENAVIDES, JJ.

OPINION

NYE, Chief Justice.

Fina Oil and Chemical Company (Fina) seeks a writ of mandamus directing Judge Homer Salinas of the 92nd District Court of Hidalgo County to set aside his order denying discovery of certain documents in the possession of Texas Employers Insurance Company (TEIA). TEIA contends the documents are privileged under the investigative and attorney-client privileges. Tex. R.Civ.P. 166b(3)(d), 166b(3)(e), and Tex.R. Evid. 503. We hold that TEIA has failed to meet its burden of establishing the privileges. We, therefore, hold that the trial court abused its discretion in denying discovery and we conditionally grant the writ.[1]

On June 24, 1987, Javier Torres filed a personal injury suit against relator and others. On August 27, relator's attorneys sent a request for written statements to TEIA's attorney. At that time TEIA was not a party to the litigation although they were the workman's compensation carrier for Javier Torres's employer. On September 8, relator filed a motion to compel TEIA to produce the documents. On November 6, an amended motion to compel was filed by relator. On November 23, a hearing was held on relator's motion to compel. At that time TEIA had not filed a response to any of relator's motions. At the hearing before the trail court, an attorney for TEIA appeared and argued that the documents sought by relator were protected from discovery by the attorney-client privilege. [redacted] without ruling on relator's motion and requested additional authorities from the parties. On February 2, 1988, the trial court denied relator's motion to compel production of the documents. On March 12, 1988, relator filed its petition for writ of mandamus in this Court.

This court granted leave to file the writ of mandamus and set the motion for oral argument. Apparently realizing that the trial court had erred in denying relator's motion, on March 16 TEIA [redacted] of the November 23 hearing on relator's motion to compel. In its motion for rehearing TEIA asserted the need for a protective order based on investigative and attorney-client privileges [redacted] On March 21 a hearing was held in the trial court on TEIA's motion for rehearing and on that date relator's motion to compel was again denied and a protective order was entered protecting the documents from discovery.

[1] [redacted] presents an interesting question [redacted] Based on the complete record we have of the November 23 first hearing on relator's motion to compel production of documents, the trial court's order of February 22, 1988, was in error.

The requisites of *Peoples v. Fourth Supreme Judicial District*, 701 S.W.2d 635 (Tex.1985) *must be* followed by the party opposing discovery. *McAllen State Bank v. Salinas*, 738 S.W.2d 381 (Tex.App.—Corpus Christi, 1987) (original proceeding). In *Peoples* the Supreme Court held that in this type of discovery process any party seeking to exclude documents or other evidence from discovery: 1) has the affirmative burden to specifically plead the particular privilege, immunity or exclusion claimed; 2) must request a hearing; and 3) must produce evidence substantiating the claim. The trial court must then determine if an in-camera inspection of the documents is necessary, and if so, make such inspection. None of the three prerequisite actions were taken by TEIA prior to or during the November 23 hearing. Therefore, the trial court's denial of the relator's motion in its February 2 order was an abuse of discretion. *Peoples* 701 S.W.2d at 637.

1. In a companion case involving essentially the same facts, we make this same holding in an unpublished opinion.

TEIA has attempted to cure these errors by its motion for rehearing before the trial court in a second hearing held on March 21. Relator argues that TEIA has *waived* its right to assert any privilege by virtue of its failure to adequately respond to the November 23, first hearing.

In *Hobson v. Moore*, 734 S.W.2d 340 (Tex.1987) our Supreme Court recognized that while a party is entitled to assert a privilege in opposition to discovery such privilege must be asserted in a timely manner or it is waived. In the *Hobson* case the real party in interest failed by six days to timely file a response to interrogatories. The Supreme Court held that by failing to timely respond, the privilege had been waived and ordered the otherwise privileged materials discovered. *See also E.F. Hutton & Company v. Youngblood*, 741 S.W.2d 262, 264 (Tex.1987).

In *Peeples*, the Supreme Court provided in no uncertain terms the procedure to be followed when discovery is resisted. Failure to follow this procedure constitutes a waiver of any complaint of the trial court's action. *Peeples*, 701 S.W.2d at 637; *see also Jordan v. Honorable Court of Appeals for the Fourth Supreme Judicial District*, 701 S.W.2d 644 (Tex.1985). [redacted] The [redacted] as set forth in the aforementioned authorities applies to the facts of this [redacted].

[redacted] TEIA had more than six weeks notice of the hearing seeking to compel them to produce the documents in question. However, TEIA chose not to file a response or to in any manner claim the existence of any privilege prior to the day of the trial court hearing. Then, at the hearing TEIA came forward with *no evidence* to support its claimed privilege and produced *no documents* for in-camera inspection. Only in a belated rehearing did TEIA attempt to comply with the requisites of *Peeples*. We hold that TEIA's failure to timely respond to relator's first motion for production and to comply adequately with *Peeples* at the hearing constituted a waiver of the privileges asserted.

Normally, in a mandamus proceeding, it is incumbent upon the relator to bring forward all the elements of the record below to enable the appellate court to render a decision. *See* Tex.R.App.P. 121. In this case relator met its burden and established a *prima facie* case of abuse of discretion by the trial court. At this juncture TEIA sought to bring forward additional evidence of a change in circumstances in the trial court. While TEIA has favored this court with a verified response and certified copies of affidavits and orders, it has failed to bring forward the statement of facts from any additional hearings held below and to bring forth the documents in question for our review of the propriety of the trial court's action. *See Greenstein, Logan Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170 (Tex.App.—Waco 1987, writ denied). Absent such evidence, we are left with relator's *prima facie* case of abuse of discretion.

This Court is greatly concerned over the continuing [redacted] which attorneys are using in dealing with the discovery procedures. [redacted] Most concern discovery. Our Supreme Court in *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex.1987) discussed this on-going problem of "gamesmanship." The Court pointed out that the continual frustration of the ultimate goal of discovery, which is to seek the truth by the adversarial approach to discovery, has created an unconscionable increase in the costs of litigation. It causes unreasonable delay in pretrial matters and has protracted the total nature of litigation. The discovery process should be simple and straightforward and not complicated by interlocutory appeals (original proceedings), rehearings before the trial court, and/or post-discovery motions. [redacted] our Supreme Court which is to allow for

[redacted] material as possible within the framework of the applicable rules of procedure.

Ethical considerations are most important in the general discovery process.[2] Justice is defeated when the lawyers' strategy is obstruction and delay. This is because the courts are reduced to impotency, and public confidence and esteem is impaired. The president of the Texas Bar Association, the Honorable Joe Nagy, in an article entitled "The Power of Professionalism" admonished the Texas lawyer to use professional courtesy. He referred all of us to the document by the Pulaski County Bar Association in Little Rock, Arkansas entitled "Code of Professional Courtesy," set out below.[3] Trial lawyers should adopt these timely procedural rules as guidelines for their trial practice. Within the bounds of the Code of Professional Responsibility, lawyers should represent their clients to the fullest extent and make an effort to assist in the orderly administration of the legal system.

The writ of mandamus is conditionally granted and will not issue if the respondent withdraws his order of March 21, 1988, in conformity with this opinion.

OPINION ON MOTION FOR REHEARING

On April 28, 1988, this Court conditionally granted a writ of mandamus in the above cause, and on May 5, 1988, respondent and Texas Employers' Insurance Association, the real party in interest, filed a motion for rehearing. We overrule the motion for rehearing with opinion.

This Court has now been notified that Judge Salinas entered an order in conformity with this Court's order. Also, we note that Texas Employers' Insurance Association has produced the documents in question for Fina Oil & Chemical Company and did so on May 16, 1988.

Accordingly, since the parties and judge have complied with this Court's order, we are of the opinion that the matter is now moot. Therefore, it is ORDERED that no writ shall issue.

2. *E.g.*, Supreme Court of Texas, State Bar Rules art. 10, § 9 (Code of Professional Responsibility) (1984) DR 1-102(A)(5); DR 7-102(A)(1); EC 7-10, 7-37; 7-38.

3. The pertinent sections are set forth below:
I recognize that procedural rules are necessary as a last resort to order and decorum, therefore, if my adversary is entitled to something it should be provided without motions, briefs, hearings, orders, and other formalities. If something is a fact, it should be stipulated in writing without requests for admission, interrogatories, witnesses, and documents. Vigorous advocacy is not inconsistent with professional courtesy. I will stay above the belt. Even

LAW OFFICES

SOULES & REED

TENTH FLOOR

TWO REPUBLICBANK PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

July 29, 1988

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Discovery Abuse

Dear Bill:

I have enclosed a copy of a letter sent to me by Paul Gold regarding Discovery Abuse. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

SCAC SUBCOMMITTEE RECOMMENDATION

Rule 216 REQUEST AND FEE FOR JURY TRIAL

~~1.~~ [a] (no change)

~~2.~~ [b] [Unless otherwise provided by law, A [a] fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

Comment: This amendment was made necessary by Tex Gov Code §51.604 which provides for additional jury fees in certain counties.

Additional fees for jury trials may be required by other laws. E.g. Tex Gov Code §51.604

User Approved

60905

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

Copy to LHS
Orig. to file
4-12-88 hjh

CLARK, GORIN, RAGLAND & MANGRUM
ATTORNEYS AT LAW
218 NORTH 6TH STREET
P.O. BOX 239
WACO, TEXAS 76703

AREA CODE 817
752-9267

GEORGE CLARK
OF COUNSEL

LEONARD L. GORIN
OF COUNSEL

TOM L. RAGLAND
CERTIFIED SPECIALIST
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

BOYD MANGRUM
CERTIFIED SPECIALIST
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

KIM B. YOUNG
CERTIFIED SPECIALIST
ESTATE PLANNING AND PROBATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

SHERYL S. SWANTON

ALLEN D. WRIGHT

HSH,
Sup Sup Ct
Agenda
Xc to LHS.

April 11, 1988

Mr. Luther H. Soules, III
Attorney at Law
800 Milam Bldg.
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee;
Section 31.007, Civil Practice and Remedies Code;
Section 51.604, Government Code

Dear Luke:

I enclose copies of the above Statutes which appear to me to be in conflict with the Texas Rules of Civil Procedure.

I don't understand the purpose of Section 31.007, Civil Practice and Remedies Code, but it appears to be in conflict with the duties of the District Clerk. See generally Section 51.301, of the Government Code.

Section 51.604 of the Government Code seems to be in general conflict with Section 6 of the Texas Rules of Civil Procedure, beginning with Rule 125, and specifically Rule 216 regarding the amount of jury fees and the time in which they must be paid.

The following questions occur to me:

Are the above Statutes in conflict with the Rules of Procedure?

Did the recent amendment to the Rules of Procedure repeal those Statutes?

If not, should the Statutes be repealed?

I see a potential for some serious problems, especially between Section 51.603 and Rule 216. I recently filed a suit in Harris County. I calculated the court cost deposit in accordance with Section 51.317, Government Code and Rule 216 and sent along my check. The clerk refused to file the petition until I sent an additional $10.00 for a jury fee as required by Section 51.604.

Fortunately, I did not have a limitations problem and the harm

was more in the nature of annoyance. However, had the statute of limitations run on my cause of action while the Plaintiff's Original Petition was resting in the clerk's office of Harris County, the problem would have become real and substantial.

If you think this situation needs to be addressed by this committee, or the Supreme Court without intervention of the committee, I trust you will foward this along to the appropriate sub-committee, or to Justice Kilgarlin.

Sincerely,

Tom L. Ragland

TLR/dub
Enclosure

§ 51.603. Destruction of Records

A district clerk or a county clerk may destroy by shredding any records, ballots, stubs, lists, or papers that the clerk is authorized or required to destroy by burning.

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985.

Historical Note

Prior Law:
Acts 1971, 62nd Leg., p. 2452, ch. 792.
Vernon's Ann.Civ.St. art. 1901a.

§ 51.604. Jury Fee in Certain Counties

Text of section as added by Acts 1987, 70th Leg., ch. 897, § 1

(a) This section applies only to counties with a population of two million or more.

(b) The district clerk shall collect a $20 jury fee for each civil case in district court in which a person applies for a jury trial. The clerk of a county court or statutory county court shall collect a $17 jury fee for each civil case in those courts in which a person applies for a jury trial. The clerk shall note the payment of the fee on the court's docket sheet.

(c) The fee required by this section must be paid by the person applying for a jury trial not later than the 10th day before the jury trial is scheduled to begin.

(d) The fee required by this section is in addition to the jury fee required by Rule 216, Texas Rules of Civil Procedure, and any other fee allowed by law or rule.

Added by Acts 1987, 70th Leg., ch. 897, § 1, eff. June 19, 1987.

For text of section as added by Acts 1987, 70th Leg., ch. 345, § 1, effective January 1, 1988, see § 51.604, post

Historical Note

Section 2 of Acts 1987, 70th Leg., ch. 897 provides:

"This Act applies only to fees for jury trial for cases for which a person applies for a jury trial on or after the effective date of this Act. The fees for jury trials for which the application was made before the effective date of this Act are governed by the law in existence on the date the application was made, and that law is continued in effect for that purpose."

§ 51.604. Continuing Education

Text of section as added by Acts 1987, 70th Leg., ch. 345, § 1, effective January 1, 1988

(a) Whenever the word "clerk" is used in this section, it shall refer to a county clerk, a district clerk, or a county and district clerk.

60911

PRACTICE AND REMEDIES CODE

SECTION 3. Chapter 31, Civil Practice and Remedies Code, is amended by adding Section 31.007 to read as follows:

Section 31.007. PARTIES RESPONSIBLE FOR ACCOUNTING OF OWN COSTS:

(a) Each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, if the judgment is to provide for the adjudication 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.

(b) A judge of any court may include in any order or judgment all 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) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and

(4) such other costs and fees as may be permitted by these rules and state statutes.

SECTION 4. This Act takes effect September 1, 1987, and applies only to actions filed on or after that date.

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

April 19, 1988

Mr. Sam Sparks
Grambling and Mounce
P.O. Drawer 1977
El Paso, Texas 79950-1977

RE: Tex. R. Civ. P. 125

Dear Sam:

Enclosed please find a copy of a letter I received from Tom L. Ragland regarding Rule 125. Please be prepared to report on this matter at our next SCAC meeting. I will include this matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luke Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Mr. Tom L. Ragland

RULE 223. JURY LIST IN CERTAIN COUNTIES

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are [either selected by electronic or mechanical means or] drawn from the wheel, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return[.] ~~provided, however, that the trial judge upon the demand of any party to any case reached for trial by jury, or of the attorney for any such party, shall cause the names of all the members, of the general panel available for service as jurors in such case to be placed in a receptacle and well shaken, and said trial judge shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such cause, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case.~~

Note: Government Code § 62.011 provides for selection by mechanical or electronic means, while §§ 62.016 - .017 provide for drawing from a jury wheel. Tex.R.Civ.P. 223 provides for a reshuffle of the particular jury panel. Davis v. Huey, 608 S.W.2d 944 (Tex.App. - Austin 1980), rev. o.g. 620 S.W.2d 561 (1981) affirmed trial court action which allowed a party a reshuffle after having an opportunity to study the jury list. But see Texas Employers Insurance Association v. Burge, 610 S.W.2d 524 (Tex.App.

- Beaumont 1980, no writ) which held that the motion to reshuffle must be made to the judge who organizes the central jury room panel, rather than the individual trial judge. The sub-committee recommends that a provision for reshuffling be eliminated entirely because both methods insure a random selection.

However, if the Committee does not accept the above recommendation, then we recommend the following alternative:

RULE 223. JURY LIST IN CERTAIN COUNTIES

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are [~~either selected by electronic or mechanical means or~~] drawn from the ~~wheel~~, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided, however, ~~that the trial judge upon the demand of any party to any case reached for trial by jury, or of the attorney for any such party, shall cause the names of all the members, of the general panel available for service as jurors in such case to be placed in a receptacle and well shaken, and said trial judge shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such cause, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case.~~ [after such assignment to a particular court, the trial judge of such court, upon the demand prior to voir dire

examination by any party or attorney in any case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case.]

Amendment Approved

Rule 223

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW OR CHANGE OF EXISTING RULE--TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

Rule 223. Jury List in Certain Counties

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are drawn from the wheel, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided, however, that the trial judge upon the demand of any party to any case reached for trial by jury, or of the attorney for any such party, shall cause the names of all the members of the general panel available for service as jurors in such case to be placed in a receptacle and well shaken, and said trial judge shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such cause, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case.

II. Proposed Rule: Mark through deletions to existing rule with dashes; under proposed new wording.

Rule 223. Jury List in Certain Counties

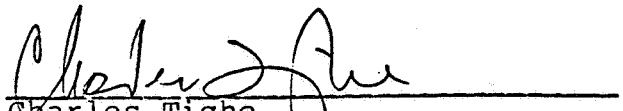
In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are drawn from the wheel, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided,

however, after such assignment to a particular court, the trial judge of such court, upon the demand of any party or attorney in any case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case.

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

There seems to be some confusion in the application of this rule. Apparently some courts allow the jury panel, as assigned to a particular court, to be shuffled and drawn twice if requested. It also appears that some judges, upon a demand for a shuffle after the assignment of a jury panel to a particular court, send the entire panel back to the central jury room so that an entirely new panel can be drawn. The purpose of this proposed change is to make it clear that once a jury panel is assigned to a particular court any shuffling and redrawing takes place with that particular panel, without the necessity of returning the panel to the central jury room, and that there will be only one shuffle and redrawing of the particular jury panel by the trial judge.

Respectfully submitted,



Charles Tighe
COTTON, BLEDSOE, TIGHE & DAWSON
United Bank Building, Suite 300
500 West Illinois
P. O. Box 2776
Midland, Texas 79702

Date: January 16, 1989

00913

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 223 and 245

Dear Hadley:

Enclosed herewith please find a copy of a letter from Evelyn A. Avent, Secretary to the Committee on Administratin of Justice regarding changes to Rules 223 and 245. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 223

COTTON, BLEDSOE, TIGHE & DAWSON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

SUITE 300 UNITED BANK BUILDING

500 WEST ILLINOIS

MIDLAND, TEXAS 79701

TELEPHONE (915) 684-5782

P. O. BOX 2776 ZIP 79702

TELECOPIER (915) 682-3672

CLAYDESTA OFFICE

SUITE 5550

CLAYDESTA NATIONAL BANK BLDG.

6 DESTA DRIVE

MIDLAND, TEXAS 79705

TELEPHONE (915) 684-5782

ROBERT C. BLEDSOE*°

CHARLES L. TIGHE

ROBERT H. DAWSON

TEVIS HERD*°

RICHARD T. McMILLAN

JOHN A. WOODSIDE

CORBY CONSIDINE

BARRY N. BECK

ALLEN D. CUMMINGS°

ALAN H. MEYERS

MAX E. WRIGHT

RUSSELL N. MULLINS

TERRY W. RHOADS

BILL J. HOWARD

W. BRUCE WILLIAMS

SUSAN R. RICHARDSON

*BOARD CERTIFIED - OIL, GAS AND MINERAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

BRADLEY H. BAINS

MARK S. CARDER

RICK D. DAVIS, JR.

DIANN M. HANSON

DAN G. LEROY

RICHARD R. MONTGOMERY

STEVEN D. SELBE

RICK G. STRANGE*

JERRY D. ZANT

OF COUNSEL

ROBERT K. HUDSON

*ALSO LICENSED IN NEW MEXICO

January 16, 1989

Ms. Evelyn A. Avent
State Bar of Texas
P. O. Box 12487
Austin, Texas 78711

Re: Committee on Administration of Justice --
TRCP Rules 216-314

Dear Evelyn:

Please find enclosed herewith a request for rule change, which we discussed at the meeting on January 14, which our subcommittee would like for the full committee to consider. It will be appreciated if you will circulate the proposed change so that it can be considered at the meeting on March 11, 1989.

Thank you for your attention to this matter.

Very truly yours,

Charles Tighe

CT:kl
Enclosure
cc - w/enclosure:
Mr. George G. Brin
Mr. Bob Hanna
Mr. Fred B. Werkenthin
Mr. John M. Davidson

00920

STATE BAR OF TEXAS

HS H
SCAC Subc
+ Agenda

Copy to LHS
Orig. to file
1-27-89
Tighe

January 23, 1989

To the Committee on Administration of Justice

From Evelyn A. Avent, Secretary

Enclosed are proposed changes in final form to Rules 21, 21a, 72 and 73 submitted by Robert F. Watson.

Also enclosed are proposed changes in final form to Rules 223 and 245 submitted by Charles Tighe.

These items will be on the Agenda for action at the March 11 meeting.

Evelyn A. Avent

Enclosures

00921

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

4th copy
Orig to HJH

1/21/88

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

January 19, 1988

HJH -
SCAC Seed
& Agenda -

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

Re: TRCP Rule 226A

Dear Justice Wallace:

When West Publishing Company published the rules of civil procedure effective January 1, 1988, it omitted the material which I have highlighted on the attached copy of the old rule.

In reviewing Luke's letter to you dated October 29, 1987, it appears that this is the result of an error on the part of the publisher.

In all likelihood, several trial judges have already called this to your attention. However, please let me know if there is anything I can do in order to rectify it.

Sincerely yours,

J. Hadley Edgar
Professor of Law

JHE/nt
Enclosure

cc: Luther H. Soules III ✓

III.

That the following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

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

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten* or more members of the jury. The same ten* or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten* jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

(Definitions, issues and special instructions given to the jury will be transcribed here.)

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

_____

Judge Presiding

Certificate

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____

IV.

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

The court has previously instructed you that you should observe strict secrecy during the trial and during your deliberations, and that you should not discuss this case with anyone except other jurors during your deliberations. I am now about to discharge you. After your discharge, you are released from your secrecy. You will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish.

After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.

Change by amendment effective April 1, 1984: The word "foreman" is changed to Presiding Juror.

* "five" in the case of a jury of six members.

60929

Rule 239. Judgment by Default

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer ~~in state or federal court~~, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.

Comment: To provide that any answer, state or federal, will preclude state court default.

No default judgment shall be rendered ~~if~~ an answer filed in federal court in a removed case against a party in a case removed from federal court if an answer that party filed in federal court during removal.

Rule 239. Judgment by Default

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer ~~in state or federal court~~, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.

Comment: To provide that any answer, state or federal, will preclude state court default.

All in 239 a new sentence An answer filed in federal court shall be deemed an answer

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

April 17, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 239 and 245

Dear Hadley:

Enclosed herewith please find redlined versions of Rule 239 and 245. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

OFFICE PHONE
(817) 939-3521, EXT. 214

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

January 21, 1988

R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Congratulations on a great meeting last Saturday.

Our Subcommittee will endeavor to take a hard look at the new Rule 279 prior to the March meeting and I will give you a report regarding any suggestion we have for changing Rule 279 prior to that time.

For the benefit of our Subcommittee members who were not present and for the record I want to report that the Committee on the Administration of Justice Without Dissent concurred regarding our recommendation regarding Rule 239a i.e., that there was no immediate reason to change the Rule at this time.

The record will also reflect that the Committee voted to correct the typographical error in Rule 269g which is corrected as follows:

Rule 269. Argument

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but [by] should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

In regard to our suggestion regarding Rule 245 Mr. McManes expressed a concern that our suggestion of forty-five days might be used on a resetting. I do not have notation of whether the Committee approved any change in Rule 245 therefore I submit to you and will be in a position to resubmit after the Subcommittee reports a new proposed Rule 245. I make the following suggestion:

Rule 245. Assignment of Cases for Trial
The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five [ten] days to the parties, or by agreement of the parties. Provided however, that when a case has previously been set for trial and is reset then the Court may set said contested cases on motion of any party or on Court's own motion with reasonable notice of not less than ten days to the parties or by agreement of parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

I am by copy of this letter requesting that members of our Subcommittee advise me at this time of any suggestions concerning changing Rule 245 and Rule 279.

Yours truly,

Stanton B. Pemberton

SBP/pm

cc: Evelyn A. Avent,
SECRETARY TO COMMITTEE
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Charles Matthews
VICE CHAIRMAN
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Luther H. Soules, Chairman, Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Members of Subcommittee:

Charles Boston
FULBRIGHT AND JAWORSKI
1301 McKinney Street
Houston, Texas 77010

George G. Brin
BRIN AND BRIN
1202 3rd Street
Corpus Christi, Texas 78404

John E. Collins
Suite 220, 3500 Oak Lawn
Dallas, Texas 75219

Charles Tighe
COTTON, BLEDSOE, TIGHE AND DAWSON
P.O. Box 2776
Midland, Texas 79705

Judge Stanton B. Pemberton
169th District Court
P.O. Box 747
Belton, Texas 76513

RULE 245. ASSIGNMENT OF CASES FOR TRIAL

[Unless otherwise provided,] the court may set contested cases on ~~motion~~ of any party, or on the court's own motion, with reasonable notice of not less than [forty-five] ~~ten~~ days to the parties, or by agreement of the parties. [Provided, however, that when a case previously has been set for trial, the court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties.] Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

written request

A request for a trial setting, and in good faith, constitutes a representation that reasonably expects the requesting party will be ready for trial by the date requested, but no additional ~~pleadings~~ concerning the completion of pretrial proceedings or a current readiness for trial shall be required in order to obtain a trial setting in a contested case.

Board

request

Rule 245. Assignment of Cases for Trial

Unless otherwise provided, the Court may set contested cases on ~~motion~~ of any party, or on the court's own motion, with reasonable notice of not less than forty five [ten] days to the parties, or by agreement of the parties; ~~[, provided that]~~ readiness for trial shall not be a requisite to a trial setting unless the trial will commence no more than sixty days after the date of the order setting the trial. Provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

Comment: To allow case preparation after a case is set for trial if not set for trial within 60 days of the order setting the trial.

obtaining

request for

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

April 17, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 239 and 245

Dear Hadley:

Enclosed herewith please find redlined versions of Rule 239 and 245. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:

(512) 299-5434

April 13 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

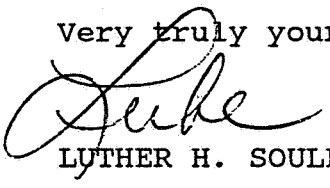
Re: Proposed Change to Tex. R. Civ. P. 245

Dear Hadley:

Enclosed herewith please find a redlined version of Rule 245. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,



LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 245. Assignment of Cases for Trial

Unless otherwise provided, the Court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty five ~~[ten]~~ days to the parties, or by agreement of the parties. Provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

OFFICE PHONE
(817) 939-3521, EXT. 214

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

April 11, 1988

Mr. R. Doak Bishop, Chairman
Administration of Justice Committee
1000 Dallas Building
Dallas, Texas 75201

Re: Rules 245 and 279

Dear Doak:

I have now heard from all members of the Subcommittee and they all agree and recommend that Rule 245 and 279 should be changed as follows:

Rule 245. Assignment of Cases for Trial
The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five [ten] days to the parties, or by agreement of the parties. Provided, however, that when a case has previously been set for trial, and is reset, the Court may set said contested cases on motion of any party or on Court's own motion with reasonable notice of not less than ten days to the parties or by agreement of parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

Rule 279. Omissions From the Charge
Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. [A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.] A claim that a question should not have been submitted because either the evidence was legally insufficient to warrant its submission or the answer was conclusively established by the evidence as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

00939

Rule 245

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW OR CHANGE OF EXISTING RULE--TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

Rule 245. Assignment of Cases for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ten days to the parties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

II. Proposed Rule: Mark through deletions to existing rule with dashes; under proposed new wording.

Rule 245. Assignment of Cases for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ~~ten~~ [forty-five] days to the parties, or by agreement of the parties. After a case has been on file for one year, such case may be set for trial upon reasonable notice of not less than ten days. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

00940

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

The period prior to trial for a jury fee and demand was extended from ten to thirty days (Rule 216) and the increase from ten to forty-five days in this Rule will permit a party who receives a non-jury setting to preserve the right to trial by and avoid the necessity to routinely make demand and paying a jury fee in every case. The second sentence of the proposed rule is based on the assumption that after a case has been on file for one year it is ready for trial and can, accordingly, be fairly set with a shorter notice.

Respectfully submitted,

Charles Tighe
COTTON, BLEDSOE, TIGHE & DAWSON
United Bank Building, Suite 300
500 West Illinois
P. O. Box 2776
Midland, Texas 79702

Date: January 9, 1989

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 223 and 245

Dear Hadley:

Enclosed herewith please find a copy of a letter from Evelyn A. Avent, Secretary to the Committee on Administratin of Justice regarding changes to Rules 223 and 245. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

January 17, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 245

Dear Hadley:

Enclosed herewith please find a copy of a Request for New or Change of Existing Rule--Texas Rules of Civil Procedure submitted to the Committee on Administration of Justice by Charles Tighe. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Mr. Charles Tighe

NOT - Xa Scan Send

Approved 6-4-J 1-14-85

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW OR CHANGE OF EXISTING RULE--TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

Rule 245. Assignment of Cases for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ten days to the parties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

II. Proposed Rule: Mark through deletions to existing rule with dashes; under proposed new wording.

Rule 245. Assignment of Cases for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ~~ten~~ [forty-five] days to the parties, or by agreement of the parties. After a case has been on file for one year such case may be set for trial upon reasonable notice of not less than ten days. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

Good idea - eliminate 45 days restor & makes it more "reasonable" for 216 Jury January

00944

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

The period prior to trial for a jury fee and demand was extended from ten to thirty days (Rule 216) and the increase from ten to forty-five days in this Rule will permit a party who receives a non-jury setting to preserve the right to trial by and avoid the necessity to routinely make demand and paying a jury fee in every case. The second sentence of the proposed rule is based on the assumption that after a case has been on file for one year it is ready for trial and can, accordingly, be fairly set with a shorter notice.

Respectfully submitted,

Charles Tighe
COTTON, BLEDSOE, TIGHE & DAWSON
United Bank Building, Suite 300
500 West Illinois
P. O. Box 2776
Midland, Texas 79702

Date: January 9, 1989

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr.Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 245

Dear Hadley:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rule 245. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

TRCP

Rule 245. Assignment of Case for Trial

The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than ~~ten~~ [forty-five] days to the parties, or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

COMMENT: The period prior to trial for jury fee and demand was extended from 10 to 30 days and the increase from 10 to 45 days in this rule will permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed thus clogging the jury dockets unrealistically and unnecessarily.

and other unresolved matters,

Rule 248. Jury Cases

When a jury has been demanded, questions of law, motions, exceptions to pleadings, ~~etc.~~, shall, as far as practicable, be heard and determined by the court before ~~the day designated for~~ the trial [commences], and jurors shall be summoned to appear on the day so designated.

[When a case has been first assigned to a court for trial for the same day that is scheduled for jury selection in the case, questions of law, motions, exceptions to pleadings ~~etc.~~, shall, as far as practicable, be heard and determined by the court before jury selection commences.]

and other unresolved matters,

6 to 4 ~~Do~~ rejected

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5434

April 17, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 248

Dear Hadley:

Enclosed herewith please find a redlined version of Rule 248. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht

00952

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

(512) 299-5434

May 17, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 254 and 267

Dear Hadley:

Enclosed herewith please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 254 and 267. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stan Pemberton

OK

March 23, 1989

Hon. Carolyn H. Spears
224th District Court
Bexar County Courthouse
San Antonio, Texas 78205

Dear Judge Spears:

Thank you for your thoughtful suggestion concerning Texas Rule of Civil Procedure 254.

We will be considering changes in the rules throughout the year, and I will see to it that your suggestion is presented at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

(512) 220-2132

(512) 220-2133

Carolyn H. Spears
Judge 224th District Court
Bexar County Courthouse
San Antonio, Texas 78205

March 21, 1989

Honorable Nathan L. Hecht
Post Office Box 12248
Capitol Station
Austin, Texas 78711

Dear Justice Hecht:

This letter is written to you as a member of the Rules Committee. I am writing with particular concern about Rule 254. I recently had a case in my court which warranted denial of a continuance, however, under the present Rule 254 there is no discretion given to a Judge except when the continuance is filed within ten days of trial. In this case the Plaintiff had a medical diagnosis of cancer; she was suing to have a Trust set aside which she maintained was fraudulently established. She will not be able in her lifetime to have her case heard because continuances will be mandatory and legislators are hired simply to insure that continuance. I think the trial court should be able to look at all the circumstances surrounding the continuance and determine in its discretion whether or not to grant such a continuance.

Thank you for your work in the Rules area.

Very truly yours,

CAROLYN H. SPEARS

CHS/bs

SCAC SUBCOMMITTEE RECOMMENDATION

RULE 260. IN CASE OF NEW COUNTIES

Repeal

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5434

April 11, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 260

Dear Hadley:

Enclosed herewith please find a copy of the last page of a letter from Stanton B. Pemberton regarding abolishing Rule 260. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanton Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

4/10 HJH

Page 2 continued
letter of April 11, 1988

I have not heard from all of the members of the Subcommittee regarding abolishing Rule 260.

Yours truly,

Stanton B. Pemberton

SBP/pm

cc: Mr. Charles Matthews
Vice Chairman
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Ms. Evelyn A. Avent
Secretary to Committee
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Copy to LHS
Orig to File
3/23 hjh
3/25 H'S H
50 AC Subd
Agenda
COA -

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

March 21, 1988

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

Dear Luke:

Enclosed is Judge Charles Bleil's letter to Jim Wallace.

I don't know how Rule 260 has survived this long, unless someone felt we might be creating new counties someday.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
CHARLES BLEIL
BEN Z. GRANT

Court of Appeals
State of Texas
Sixth Supreme Judicial District

CLERK
LOUISE WALDROP LOHSE

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE
TEXARKANA, TEXAS 75501
214/798-3046

March 16, 1988

Honorable James Wallace
Texas Supreme Court
P.O. Box 12248
Austin, TX 78711

Re: Necessity of TRCP 260

Dear Jim:

Rule 260, entitled "In Case of New Counties" provides:

> When a suit is pending in the district or county court of any county, out of the territory of which a new county has been or may be made, in whole or in part, if the defendants or any one of them, shall file a motion in the court where such suit is pending, to transfer the same to such new county, naming it, together with an affidavit stating that neither he nor any one of the defendants resided in said territorial limit at the time the suit was instituted, and further stating that at the date of the filing of such suit, said defendant was resident citizen within the territorial limits of the new county, the court shall grant a change of venue to such new county, unless the suit could be property (sic) brought in the county in which the same is pending under some provision of law.

In looking at the annotations, I see that the only case to cite this rule was one decided in 1891 and that case held that the rule did not apply.

I would suggest that perhaps the Rules Committee look at this rule to determine whether we need to retain it for another hundred years or whether ~~it~~ might be just as well left out of our Rules of Civil Procedure.

Best regards,

Charles

Charles Bleil

CB/djt

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 28, 1988

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

RE: Tex. R. Civ. P. 260

Dear Hadley:

Enclosed herewith please find a copy of a letter I received from Judge William W. Kilgarlin regarding the above-referenced rule. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin
Mr. Doak Bishop

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

(512) 299-5434

May 17, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 254 and 267

Dear Hadley:

Enclosed herewith please find a copy of a letter sent to me by Justice Nathan L. Hecht regarding proposed changes to Rules 254 and 267. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stan Pemberton

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

SCAC SUBCOMMITTEE RECOMMENDATION

RULE 269. ARGUMENT

(a) After the evidence is concluded and the charge is read, the parties may argue the case to the jury. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, ~~whether upon special issues [questions] or otherwise,~~ shall be entitled to open and conclude the argument; where there are several parties having separ
defenses, the court shall prescribe the orde
them.

DELETE

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to
be made when the rules as to arguments are
should they not be noticed and corrected by
counsel may ask leave of the court to rise
of objection. But the court shall protect
unnecessary interruption made on frivolous
grounds.

Use Approved

(h) No change

Comment: Textual change only

SCAC SUBCOMMITTEE RECOMMENDATION

RULE 269. ARGUMENT

(a) After the evidence is concluded and the charge is read, the parties may argue the case to the jury. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, ~~whether upon special issues [questions] or otherwise,~~ shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; ~~by~~ [but] should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

(h) No change

Comment: Textual change only

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 269. Argument

(a) No changge

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but ~~by~~ should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant ground.

(h) No change

COMMENT: This change was made simply to correct a typographical error.

LTS Info Copy

OFFICE PHONE
(817) 939-3521, EXT. 214

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

SCAC Subc
& Agenda

January 21, 1988

R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Congratulations on a great meeting last Saturday.

Our Subcommittee will endeavor to take a hard look at the new Rule 279 prior to the March meeting and I will give you a report regarding any suggestion we have for changing Rule 279 prior to that time.

For the benefit of our Subcommittee members who were not present and for the record I want to report that the Committee on the Administration of Justice Without Dissent concurred regarding our recommendation regarding Rule 239a i.e., that there was no immediate reason to change the Rule at this time.

The record will also reflect that the Committee voted to correct the typographical error in Rule 269g which is corrected as follows:

Rule 269. Argument

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but [by] should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

In regard to our suggestion regarding Rule 245 Mr. McManes expressed a concern that our suggestion of forty-five days might be used on a resetting. I do not have notation of whether the Committee approved any change in Rule 245 therefore I submit to you and will be in a position to resubmit after the Subcommittee reports a new proposed Rule 245. I make the following suggestion:

Rule 245. Assignment of Cases for Trial
The court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five [ten] days to the parties, or by agreement of the parties. Provided however, that when a case has previously been set for trial and is reset then the Court may set said contested cases on motion of any party or on Court's own motion with reasonable notice of not less than ten days to the parties or by agreement of parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

I am by copy of this letter requesting that members of our Subcommittee advise me at this time of any suggestions concerning changing Rule 245 and Rule 279.

Yours truly,

Stanton B. Pemberton

SBP/pm

cc: Evelyn A. Avent,
SECRETARY TO COMMITTEE
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Charles Matthews
VICE CHAIRMAN
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Luther H. Soules, Chairman, Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Members of Subcommittee:

Charles Boston
FULBRIGHT AND JAWORSKI
1301 McKinney Street
Houston, Texas 77010

George G. Brin
BRIN AND BRIN
1202 3rd Street
Corpus Christi, Texas 78404

John E. Collins
Suite 220, 3500 Oak Lawn
Dallas, Texas 75219

Charles Tighe
COTTON, BLEDSOE, TIGHE AND DAWSON
P.O. Box 2776
Midland, Texas 79705

Judge Stanton B. Pemberton
169th District Court
P.O. Box 747
Belton, Texas 76513

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

January 28, 1988

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

RE: Tex. R. Civ. P. 239a and Tex R. Civ. P. 269

Dear Hadley:

Enclosed herewith please find a copy of a letter I received from Judge Stanton B. Pemberton regarding the above-referenced rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice James P. Wallace

00970

TISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

MARY JANE SMART
CLERK

RICHARD A. DAWSON
STAFF ATTORNEY

PHONE
713-655-2800

September 17, 1987

Holly
R 274/279 SCAC Suite 7
+ Arguello's J

Orig HJH
Copy LHS 2/9/88

Holly. This is a copy of the letter Judge Kilgarlin was referring to —

Sherman

Mr. Luther Soules, III
Chairman, Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
E. Travis at Soledad
San Antonio, TX 78205

Dear Mr. Soules:

This letter relates to the proposed changes to the rules of civil procedure. I am a briefing attorney with the 14th Court of Appeals in Houston, and when I read the proposed new rules in the Bar Journal, I called a Mr. Willis at the Supreme Court. He sent me a copy of the minutes of your September 12-13 committee meeting, including a transcript of your discussion of the changes to Rule 279.

The last sentence of (current) Rule 279 has been changed by the Committee, and I hope you will suggest that the Committee reconsider. Judge Tunks expressed his concern during the meeting that people will be confused by inclusion of the word "factual" in the new rule. He is quite correct.

Every Baylor Law School student must memorize Rule 279, so there will be thousands of lawyers and judges who notice the changes. I promise you that many people will read the new rule in precisely the same fashion that Judge Tunks did. Please let me explain why.

The new rule reads in part,

> A claim that the evidence was legally or factually insufficient to warrant the submission . . . may be made. . . .

To me this suggests simply that a party may claim that the evidence was factually insufficient to warrant the submission of an issue (or question). But we all know that a party just cannot lodge such a complaint.

Moreover, Rule 274 already warns lawyers not to fill the record with unfounded objections to the charge. Yet the new rule as proposed appears to give a basis for making an unfounded objection.

You must be very busy with all of your responsibilities, and I do not want to make your life miserable. But I fear that the new version of Rule 279 will needlessly complicate many people's lives. Nothing would be lost by dropping the reference to factual insufficiency; broad issue practice will continue unimpaired. I respectfully implore you to urge your comrades on the committee to drop that reference. Just because the committee's intent is clear to the committee does not mean that we ordinary lawyers will discern that intent.

Respectfully,

David Gunn

DG:ac

RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS, AND INSTRUCTIONS

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

[To complain of and seek reversal of a judgment because of the court's:

a. failure to submit a question, the party relying on the question must request and tender it in writing in

Unanimously approved

18 to 1 approved Sent back to Comm.

~~correct wording, and object to the court's~~
~~include it in the charge~~, while the party not
the question must either request and tender
in writing in substantially correct form or
court's failure to ~~include it in the~~

a defective question, the party relying on
must request and tender in substantially
~~ng and object to the court's failure to~~
~~the charge~~, while the party not relying on
must either request and tender the question
substantially correct form or object to
the court's defective submission;

a definition or instruction, the party
tender the definition or instruction in
~~correct wording and object to the court's~~
~~de it in the charge~~,
defective definition or instruction, the
r request and tender the definition ~~or~~
in substantially correct ~~wording~~ or object
efective submission.]

~~to the court's failure to include it in the charge~~

00974

substantially correct ~~wording, and object to the court's failure to include it in the charge,~~ while the party not relying on the question must either request and tender the question in writing in substantially correct form or object to the court's failure to ~~include it in the charge;~~

b. submission of a defective question, the party relying on the question must request and tender in substantially correct ~~wording and object to the court's failure to include it in the charge,~~ while the party not relying on the question must either request ~~or~~ and tender the question in writing in substantially correct form or object to the court's defective submission;

c. failure to submit a definition or instruction, the party must request and tender the definition or instruction in substantively correct ~~wording and object to the court's failure to include it in the charge;~~

d. submission of a defective definition or instruction, the party must either request ~~or~~ and tender the definition ~~or~~ or instruction in substantially correct ~~wording~~ or object to the court's defective submission.]

Luke, you don't have this letter. It showed up in the work book. JHE 5/3/89

March 8, 1989

To: Subcommittee Numbers of Rules 216-314

From: J. H. Edgar JHE

Re: Preservation of Error
to the Court's Charge - Rule 278

The method of preserving error to questions, definitions, and instructions to the court's charge is made difficult by the fact that the last two sentences of Rule 278 don't help much. Consequently, we've had to rely upon Court decisions to enlighten us, the last one being Morris v. Holt, 714 S.W.2d 311 (Tex. 1986), which raises some interesting questions.

I propose that we "codify" the law in this regard and spell out, in detail, the proper way to preserve such error under most circumstances. The attached is a starting point. Please look this over and let's see if we can come up with a recommendation at our meeting on April 28.

JHE/nt

SCAC SUBCOMMITTEE RECOMMENDATION

RULE 279. ~~OMITTED QUESTIONS AND REVIEW~~

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 as waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to suppor
trial court, at the request of either party
hearing and at any time before the judgment
file written findings on such omitted eleme
support of the judgment. If no such writte
such omitted element or elements shall be de
court in such manner as to support the judgm

~~A claim that the evidence was legally e~~
~~insufficient to warrant the submission of an~~
~~for the first time after verdict, regardless~~
~~submission of such question was requested by~~
~~[While a claim~~ that the evidence was factuall
~~warrant the submission of any question or tha~~
question was against the great weight and pre
evidence ~~can only~~ be made after verdict, a cl
evidence to warrant the submission of any question or that an
~~opposite~~ answer to a question was conclusively established as a
matter of law may be made ~~for the first time~~ after verdict,
regardless of whether the submission of such question was
requested by the complainant.]

00976

SCAC SUBCOMMITTEE RECOMMENDATION

RULE 279. ~~OMITTED QUESTIONS AND REVIEW~~

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 as waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may, after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment.

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

[~~While a claim~~ that the evidence ~~was~~ factually insufficient to ~~warrant the submission of any question or that an~~ support an answer to a question ~~was~~ against the great weight and preponderance of the evidence ~~can only~~ be made after verdict, ~~A claim~~ that there was no evidence to warrant the submission of any question or that an ~~objection~~ answer to a question was conclusively established as a matter of law may be made ~~for the first time~~ after verdict, regardless of whether the submission of such question was requested by the complainant.]

00976

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 20, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 279

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rule 279. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to LHS
Orig to Luke.
9-17-88-kyh

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

September 16, 1988

HSH
SCA Subc

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

I'm sending the enclosed information on a case involving Rule 279 in case you didn't see it.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

Texas Lawyers' CIVIL DIGEST
August 24, 1988 Vol. 25 No. 32

COURTS OF APPEAL

Procedure

Charge. R 279 (1988). No Obj To Factual Insuff After Verdict. The 1988 amendments to R 279 did not authorize objection to the submission of an issue on grounds of factual insufficiency. Despite the language of the new rule ("a claim that the evidence was legally *or factually* insufficient to warrant the submission of any question may be made for the 1st time after verdict...."), its legislative history demonstrates that no change in procedure was intended. *Smith v Christley* (B14-87-00113-CV), 7/21/88, Hou-14 (On motion for rehearing).

Discovery. Failure To Answer Interrogatories Of 3d Parties. P's attorney was allowed to testify as to attorney's fees, even though he was not listed as an expert witness in response to interrogatories propounded by a 3d party who eventually settled. D never asked for a list of experts. *Held:* Since P's attorney did not disclose his prospective testimony in response to the interrogatory, he should not have been allowed to testify. Good cause was not shown for allowing the testimony. A party must be able to rely on the interrogatories & answers of other parties in the same suit. Otherwise, a multiple party case would require redundant interrogatories with identical questions & answers. Although R 168(2) limits interrogatories to use *against* the answering party, there is no such limit on who may use them. *Id.*

Power Of Atty. Execution Effective Though Tortious. Jr had a power of attorney from Sr. Execution of the 2 guaranty contracts in question was within the scope of the agency as defined by the grant of power. Thus, that execution was effective, regardless of whether it may have been tortious. *Id.*

Contract Signed By Incompetent Effective Because Of Acts Of Agent. A deed of trust signed by Sr at a time when he lacked sufficient mental capacity was enforceable against him because of the acts of his agent, Jr. Under §15 Restatement (2d) of Contracts, where the contract is made on fair terms & the other party is without knowledge of the mental illness or defect of the maker, the power of avoidance terminates to the extent that the contract has been performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires. Thus, when avoidance is inequitable, as where the parties cannot be restored to their previous positions, or may otherwise render avoidance inequitable, the contract then ceases to be voidable. The court is to consider not only benefits conferred & received on both sides, but also the extent to which avoidance will benefit the incompetent & the extent to which others, who will benefit from avoidance, had opportunities to prevent the situation from arising. *Id.*

Personal Injury, Commerce

Course Of Employment. Not Employees On Way To Lunch. P sued Ds for damages resulting from a car accident. Ds offered summary judgment evidence showing that, at the time of the accident, Murphy, the driver of Ds' vehicle, & 2 other employees, were *en route* to a restaurant for dinner, intending to return to work after dinner. The trial court entered summary judgment for Ds. *Held:* Affirmed insofar as P's theory of recovery was based upon the doctrine of *respondeat superior.* Ds provided summary judgment evidence that Murphy was not acting in the course of employment. An employer is not liable for actions that an employee takes in his own interest & not to further the purpose of carrying out the master's business. When an employee deviates from the performance of his duties as an employee for his own, personal purposes, his employer is neither responsible nor liable on a *respondeat superior* theory for what occurs during that deviation. *Drooker v Saeilo Motors* (01-87-00793-CV), 8/4/88, Hou-1 (Evans, CJ, concurs).

> Interest rate computed by Consumer Credit Commissioner to be used in determining interest rate for September 1988 judgments under art 5069—1.05: 10%

Negl Entrustment. Little Driving Experience. Learners Permit. Evidence established that Murphy, the driver of Ds' vehicle at the time of the accident, was licensed with an instruction permit at the time of the accident, that Murphy had driven with a coworker many times, that he had never been in an accident, nor ticketed, nor issued a moving violation, & did not establish as a matter of law that Murphy was not an "unlicensed, incompetent, or reckless" driver, nor that Ds did not know, nor should have known, that Murphy was unlicensed, etc. The evidence in this case raises a jury question on the issue of whether Murphy was competent because the evidence established that Murphy had little driving experience & possessed only an instruction permit. The trial court, therefore, erred in entering summary judgment for Ds on P's theory of negligent entrustment. *Id.*

Duty. Restrict Access To Vehicles. Safety Rs. In an automobile accident case involving Ds' employee driving Ds' vehicle, the trial court erred in granting summary judgment where material issues of fact existed about whether Ds were negligent in failing to restrict access to company vehicles or vehicles loaned to the company, (including access to the keys) & in failing to create &/or enforce safety rules concerning the use of company vehicles or vehicles loaned to the company. This is a straight-forward allegation of negligence which usually presents fact issues that cannot be determined by summary judgment. *Id.*

Procedure

Appellate J. Lack Of Prayer For Rendition. Rendition. A court of appeals should render judgment when rendition is supported by the record & the assigned errors in a party's brief, even though there is no prayer for rendition. The prayer's irregularity of form or substance does not limit the relief available to a party. *Kaspar v Thorne* (05-87-00750-CV), 7/29/88, Dal (On motion for rehearing).

© 1988 State Bar of Texas

OFFICE PHONE
(817) 939-3521, EXT. 214

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

March 8, 1988

R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Dear Doak:

Attached is a copy of a letter from Professor Louis Muldrow concerning both Rule 165a and Rule 279. Perhaps it could be included in the material to be distributed at our Saturday meeting.

Yours truly,

Stanton B. Pemberton

SBP/pm

cc: Evelyn A. Avent
SECRETARY TO COMMITTEE
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Charles Matthews
VICE CHAIRMAN
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Luther H. Soules, Chairman,
Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Professor Jeremy Wicker
School of Law
Texas Tech University
Luboock, Texas 79409-2171

Professor Louis S. Muldrow
School of Law
Baylor University
Waco, Texas 76798

Judge George Thurmond, Chairman of
Subcommittee for Rules 1-165a
P.O. Box 103
Del Rio, Texas 78841

Members of Subcommittee:

Charles Boston
FULBRIGHT AND JAWORSKI
1301 McKinney Street
Houston, Texas 77010

George G. Brin
BRIN AND BRIN
1202 3rd Street
Corpus Christi, Texas 78404

John E. Collins
Suite 220, 3500 Oak Lawn
Dallas, Texas 75219

Charles Tighe
COTTON, BLEDSOE, TIGHE AND DAWSON
P.O. Box 2776
Midland, Texas 79705

BAYLOR UNIVERSITY
SCHOOL OF LAW
Louis S. Muldrow • Professor
Waco, Texas 76798 • (817) 755-3611

March 7, 1988

Hon. Stan Pemberton
169th District Court
P.O. Box 747
Belton, Texas 76513

Re: T.R.C.P.

Dear Judge:

This confirms our conversation about Rules 165a and 279.

Rule 279:

Prior to the Jan. 1, 1988 amendment, R. 279 stated, in the last paragraph:

> "A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict. . . . "

This meant no evidence, since it relates only to insufficient to warrant submission. It does not relate to sufficiency of evidence to support the jury answer to the issue. The court decides whether to submit or not on the basis of "some" evidence; and must submit, even though the answer made may be against the weight or not supported by factually sufficient evidence. McDonald, § 12.08.

The 1988 amendment states:

> "A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict. . . ."

I object to this because "factual insufficiency" is never a valid complaint to the submission of an issue. Only to the answer. Thus, in telling the lawyer that he "may" so object for the first time after verdict, the rule suggests that (1) it is a valid objection which (2) may be made for the first time after verdict. The lawyer may be led to believe that he or she may also complain on that basis at the objections to the charge, when, in fact, that would be a spurious objection which will contribute to "numerous and unfounded" objections.

Rule 165a:

See attached copies of former and current 165a.

The former rule allowed the court to dismiss (1) for failure to appear for hearing or trial, the setting of which the party had notice, and, (2) for failing to set the case or take other affirmative action after receiving notice of the court's intent to dismiss. The first required no advance notice of intent to dismiss, while the second required such notice. McDonald, § 17.18.2-(b), and cases cited.

The 1988 deletion of the latter part of the first sentence now, it seems to me, when considered with the second sentence, suggests that the court may have to give notice for all dismissals.

Also, it seems to me that the reinstatement standard ("not intentional or the result of conscious indifference!!") is easier than keeping the case on the docket ("good cause" - which usually means no negligence); so that one is better off allowing the case to be dismissed, and then seeking reinstatement.

Yours very truly,

Louis

Louis S. Muldrow

LSM/lsl

P.S. Pardon The corrections!

the liability for attorney fees, sanctions, or other costs.

(Amended by orders of July 22, 1975, eff. Jan. 1, 1976; Dec. 5, 1983, eff. April 1, 1984.)

Source: R.C.S. Art. 2182, unchanged.

Changes by amendment effective January 1, 1976: The rule permits non-suit up to time the plaintiff rests his case.

Change by amendment effective April 1, 1984: The last sentence is new and prevents the avoidance of certain sanctions by a non-suit.

Rule 165. Abandonment

A party who abandons any part of his claim or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried.

Source: Texas Rule 33 (for District and County Courts).

Rule 165a. Dismissal for Want of Prosecution

1. Dismissal. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief or his attorney to appear for any hearing or trial of which the party or attorney had notice, or on failure of the party or his attorney to request a hearing or take other action specified by the court within fifteen days after the mailing of notice of the court's intention to dismiss the case for want of prosecution. Notice of the court's intention to dismiss shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

2. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

3. Cumulative Remedies. This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedure and timetable is applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

(Added by order of Oct. 3, 1972, eff. Feb. 1, 1973. Amended by orders of July 22, 1975, eff. Jan. 1, 1976; Dec. 5, 1983.)

Note: This is a new rule effective February 1, 1973.

Change by amendment effective January 1, 1976: The words "or docket call" are deleted after the word "trial" in the first sentence.

Change by amendment effective January 1, 1984: The rule is rewritten to provide a statewide rule for dismissal and reinstatement of cases.

Editorial note: Notwithstanding the language contained in the above note which was appended to the amendment of this rule by the order of December 5, 1983, par. 2 of said order provides:

"That the amendments, new rules, and repeals of rules shall become effective on April 1, 1984."

SECTION 8. PRE-TRIAL PROCEDURE

Rule 166. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All dilatory pleas and all motions and exceptions relating to a suit pending;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments to the pleadings;

(d) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

00983

such corporation and judgment shall be rendered as though the same were not dissolved.

Source: Art. 1390 (part). unchanged.

Rule 161. Where Some Defendants Not Served

When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not so served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by statute. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liability, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered.

(Amended by orders of Dec. 5, 1983, eff. April 1, 1984; April 24, 1984, eff. Oct. 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2087.

Change by amendment effective April 1, 1984: Textual changes.

Rule 162. Dismissal or Non-Suit

At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.

Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

(Amended by orders of Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2089, unchanged.

Change by amendment effective April 1, 1984: The rule is rewritten.

COMMENT TO 1988 CHANGE: The purpose of this rule is to [illegible] a definite time after which a party may not voluntarily dismiss or non-suit the cause of action. In addition, these amendments will [illegible] disturb any pending motions for sanctions or attorney's fees [illegible] were filed before the motion for non-suit or dismissal.

Rule 163. Dismissal As To Parties Served, Etc.

When it will not prejudice another party, the plaintiff may dismiss his suit as to one or more of several parties who were served with process, or who have answered, but no such dismissal shall in any case, be allowed as to a principal obligor, except in the cases provided for by statute.

(Amended by orders of Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Source: Art. 2090, with minor textual changes.

Change by amendment effective April 1, 1984: Textual changes.

Rule 164. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

Rule 165. Abandonment

A party who abandons any part of his claim or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried.

Source: Texas Rule 33 (for District and County Courts).

Current

Rule 165a. Dismissal for Want of Prosecution

1. Failure to Appear. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, filing of all pleadings, the making of a response or supplemental responses to discovery and other pretrial matters. The case may be continued thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

00984

2. Non-Compliance With Time Standards. Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.

3. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

4. Cumulative Remedies. This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

(Added by order of Oct. 3, 1972, eff. Feb. 1, 1973. Amended by orders of July 22, 1975, eff. Jan. 1, 1976; Dec. 5, 1983; July 15, 1987, eff. Jan. 1, 1988.)

Note: This is a new rule effective February 1, 1973.

Change by amendment effective January 1, 1976: The words "or docket call" are deleted after the word "trial" in the first sentence.

Change by amendment effective January 1, 1984: The rule is rewritten to provide a statewide rule for dismissal and reinstatement of cases.

Editorial note: Notwithstanding the language contained in the above note which was appended to the amendment of this rule by the order of December 5, 1983, par. 2 of said order provided

"That the amendments, new rules, and repeals of rules become effective on April 1, 1984."

SECTION 8. PRE-TRIAL PROCEDURE

Rule 166. Pre-Trial Procedure; Formulation Issues

In any action, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All dilatory pleas and all motions and exceptions relating to a suit pending;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments to the pleadings;

(d) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(e) The limitation of the number of expert witnesses;

(f) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury.

(g) Such other matters as may aid in the disposition of the action. The court shall make an order which recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

(Amended by order of July 26, 1960, eff. Jan. 1, 1961.)

Source: Federal Rule 16.

Change: Subsection 1[(a)] has been added. The court has been given the power to compel the appearance of the parties or their agents as well as the attorneys. Reference to an auditor is authorized.

Change by amendment effective January 1, 1961: Requirement that court's order at pre-trial conference allowing amendments show "the time within which same may be filed."

00985

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205-1695

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
ROBERT W. LOREE
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 11, 1988

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

RE: Tex. R. Civ. P. 279

Dear Hadley:

Enclosed herewith please find a copy of a letter I received from Judge Stanton B. Pemberton regarding the above-referenced rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

OFFICE PHONE
(817) 939-3521, EXT. 214

LHS Info Copy

POST OFFICE BOX 747
BELTON, TEXAS 76513-0747

STANTON B. PEMBERTON
JUDGE, 169TH DISTRICT COURT
BELL COUNTY, TEXAS

February 17, 1988

R. Doak Bishop
Committee on Administration of Justice
1000 Dallas Building
Dallas, Texas 75201

Re: Texas Rule of Civil Procedure 279

Dear Mr. Chairman and Friends:

Attached is a copy of an excellent letter from Professor Jeremy Wicker concerning Rule 279 which I received today. I anticipate receiving one from Professor Louis Muldrow of Baylor Law School shortly.

Your friend,

Stanton B. Pemberton

SBP/pm

cc: Evelyn A. Avent
SECRETARY TO COMMITTEE
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Charles Matthews
VICE CHAIRMAN
Exxon Co., Room 1895
P.O. Box 2180
Houston, Texas 77001

Luther H. Soules, Chairman,
Supreme Court Advisory Committee
800 Milam Building
San Antonio, Texas 78205

Professor Jeremy Wicker
School of Law
Texas Tech University
Lubbock, Texas 79409-2171

Professor Louis S. Muldrow
School of Law
Baylor University
Waco, Texas 76798

Members of Subcommittee:

Charles Boston
FULBRIGHT AND JAWORSKI
1301 McKinney Street
Houston, Texas 77010

George G. Brin
BRIN AND BRIN
1202 3rd Street
Corpus Christi, Texas 78404

John E. Collins
Suite 220, 3500 Oak Lawn
Dallas, Texas 75219

Charles Tighe
COTTON, BLEDSOE, TIGHE AND DAWSON
P.O. Box 2776
Midland, Texas 79705

Texas Tech University

School of Law
Lubbock, Texas 79409-2171 / (806) 742-3791 Faculty 742-3785

February 15, 1988

The Honorable Stan Pemberton
Judge, 169th District Court
Courthouse
Belton, TX 76513

Re: Tex. R. Civ. P. 279

Dear Judge Pemberton:

You requested at our last Administration of Justice Committee meeting that I write you regarding a possible problem with the wording of the last sentence of Rule 279. It currently reads: "A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant."

This language is misleading in two respects. First, a factual insufficiency attack can be raised only after the verdict. It assumes the evidence was sufficient to warrant submission of the question, but that the evidence is too weak factually to support the finding. The current language suggests that it would be proper to raise a factual insufficiency point before the verdict is rendered, which, of course, is not true. Thus the language is misleading. While it may not throw off the experienced trial lawyer, such language has no place in this sentence. I would therefore recommend that the words "or factually" be deleted from this sentence.

Second, I see a problem in this sentence in using only the phrase "legally insufficient." This, of course, refers to a "no evidence" ground. While the sentence is completely correct in stating that a legally insufficiency ground may be raised for the first time after verdict, it is somewhat misleading in that it does not also include an "established as a matter of law" ground. Both legal evidentiary points may be raised for the first time after verdict. I recommend that the last sentence of Rule 279 be amended to read:

A claim that a question should not have been submitted because either the evidence was legally insufficient to warrant its submission or the answer was conclusively established by the evidence as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

Yours truly,

Jeremy C. Wicker
Professor of Law

JCW/tm

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

March 1, 1988

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

RE: Tex. R. Civ. P. 279

Dear Hadley:

Enclosed herewith please find a copy of a letter I received from Judge Stanton B. Pemberton regarding the above-referenced rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice William W. Kilgarlin

00990

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 17, 1987

MARY JANE SMART
CLERK

RICHARD A. DAWSON
STAFF ATTORNEY

PHONE
713-655-2800

Orig HJH
Copy LHS 2/9/88

Mr. Luther Soules, III
Chairman, Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
E. Travis at Soledad
San Antonio, TX 78205

Dear Mr. Soules:

This letter relates to the proposed changes to the rules of civil procedure. I am a briefing attorney with the 14th Court of Appeals in Houston, and when I read the proposed new rules in the Bar Journal, I called a Mr. Willis at the Supreme Court. He sent me a copy of the minutes of your September 12-13 committee meeting, including a transcript of your discussion of the changes to Rule 279.

The last sentence of (current) Rule 279 has been changed by the Committee, and I hope you will suggest that the Committee reconsider. Judge Tunks expressed his concern during the meeting that people will be confused by inclusion of the word "factual" in the new rule. He is quite correct.

Every Baylor Law School student must memorize Rule 279, so there will be thousands of lawyers and judges who notice the changes. I promise you that many people will read the new rule in precisely the same fashion that Judge Tunks did. Please let me explain why.

The new rule reads in part,

> A claim that the evidence was legally or factually insufficient to warrant the submission . . . may be made. . . .

To me this suggests simply that a party may claim that the evidence was factually insufficient to warrant the submission of an issue (or question). But we all know that a party just cannot lodge such a complaint.

Moreover, Rule 274 already warns lawyers not to fill the record with unfounded objections to the charge. Yet the new rule as proposed appears to give a basis for making an unfounded objection.

You must be very busy with all of your responsibilities, and I do not want to make your life miserable. But I fear that the new version of Rule 279 will needlessly complicate many people's lives. Nothing would be lost by dropping the reference to factual insufficiency; broad issue practice will continue unimpaired. I respectfully implore you to urge your comrades on the committee to drop that reference. Just because the committee's intent is clear to the committee does not mean that we ordinary lawyers will discern that intent.

Respectfully,

David Gunn

DG:ac

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 12, 1987

Mr. J. Hadley Edgar
Texas Tech University
School of Law
Lubbock, Texas 79409

Mr. Doak Bishop
Administration of Justice Committee
Hughes & Luce
1000 Dallas Building
Dallas, Texas 75201

Re: Last sentence of R. 279

Gentlemen:

I have enclosed comments sent to me through Louis Muldrow regarding Rule 279. Please be prepared to report on this matter at our next SCAC meeting. I will include this matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tct
enclosures

BAYLOR UNIVERSITY
SCHOOL OF LAW
Louis S. Muldrow • Professor

WACO, TEXAS 76798
(817) 755-3611

9-28-87

Louis,
Xc
SCAC SubC
CAJ Chair Bishop
Agenda

Mr. Luther Soules, III
800 Milam Bldg.
East Travis at Soledad
San Antonio, TX 78205

(Last sentence of R. 279)

Luther:

See enclose comments from paper clm giving on preserving error.

(I agree with Judge Tunk's reservations expressed in the 9/13/86 Advisory Board Meeting.)

Best regards.

Lewis

this discretion as "abuse of discretion," requiring that the court's actions have been arbitrary and unreasonable to be reversible: K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. - Houston (1st) 1984, writ ref'd, n.r.e., 686 S.W.2d 593 (Tex. 1985).

VIII. Jan. 1, 1988 Amendments

Cosmetic and substantive changes are made in Rules 271-279 in the amendments taking effect in 1988. I do not believe that any of the changes affect the methods of preserving error.

The first paragraph of current Rule 279 will be new Rule 278.

The last sentence of current 279 states:

> "A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party."

This referred, as previously observed to a "no evidence" or legal insufficiency complaint. This is obscured by the 1988 amendment, which will state:

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

The addition of "or factually" is unfortunate, and will contribute to confusion, and perhaps, lead some into making spurious objections. As observed, one can complain that there is no evidence to warrant submission, but not that there is factually insufficient evidence to do so. Smith v. State, supra; McDonald, § 12.08-C. The trial court must submit, even though the answer will be against the great weight and preponderance of the evidence or supported by factually insufficient evidence. This being true, objections to submission on those bases are meritless, and may contribute to a charge of "numerous, unfounded" objections.

It is most unfortunate, therefore, that the new rule itself now suggests that such objections have merit, but "may be made for the first time after verdict..."

IX. Conclusion

The rules for preservation of error in the charge are, for the most part, logical and simple rules. As in all procedural matters, however, one must remain attentive to detail.

Many difficulties encountered in preservation of complaints about

SCAC SUBCOMMITTEE RECOMMENDATION

RULE 295. CORRECTION OF VERDICT

If the purported verdict is defective, the court may direct it to be reformed. If it is incomplete, or not responsive to the questions contained in the court's charge, or the answers to the questions are in conflict, the court shall in writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations. [A conflict in the answers to questions shall be called to the court's attention prior to the discharge of the jury.]

Keep No Amendment

Texas Tech University

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

March 8, 1989

3/13

HJH,
SCAD SubC R 295-/324
Agenda
CJ & I
Prof Edgar

Mr. Luther H. Soules III
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-2230

Re: Conflicting Answers and
T.R.C.P. 295 and 324

Dear Luke:

While the opportunity for conflicting answers has lessened, Little Rock Furniture Co. v. Dunn, 222 S.W.2d 985 (Tex. 1949) bothers me each time I teach it. You will recall that one of the Court's holdings was that a party could wait until after the jury had been discharged to complain of the conflict. Id. at 991.

When, then, must the loser complain? As a result of the recent amendment to Rule 324, one could argue that a motion for new trial is not required. Thus, can the judgment loser wait and complain for the first time in an appellant's brief? I hope not.

The problem can be cured in one of two ways. Since I disagree with the Little Rock holding, I would prefer that we add a sentence to Rule 295 to incorporate waiver for failure to call the conflict to the judge's attention before the jury is discharged. My subcommittee will consider this possibility.

An alternative would be to require that a complaint be made mandatory in Rule 324. Would you please refer this suggestion to the appropriate subcommittee so that we can resolve the matter at our next meeting?

Thanks.

Sincerely,

Hadley

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

"An Equal Opportunity/Affirmative Action Institution"

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ‡‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

March 14, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 324

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from J. Hadley Edgar regarding Rule 324. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Professor J. Hadley Edgar
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

SCAC SUBCOMMITTEE RECOMMENDATION

~~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. Notice-of-the-filing-of-the-request-shall-be-served-on-the opposite-party-as-provided-in-Rule-21a.~~

[Rule 296. Requests for Finding of Facts an

In any case tried in the district or co jury, any party may request the court to sta findings of fact and conclusions of law. Su entitled REQUEST FOR FINDINGS OF FACT AND CO shall be filed with the clerk of the court w call such request to the attention of the

Time for Filing. Such request shall be (20) days after judgment is signed.

Notice of Filing. Each request made pu shall be served on each party accordance with Rule 21a.]

R296

11 & 5 approved

any method allowed in Rule 21a.

the party making the request shall also provide a

00999

SCAC SUBCOMMITTEE RECOMMENDATION

~~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. Notice-of-the-filing-of-the-request-shall-be-served-on-the opposite-party-as-provided-in-Rule-21a.~~

[Rule 296. Requests for Finding of Facts and Conclusions of Law

In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW and shall be filed with the clerk of the court who shall immediately call such request to the attention of the judge who tried the case.

Time for Filing. Such request shall be filed within twenty (20) days after judgment is signed.

Notice of Filing. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule 21a.]

copy to the judge who tried the case by any method allowed in Rule 21a.

the party making the request shall also provide a

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5444

February 6, 1989

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296

Dear Hadley:

Enclosed herewith please find a copy of a letter from Judge George M. Thurmond regarding changes to Rule 296. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable George M. Thurmond

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

GEORGE M. THURMOND
District Judge
P. O. Drawer 1089
Del Rio, Texas 78841 - 1089
512 774-3611 - Ext. 231

JOHN R. PRICE
Official Court Reporter
P. O. Box 1156
Del Rio, Texas 78841 - 1156
512 774-3611 - Ext. 233

BLANCA S. BRIONES
Court Coordinator-Administrator
P. O. Drawer 1089
Del Rio, Texas 78841 - 1089
512 774-3611 - Ext. 232

SIXTY-THIRD JUDICIAL
DISTRICT OF TEXAS

COUNTIES COMPRISING
63RD JUDICIAL DISTRICT:

EDWARDS (ROCKSPRINGS)
KINNEY (BRACKETTVILLE)
TERRELL (SANDERSON)
VAL VERDE (DEL RIO)

2/4
WJH,
SCAC R. 296 Sub C
Agenda

February 1, 1989

Hon. Stanton B. Pemberton
Chairman, Administration of Justice Committee
P.O. Box 747
Belton, Texas 76513

xc Judge Thurmond

RE: Proposed amendment to Rule 296, T.R.C.P., regarding filing request for findings of fact and conclusions of law in non-jury trials

Dear Stan:

Last night I read the opinion of our Chief Justice in the case of Cherne Industries, Inc. vs. Juan Magallanes, Guardian Ad Litem, an unanimous decision of our Supreme Court rendered on January 25, 1989. Chief Justice Phillips's opinion clearly states that counsel need only file a request for findings of fact and conclusions of law initially with the clerk of the court, and there is no requirement in the Rules that the request be "presented" to the judge of the court, to trigger the necessity for the court to file such findings and conclusions within thirty days after the signing of the judgment in the case. As you know, if the failure to file findings and conclusions is brought the attention of the court in timely manner, then the judge has only five days after such complaint to file same, Rule 297.

I believe that most if not all trial and appellate courts have been following the rule of Lassiter vs. Bliss, 559 S.W. 2d 353 (Tex. 1977) and have assumed that a request for findings and conclusions must be presented or personally brought to the attention of the trial judge before both triggering the further provisions of the Rules, and giving rise to the methods of review of the case on appeal where the request for findings and conclusions was not "presented" to the judge.

I can visualize a problem in the trial courts with the request for findings and conclusions in a non-jury case being only filed with the clerk of the court, and with a copy of the request being served only upon opposing counsel. In many instances a judge will not know that he has been requested to make findings and conclusions until the second request for same is brought to his attention, and then he has only five days to prepare same - a rather short time in most cases. I do not think it is appropriate to have the clerk call the filing of the request to the attention of the court.

I would suggest that the Committee on Administration of Justice consider an amendment to Rule 296. The Rule presently reads as follows:

> In any case tried in the district or ocunty 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. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

My suggested amendment would simply change the period at the end of the present Rule to a comma and add this language to the Rule: "and a copy of the request shall be delivered to the judge by the party making the request."

I believe that then the judge will promptly learn of the request and thus have 20 to 30 days time from the date of the judgment to formulate and file his findings and conclusions, and will hold down second requests and a short five day schedule being imposed on the trial judge through no fault or neglect on his part.

I am taking the liberty of sending a copy of this letter to Luke Soules, Chairman of the Supreme Court Advisory Committee on Rules of Civil Procedure, and to our committee's secretary, Mrs. Evelyn Avent. I am also sending Evelyn a copy of the Supreme Court opinion in Cherne Inudustries, Inc., and she might want to transmit copies of these materials to members of the appropriate subcommittee of our committee. Perhaps my suggestions could come up as new matter in our next meeting, which I believe is scheduled for March 11th.

With best personal regards, I remain,

Sincerely yours,

George M. Thurmond

GMT:ccm
cc: Mr. Luke Soules, III
Mrs. Evelyn Avent

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

November 1, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 306a(3) and 306a(4)

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 296, 297, 306a(3) and 306a(4). Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

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

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

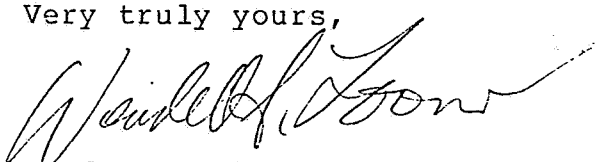
I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. <u>It used to be</u> that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,



Wendell S. Loomis

WSL:slm

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

10-13-98

Your Internal Billing Reference

Sender's Name: Daniel S. Loomis | Phone: 713 893-6600

Company: ALL FLOORS ATX

Sender's Address: 27 IH 10W0 WEST STE 250

City: HOUSTON | State: TX | ZIP Required For Correct Invoicing: 7 7 0 6 6

Recipient's Name: John Dickson, Clerk | Phone: 512 473-9457

Company: District Court, Travis County

Recipient's Address (Use of P.O. Boxes or P.O. * Zip Codes Will Delay Delivery And Result in Extra Charge.): 1000 Guadalupe

City: Austin, | State: TX | ZIP Street Address Zip Required: 78767

BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.): McQuiston vs TWCARP

Bill To: [X] Bill Sender [ ] Bill Recipient's FedEx Acct. No. [ ] Bill 3rd Party FedEx Acct. No. [ ] Bill Credit Card [ ] Cash

HOLD FOR PICK-UP AT THIS FEDERAL EXPRESS LOCATION
Street Address (See Service Guide or Call 800-238-5355)
City | State
ZIP * Zip Code of Street Address Required

Federal Express Use
Base Charges
Declared Value Charge
Origin Agent Charge
Other
Total Charges

SERVICES — CHECK ONLY ONE BOX

PRIORITY 1 (overnight delivery of letters, packages, and your packaging)
OVERNIGHT LETTER* (your packaging 8 oz. or less)
OVERNIGHT DELIVERY USING OUR PACKAGING
FedEx Overnight Envelope* (12½" x 15½")
Overnight Box A (12¾" x 17¾" x 3") ☐
Overnight Tube B (6" x 6" x 38") ☐
Declared Value Limit $100.
STANDARD AIR (delivery not later than second business day)
SERVICE COMMITMENT (Delivery is by end of scheduled day, next business morning, or other time(s) of more business days if the package cannot be delivered by the scheduled time due to weather or other conditions beyond our control. Service areas.)

DELIVERY AND SPECIAL HANDLING — CHECK SERVICES REQUIRED

1 ☐ HOLD FOR PICK-UP (See Section III at right)
2 ☐ DELIVER WEEKDAY
3 ☐ DELIVER SATURDAY (Extra charge)
4 ☐ DANGEROUS GOODS (Priority 1 and Standard Air Packages only. Extra charge)
5 ☐ CONSTANT SURVEILLANCE SERVICE (CSS) (Extra charge. Do not complete Section 5.)
6 ☐ DRY ICE ____ Lbs.
7 ☐ OTHER SPECIAL SERVICE
8 ☐
9 ☐ SATURDAY PICK-UP (Extra charge)
10 ☐

	PACKAGES	WEIGHT	YOUR DECLARED VALUE (See right)	OVER SIZE
		LBS		
		LBS		
		LBS		
		LBS		
Total	Total	Total		

Received At
1 ☐ Regular Stop
2 ☐ On-Call Stop
3 ☐ Drop Box | 4 ☐ B.S.C. | 5 ☐ Station

Federal Express Corp. Employee No.

Date/Time For Federal Express Use

YOUR DECLARED VALUE

DAMAGE OR LOSS
We are liable for no more than $100 per package in the event of physical loss or damage unless you declare a higher Declared Value for the air and document number shown on the front of this airbill. We charge 40¢ for each additional $100 of declared value up to the maximum shown in our Service Guide. Declared value restrictions are shown on the back of the Sender's Copy of this airbill. We make no expressed or implied warranties.

DELAY
There is always a risk of late delivery or non-delivery in the event of a late delivery, Federal Express will, at your request, and with some limitations, refund a transportation charges paid. See back of Sender's Copy of this airbill for further information.

CONSEQUENTIAL DAMAGES
We will not be responsible for loss of sales, income, interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special, including but not limited to, those arising from delay, misdelivery, or non-delivery, unless you declare a higher value, pay an additional charge, and document your actual loss. Maximum liability for consequential damages.

DO NOT SHIP CASH OR CURRENCY

SENDER'S COPY/RETAIN FOR TRACE PURPOSES

PART #10403 REV E 97
PRINTED U.S.A. SRDE

007

01009

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S. LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

01010

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

WENDELL S. LOOMIS
RECEIVED OCT 12 1988

CHARLES M. BABB
MARK I. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARRIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
JAN FERGUSON

900 CONGRESS AVENUE
P. O. DRAWER 1967
AUSTIN, TEXAS 78767
512-473-8600
TELECOPIER
322-9274

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to MTS
Brief to file
9-28-88 Cajh

SCOTT T. COOK & Associates, P.C.
A PROFESSIONAL CORPORATION

Attorneys at Law
Suite 290
2820 South Padre Island Drive
Corpus Christi, Texas 78415

(512) 855-6655

Scott T. Cook
Board Certified in Family Law
Texas Board of Legal Specialization

William A. Dudley
Associate

September 27, 1988

Mr. Luther H. Soules, III
SOULES & REED
10th Floor
Two Republic Bank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Mr. Soules:

I attended your lecture on the 1988 Rules changes at the Advanced Family Law Seminar in Dallas. You mentioned during your lecture that you welcomed comments on the Rules of Civil Procedure and possible need for change. In my opinion, there exists a serious defect in the present Rules of Civil Procedure of which I have been confronted on two occasions.

As I understand Rule 306a, the date a judgment or order is signed is the date which determines the beginning of periods prescribed by other Rules of Civil Procedure for the Court's plenary power and for perfecting an appeal. Paragraph 4. states, "If no notice of the judgment or order is received by the adverse party within 20 days after execution by the trial court, that party's time periods begin to run from the date that party received notice or actual knowledge of the order or judgment." Stated otherwise, if a party first receives notice of judgment on the 21st through 90th day, his plenary and appellate time table begin on whatever day he actually receives notice. On the other hand, if the party receives notice at any time during the first 20 days after the judgment is signed, the day the judgment is actually signed is used to calculate a court's plenary power, or rather, time to perfect an appeal.

An often overlooked, but crucial, element in winning an appeal, is requesting findings of fact and conclusions of law. In fact, the case law says if no findings of fact and conclusions of law were requested nor filed, the appellate court must affirm the trial court if it may do so on any theory of recovery supported by the record. Findings of fact and conclusions of law are governed by Rules of Civil Procedure 296 et. seq. Rule 296 requires that a request for findings of fact and conclusions of law shall be filed within 10 days after the final judgment is signed. This presents

01017

enough of a problem for a party who has had timely notice of an adverse order entered against them when they are aware the judgment or order has been signed. However, if the adverse party is unaware and has not been given notice that a judgment or order has been signed for 10 days after the order is signed, that party may very well be without an adequate recourse, and may very well stand to lose an appeal of said judgment, no matter how much merit the appeal might have.

I recently found myself being faced with such a situation. Neither opposing counsel, nor the trial court, delivered notice to me that an order had been signed. It was not until 17 days after the trial court signed an order that I discovered that an order had, in fact, been entered. Under Rule 306a, paragraph 4, because I received actual notice within 20 days, by the time I discovered an order had been entered against my client, it was already too late to demand findings of fact and conclusions of law. As I understand the present state of these two rules, an adverse party who received notice of judgment any time between the 11th day and 20th day, has no right to demand findings of fact and conclusions of law. While he may request them, the trial court is not bound to accomodate, under a literal interpretation of these rules.

In my research, I have found no case or other dissertation analyzing this situation. I do believe, however, it is something for the Rules Committee to review.

Thank you for your patience in reviewing the above.

Sincerely,

William A. Dudley

WD/dc

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

Copy to Rite
Orig to file
9/25/88 Eyln

10/9

WSH
(1) COAS
(2) SCAC Supp
(3) SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

SCAC SUBCOMMITTEE RECOMMENDATION

~~RULE 297.--TIME TO FILE FINDINGS AND CONCLUSION~~
~~-----When demand is made therefor, the court sh~~
~~findings of fact and conclusions of law and fi~~
~~thirty days after the judgment is signed.--Such~~
~~and conclusions of law shall be filed with the~~
~~part of the record.--If the trial judge shall~~
~~them, the party so demanding, in order to comp~~
~~shall in writing, within five days after such~~
~~omission to the attention of the judge, whereu~~
~~preparation and filing shall be automatically~~
~~days after such notification.~~

[Rule 297. Time ~~to Respond to Request for~~ to Make Findings of Fact and Conclusions of Law.

(a) When timely request is filed, the court shall prepare and file its findings of fact and conclusions of law within ~~thirty (30)~~ twenty (20) days after such request is filed. The court shall cause a copy of its ~~response~~ findings and conclusions to be mailed to each party in the suit. ~~Any party desiring~~ Any party may, after ~~such response is filed, and within five days thereafter~~ request, ~~may file~~ but not later than 10 days after findings and conclusions are filed, file with the court ~~a request~~ a request for ~~such~~ findings of fact and conclusions of law which shall be ~~called to the attention of the judge~~ filed with the court by the clerk. Such notice shall ~~inform the judge~~ state the date the original request was filed and the date the ~~response was~~ findings and conclusions were due.

60 to 1044

Make findings of fact and conclusions of law

297

Have been on Calendar

01022

~~RULE 297.--TIME TO FILE FINDINGS AND CONCLUSION~~

~~-----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.--If the trial judge shall fail so to file them, the party so demanding, in order to complain of the failure, shall in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.~~

[Rule 297. Time ~~to Respond to Request for~~ to Make Finding of Facts and Conclusions of Law.

(a) When timely request is filed, the court shall ~~prepare~~ make and file its findings of fact and conclusions of law within ~~thirty (30)~~ twenty (20) days after such request is filed. The court shall cause a copy of its ~~response~~ findings and conclusions to be mailed to ~~each~~ all party in the suit.

(b) If the court fails to ~~respond timely to such request~~ make findings timely, the party making the request shall, within ~~thirty-five~~ forty (~~40~~ 30) days after filing the original request, file with the clerk a NOTICE OF PAST DUE ~~RESPONSE TO REQUEST FOR~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW which shall be immediately called to the attention of the ~~judge~~ Court by the clerk. Such notice shall ~~inform the judge~~ state the date the original request was filed and the date the ~~response was~~ findings and conclusions were due.

Make findings of fact and conclusions of law

01022

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

November 1, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 306a(3) and 306a(4)

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 296, 297, 306a(3) and 306a(4). Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

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

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

01024

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. It used to be that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,

Wendell S. Loomis

WSL:slm

10-13-92

Your Phone Number (very important) | Your Internal Billing Reference

[illegible] F. Loomis | 713/893-6600

Department, Floor No.

[illegible] FED EXPRESS ATTY

Your Address (Do not use P.O. Box)

127 IH 10 WEST STE 250

State | ZIP Required For Correct Invoicing

HOUSTON | TX | 7 7 0 6 6

To | Phone Number

John Dickson, Clerk | (512) 473-9427

Company

District Court, Travis County

Exact Street Address (Use of P.O. Boxes or P.O. + Zip Codes Will Delay Delivery And Result in Extra Charge)

1000 Guadalupe

City | State | ZIP Street Address Zip Required

Austin, | TX | 78767

YOUR BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.)

McQuiston vs TWCARP

PAYMENT ☒ Bill Sender ☐ Bill Recipient's FedEx Acct. No. ☐ Bill 3rd Party FedEx Acct. No. ☐ Bill Credit Card

☐ Cash

HOLD FOR PICK-UP AT THIS FEDERAL EXPRESS LOCATION

Street Address (See Service Guide or Call 800-238-5355)

City | State

ZIP + Zip Code of Street Address Required

Federal Express Use

Base Charges

Declared Value Charge

Origin Agent Charge

Other

Total Charges

SERVICES — CHECK ONLY ONE BOX

☐ PRIORITY 1 — Overnight Letter, Envelope and Packaging

☒ OVERNIGHT LETTER* — Your Packaging

OVERNIGHT DELIVERY USING OUR PACKAGING

Courier-Pak Overnight Envelope* 12" x 15½"

Overnight Box A ☐ 12½" x 17½" x 3"

Overnight Tube B ☐ 6" x 6" x 6"

*Declared Value Limit $100.

STANDARD AIR — Delivers next 3 am second business day

SERVICE COMMITMENT — Delivery is by 10:30 am next business morning, 4:30 pm next business day or the afternoon delivery time.

DELIVERY AND SPECIAL HANDLING — CHECK SERVICES REQUIRED

1 ☐ HOLD FOR PICK-UP (Fill in Section VI at right)

2 ☒ DELIVER WEEKDAY

3 DELIVER SATURDAY (Extra charge) ☐

4 ☐ DANGEROUS GOODS (Air and standard Air Packages only. Extra charge)

5 ☐ CONSTANT SURVEILLANCE SERVICE (CSS) (Extra charge. Do not Complete Section 5)

6 ☐ DRY ICE _____ Lbs.

7 ☐ OTHER SPECIAL SERVICE _____

8 ☐

9 ☐ SATURDAY PICK-UP (Extra charge)

10 ☐

PACKAGES	WEIGHT	YOUR DECLARED VALUE (See right)	OVER SIZE
	LBS		
	LBS		
	LBS		
	LBS		
Total	Total	Total	

Received At

1 ☐ Regular Stop

2 ☐ On-Call Stop

3 ☐ Drop Box | 4 ☐ B.S.C. | 5 ☐ Station

Federal Express Corp. Employee No.

Date/Time For Federal Express Use

YOUR DECLARED VALUE

DAMAGE OR LOSS

We are liable for no more than $100 per package in the event of shipper loss or damage unless you declare a higher Declared Value to the left and document higher actual loss. In the event of a claim, we charge you for each additional $100 of declared value up to the maximum shown in our Service Guide. Declared value restrictions are shown on the back of the Sender's Copy of this airbill. We make no expressed or implied warranties.

DELAY

There is always a risk of late delivery or non-delivery. In the event of a late delivery, Federal Express will, at your request and with some limitations, refund a transportation charges paid. See back of Sender's Copy of this airbill for further information.

CONSEQUENTIAL DAMAGES

We will not be responsible for loss of any U.S. or foreign currency, negotiable instruments or other items listed in our Service Guide except as noted. [illegible] In no event shall Federal Express be liable for loss of profit, loss of income, interest, loss of use, loss of business opportunity, or any other direct, indirect, incidental, consequential, special or punitive damages unless one of the boxes on this airbill is checked and you pay an additional charge. Written claims must be filed within strict time limits. See our Service Guide or applicable law for specific information.

DO NOT SHIP CASH OR CURRENCY

Sender agrees that Federal Express's liability shall not exceed the lesser of the actual loss or the Declared Value, unless Sender has purchased additional insurance. Sender agrees to indemnify and hold Federal Express harmless from any claims resulting therefrom.

PART #1070 REV 5 92
PRINTED U.S.A. SPSE

007

SENDER'S COPY/RETAIN FOR TRACE PURPOSES

01028

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S . LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

CHARLES M. BABB
MARK I. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARRIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
JAN FERGUSON

906 CONGRESS AVENUE
P. O. DRAWER 1967
AUSTIN, TEXAS 78767
512-473-8600
TELECOPIER
322-9274

RECEIVED OCT 12 1988

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

LAW OFFICES

SOULES & REED

TENTH FLOOR

TWO REPUBLICBANK PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

Copy to Nits
Orig. to file
9/28/88 Chgo

10/9

WSH
COAS
SCAC Supp
SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

May 12, 1988

Elaine Carlson
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002

Dear Professor Carlson:

A friend of mine, Mike Churgin, suggested that I might write you about a minor area of the Texas Rules of Civil Procedure that I think needs to be simplified. (Mike, by the way, sends his regards.)

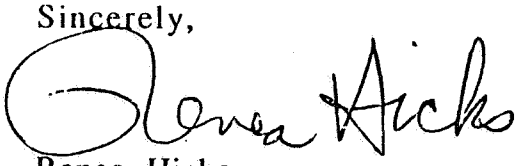
Rule 297 effectively requires a party to personally serve the trial judge a reminder to prepare requested findings of fact and conclusions of law if the party is to preserve error for failure to file them. Requiring a reminder at all seems unnecessarily burdensome and expensive, but, assuming that a reminder provision is needed, this one is the wrong one. Filing with the clerk's office should suffice. Having to obtain some notation on the written reminder which will firmly establish for the record that the trial judge personally was reminded is very cumbersome and wastes both the trial judge's and the lawyer's time. The problems become especially acute when the lawyer is at some distance from the trial judge.

A personal story may highlight some of the complications. I once had an important case of first impression in which findings of fact would prove crucial. I was based in Austin and had to file the reminder with the clerk in a small town east of Houston. The trial judge was a retired judge designated to sit in the case who lived in a rural area many miles from where the case was and was rarely home. With only five days to get the reminder personally served, and with other litigation duties requiring me to be in Austin, I had to ask my client to take the reminder to the judge. He was not home

the first few trips. When he finally was found, he refused to sign a notation that he had been personally notified, and, along with the reminder, the client had to file an affidavit of personal notification.

I realize that this is a minor matter, but I do think that a modification is in order. Thanks for listening.

Sincerely,



Renea Hicks
Special Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085

RH/av

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

July 19, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 297

Dear Hadley:

Enclosed herewith please find a copy of a letter I received from Professor Elaine Carlson regarding Rule 297. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

SCAC SUBCOMMITTEE RECOMMENDATION

~~RULE-298.--ADDITIONAL-OR-AMENDED-FINDINGS~~

~~-----After-the-judge-so-files-original-findings-of-fact-and conclusions-of-law,-either-party-may,-within-five-days,-request-of him-specified-further,-additional-or-amended-findings,-and-the judge-shall,-within-five-days-after-such-request,-and-not-later, prepare-and-file-such-further,-other-or-amended-findings-and conclusions-as-may-be-proper,-whereupon-they-shall-be-considered as-filed-in-due-time.--Notice-of-the-filing provided-for-herein-shall-be-served-on-the provided-in-Rule-21a-or-21b.~~

[Rule 298. Additional or Amended Findings of Law; Notice; Response.

(a) After the court files original findings of fact and conclusions of law, any party may file with the court a request for specified additional findings or conclusions, or both. ~~in accordance with the rules set forth in Rules 296 and 297~~. The additional findings shall be made within the time prescribed by the filing of the original findings and conclusions with the court and ~~shall be~~ served on the parties in accordance with Rule 21a.

(b) The court shall make and file ~~respond to a request~~ additional findings and conclusions within ten (10) days after such request is filed, ~~file such response with the clerk,~~ and cause a copy to be mailed to each party ~~all parties~~ to the suit. ~~No presumption~~

(c) All requests, responses and notices relating to findings of fact and conclusions of law shall be filed by the

No ~~presumed~~ findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

Rule 298 Union approved

01042

SCAC SUBCOMMITTEE RECOMMENDATION

~~RULE-298.--ADDITIONAL-OR-AMENDED-FINDINGS~~

~~-----After-the-judge-so-files-original-findings-of-fact-and conclusions-of-law,-either-party-may,-within-five-days,-request-of him-specified-further,-additional-or-amended-findings,-and-the judge-shall,-within-five-days-after-such-request,-and-not-later, prepare-and-file-such-further,-other-or-amended-findings-and conclusions-as-may-be-proper,-whereupon-they-shall-be-considered as-filed-in-due-time.--Notice-of-the-filing-of-the-request provided-for-herein-shall-be-served-on-the-opposite-party-as provided-in-Rule-21a-or-21b.~~

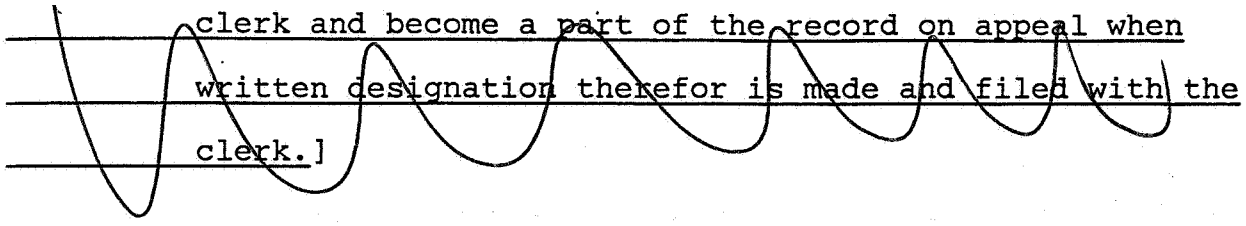
[Rule 298. Additional or Amended Findings of Fact and Conclusion of Law; Notice; Response.

(a) After the court files original findings of facts and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusion, or both, ~~in accordance with the procedures set forth in Rules 296 and 297~~. The request for these findings shall be made within ten (10) days after the filing of the original findings and conclusions by the court and ~~shall be~~ served on the court and each party ~~all parties~~ in accordance with Rule 21a.

(b) The court shall make and file any additional or amended ~~respond to a request for such findings~~ and conclusions within ten (10) days after such request is filed, ~~file such response with the clerk~~, and cause a copy to be mailed to each party ~~all parties~~ to the suit. No presumption

(c) ~~All requests, responses and notices relating to findings~~ of fact and conclusions of law shall be filed by the

No ~~presumed~~ findings or conclusion shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.



clerk and become a part of the record on appeal when written designation therefor is made and filed with the clerk.]

Note to Advisory Committee: If the amendments to Tex.R.Civ.P. Rule 296-98 are adapted as recommended, Tex.R.App.P. 41(a)(1) and 54(a) should be amended to extend the time for perfecting the appeal and filing the transcript and statement of facts in non-jury cases. Our subcommittee recommends that these latter rules be amended to provide the same time limits for the appeal of non-jury and jury cases.

(c) Upon filing the notice in (b) above, the time for the court to ~~respond~~ is extended to ~~forty-five (45)~~ days from the date the original request was filed.

(d) Notice of filing. The notice provided by this rule shall be served on the court and each party to the suit in accordance with Rule 21a.]

Make findings of fact and conclusions of law

(d) SAME AS 296

LAW OFFICES

SOULES & REED

TENTH FLOOR
TWO REPUBLICBANK PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

Copy to Mits
Orig to file
9/28/88 Chyle

10/9

HWH
(1) COAS
(2) SCAC Supp
(3) SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

SCAC SUBCOMMITTEE RECOMMENDATION

~~RULE 305.--DRAFT~~

~~-----Counsel of the party for whom a judgment is rendered shall prepare the form of the judgment to be entered and submit it to the court.~~

[Rule 305 - Proposed Judgment

~~Either~~ Any party may submit a proposed judgment to the court for signature.

Each ~~person~~ party who submits a proposed judgment for signature shall certify thereon that a true copy has been delivered to each attorney or pro se party to the suit and indicate thereon the date and manner of delivery.

Failure to comply with this rule shall not affect the time for perfecting an appeal.]

R 305

Union Approved

LAW OFFICES
LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

November 1, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 306a(3) and 306a(4)

Dear Hadley:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William W. Kilgarlin regarding proposed changes to Rules 296, 297, 306a(3) and 306a(4). Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

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

Dear Luke:

Enclosed is a copy of a letter from Wendell Loomis, as well as copy of my response.

Please see that the matter is presented to the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

01050

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER
EUGENE A. COOK

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

October 24, 1988

Mr. Wendell S. Loomis
Attorney at Law
3707 F.M. 1960 West
Suite 250
Houston, Texas 77068

Dear Wendell:

Your letter of October 19 has been forwarded to me, as I serve as the court's liaison to the Supreme Court Advisory Committee, the body that recommends Rules changes.

I understand your concern, and I have forwarded a copy of your letter to Luther H. Soules, III, Chairman of the Supreme Court Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

xc: Mr. Luther H. Soules, III

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 19, 1988

Supreme Court of Texas
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Attention: Rules Committee

Re: Rules 72, 73, 74, 296, 297, 306a(3), and 306a(4)

Gentlemen:

A matter has recently come up which, because of some diligence, did not cause a loss of rights, however because of the interaction of the above-described rules a serious problem may have been created.

To explain: The Cause No. 394,741; McQuiston, et al. vs. Texas Workers' Compensation Assigned Risk Pool was tried before Judge Dibrell on September 7, 1988. Shortly thereafter Mr. Charles Babb of the firm Babb & Hanna submitted a proposed judgment to the Court for the Court's signature on September 22, 1988. Mr. Babb did not send me a copy of the proposed judgment or his letter to the Court.

On October 3, 1988, I wrote Mr. Babb about the proposed judgment. Enclosed is a copy of my letter of October 3, 1988, to Mr. Babb.

Enclosed is copy of Mr. Babb's letter and photocopy of judgment which was signed on October 4, 1988, by Judge Dibrell. Because the judgment was signed on October 4 and Mr. Babb did not communicate with me until October 12, I had to immediately prepare and have Federal Expressed to Austin my Request for Findings of Fact and Conclusions of Law. Enclosed is a photocopy of that request and letter.

On October 14, I received a postcard from Mr. John Dickson, District Clerk, mailed October 13, 1988.

Conclusion: As can be seen Rule 72 does not include a proposed judgment. It only refers to pleadings, pleas, or motions. Nowhere other than by Rule 306a is the losing party entitled to a

copy of the judgment, nor is the winning party who prepared the proposed judgment to be submitted to the Court required to furnish a copy of this proposal to opposing counsel.

Since Rules 296 and 297 require the demand for findings and conclusions to be within 10 days after the signing of the judgment and the clerk, being quite busy with other matters, apparently interpreted "immediately" as 9 or 10 days, my right to findings and conclusions may very well have been precluded.

I suggest that either Rule 72 be amended to incude "all documents" submitted to the Court including judgments or proposed judgments and correspondence or Rule 306 be amended to require the winning party to submit the copy of the proposed judgment to opposing counsel so that he can stay on top of the date that the Judge has signed it.

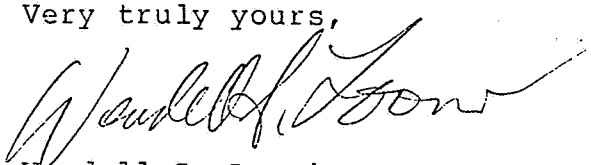
I would further suggest, however, that notice and demand for findings and conclusions be amended to 20 or 30 days instead of the 10 day "short fuse".

Further, I don't see any reason for having the preparation and submission of the findings and conclusion to be but 30 days after judgment and, upon failure to comply, 5 days additional demand.

Of course in this case, we are in different cities and a day or two is lost in mail delivery. Also, with cities the size of Houston or Dallas or San Antonio where lawyers are scattered all over, intra-city mail sometimes requires 3 or 4 or 5 days.

I have now been practicing 29 1/2 years before the Texas Courts. I liked the old method of practice much more than I do today. <u>It used to be</u> that, irrespective of the requirements of the rules, counsel were sufficiently courteous to each other so that such a situation as here described probably would not happen.

Very truly yours,



Wendell S. Loomis

WSL:slm

10-13-92

Your phone number (very important)

Marshall S. Loomis | 713 893-6600

Department, Floor No.

FULL FLORIS ATTY

Address

2727 FM 1960 WEST STE 250

City | State | ZIP Required For Correct Invoicing

HOUSTON | TX | 77068

Contact | Department

John Dickson, Clerk | 512 473-9457

District Court, Travis County

Exact Street Address (Use of P.O. Boxes or P.O. Zip Codes Will Delay Delivery And Result in Extra Charge.)

1000 Guadalupe

City | State | ZIP Street Address Zip Required

Austin, | TX | 78767

YOUR BILLING REFERENCE INFORMATION (FIRST 24 CHARACTERS WILL APPEAR ON INVOICE.)

McQuiston vs TNCARP

PAYMENT: Bill Sender | Bill Recipient's FedEx Acct. No. | Bill 3rd Party FedEx Acct. No. | Bill Credit Card | Cash

HOLD FOR PICK-UP AT THIS FEDERAL EXPRESS LOCATION.
Street Address (See Service Guide or Call 800-238-5355)

City | State

ZIP * Zip Code of Street Address Required

Federal Express Use

Base Charges

Declared Value Charge

Origin Agent Charge

Other

Total Charges

SERVICES — CHECK ONLY ONE BOX

- PRIORITY 1 (Overnight Delivery of your Packages)
- OVERNIGHT LETTER* (Your Packaging 9½"x12½")

OVERNIGHT DELIVERY USING OUR PACKAGING

- Courier-Pak Overnight Envelope* 12½" x 15½"
- Overnight Box 12½" x 17½" x 3" A
- Overnight Tube 38" x 6" x 6" B

* Declared Value Limit $100.

STANDARD AIR
Delivery not later than second business day

SERVICE COMMITMENT
[illegible] Delivery is by 10:30 a.m. next business morning [illegible] Delivery is by 4:30 p.m. of next business day(s) at the station or outside our normal service areas.
STANDARD AIR: Delivery is by 4:30 p.m. next business day or not later than 10:30 a.m. next business day if you select this service or more than two business days if you select a remote or rural station service area.

DELIVERY AND SPECIAL HANDLING — CHECK SERVICES REQUIRED

1. HOLD FOR PICK-UP (See Section III at right)
2. DELIVER WEEKDAY (Not Available)
3. DELIVER SATURDAY (Extra charge)
4. DANGEROUS GOODS (Air and Standard Air Packages only. Extra charge)
5. CONSTANT SURVEILLANCE SERVICE (CSS) (Extra charge. Not Available for Standard Air. Complete Section IV.)
6. DRY ICE ____ Kgs
7. OTHER SPECIAL SERVICE ____
8.
9. SATURDAY PICK-UP (Extra charge)
10.

PACKAGES	WEIGHT	YOUR DECLARED VALUE (See right)	OVER SIZE
	LBS		
	LBS		
	LBS		
	LBS		
Total	Total	Total	

Received At
1 ☐ Regular Stop
2 ☐ On-Call Stop
3 ☐ Drop Box | 4 ☐ B.S.C. | 5 ☐ Station

Federal Express Corp. Employee No.

Date/Time For Federal Express Use

YOUR DECLARED VALUE

DAMAGE OR LOSS
We are liable for no more than $100 per package in the event of physical loss or damage unless you have declared a higher Declared Value for the full and documented actual loss in the event of a claim. We charge 30¢ for each additional $100 of declared value up to the maximum shown in our Service Guide. Declared value restrictions are shown on the back of the Sender's Copy of this airbill. We make no expressed or implied warranties.

DELAY
There is always a risk of late delivery or non-delivery in the event of a late delivery Federal Express will, at your request and with some limitations, refund a transportation charges paid. See back of Sender's Copy of this airbill for further information.

CONSEQUENTIAL DAMAGES
We will not be responsible or liable for any loss of damage to [illegible] except as noted above, for any consequential loss or damage, including [illegible] and is limited to [illegible] Such damages are called consequential damages.

DO NOT SHIP CASH OR CURRENCY

Sender's Signature: Sender authorizes Federal Express to deliver this shipment without obtaining a delivery signature and shall indemnify and hold harmless Federal Express from any claims resulting therefrom.

SENDER'S COPY/RETAIN FOR TRACE PURPOSES

PART #1901 REV 5 ST
PRINTED U.S.A. SRDE

007

01054

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 13, 1988

Mr. John Dickson
District Clerk, Travis County
Post Office Box 1748
Austin, Texas 78701

RE: Cause No. 394,741; Marvin L. McQuiston and Jacquelyn McQuiston vs. Texas Workers' Compensation Assigned Risk Pool; 201st Judicial District Court, Travis County, Austin, Texas

Dear Sir:

Enclosed please find the original and one copy of the following document for filing in the above-described cause:

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

By copy of this letter and Certificate of Service on document, we certify that opposing counsel has been served with a true and correct copy of this document.

Please acknowledge receipt of this letter and advise date of filing by returning to us with your file stamp the enclosed extra copy of this document in the enclosed self-addressed stamped envelope.

Very truly yours,

Wendell S. Loomis

WSL:slm

enclosure

cc: Babb & Hanna
Mr. & Mrs. Marvin L. McQuiston

NO. 394,741

MARVIN L. MCQUISTON AND JACQUELYN MCQUISTON	}	IN THE DISTRICT COURT OF
VS.	}	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	}	201ST JUDICIAL DISTRICT

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs in the above-entitled and numbered cause and on this day, a time within 10 days of the signing of the judgment, Plaintiffs request findings of fact and conclusions of law in accordance with Rule 296, said findings and conclusions to be prepared and filed within 30 days of October 4, 1988, that is, November 3, 1988.

Plaintiffs respectfully request the Court and counsel either honor the time specified by Rule 297 or alternatively agree in writing for a time certain for the filing of said findings and conclusions so as to comply with Rule 297. In this connection it is called to the Court's and counsel's attention that counsel for Plaintiffs' offfice is in Houston, Texas and that mail and/or courier takes at least 1 to 2 days and that Rule 297 provides a very "short fuse" of 5 days.

RESPECTFULLY SUBMITTED this the 13th day of October, 1988.

WENDELL S . LOOMIS
TBA NO. 12552000
3707 FM 1960 West, Suite 250
Houston, Texas 77068
(713) 893-6600

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW was deposited in the U.S. mail to BABB & HANNA, attorneys for Defendant, on the 13th day of October, 1988, first class mail, postage prepaid and certified mail, return receipt requested.

WENDELL S. LOOMIS

LAW OFFICES OF
BABB & HANNA
A PROFESSIONAL CORPORATION

WENDELL S. LOOMIS
RECEIVED OCT 12 1988

CHARLES M. BABB
MARK J. HANNA
CHARLES F. DAILY, JR.
J. RICHARD HARRIS
JUDITH L. HART
WOFFORD DENIUS
CATHERINE L. TABOR
SUZANNE UNDERWOOD
JAN FERGUSON

505 CONGRESS AVENUE
P. O. DRAWER 1958
AUSTIN, TEXAS 78767
512-473-6600
TELECOPIER
322-9274

October 10, 1988

Mr. Wendell S. Loomis
3707 FM 1960 West, Suite 250
Houston, Texas 77068

Re: Cause No. 394,741; Marvin L. McQuistion and Jacquelyn McQuistion v. Texas Workers' Compensation Assigned Risk Pool; In the 201st Judicial District Court of Travis County, Texas

Dear Wendell:

Enclosed please find a copy of the Judgment regarding the above-referenced cause which was submitted to Judge Dibrell on September 22, 1988.

Sorry for the delay in sending you an executed copy of the Judgment, but Judge Dibrell did not sign it until October 4, 1988.

Very truly yours,

Charles M. Babb

Charles M. Babb

Enclosure
CMB/pg
CMB1/073

Cause No. 394,741

MARVIN L. McQUISTON and JACQUELYN McQUISTON	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
TEXAS WORKERS' COMPENSATION ASSIGNED RISK POOL	§	201ST JUDICIAL DISTRICT

JUDGMENT

On the 7th day of September, 1988, came on to be heard the above-entitled and numbered cause. The plaintiffs, Marvin L. McQuiston and Jacquelyn McQuiston, appeared in person and by their attorney of record and announced ready for trial, and defendant, Texas Workers' Compensation Assigned Risk Pool, appeared in person and by its attorney of record and announced ready for trial, and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that plaintiffs had made no showing on which it could grant their equitable bill of review as prayed for in their pleadings on file in this cause, and that plaintiffs' petition should be in all things denied, and judgment granted for defendant.

It is therefore ORDERED, ADJUDGED, AND DECREED by the Court that plaintiffs' petition for equitable bill of review and all other relief prayed for in plaintiffs' pleadings on file herein are in all things denied, and judgment is hereby granted for defendant.

01059

All costs of Court expended or incurred in this cause are hereby adjudged against plaintiffs. All other relief not expressly granted herein is denied.

Signed this 4th day of October, 1988.

/s/ Judge Joe Dibrell
JUDGE PRESIDING

01060

WENDELL S. LOOMIS
Attorney at Law
3707 F.M. 1960 WEST, SUITE 250
HOUSTON, TEXAS 77068
(713) 893-6600
FAX (713) 893-5732

October 3, 1988

Babb & Hanna, P.C.
905 Congress Avenue
P.O. Drawer 1963
Austin, Texas 78767

Attention: Hon. Charles Babb

Re: No. 394,741; Marvin L. McQuiston, et al.
vs. Texas Worker's Compensation Assigned Risk Pool;
201st Judicial District Court, Travis County, Texas.

Dear Charles:

Following the Trial it was my understanding that you were going to submit a Judgment for entry by the Court.

I have heard nothing from you nor have I received notification by the clerk that the Judgment has been submitted for entry or has been entered.

I am quite anxious to move forward with this case, either by appeal or wiping out this debt plus some other obligations for my client by a bankruptcy proceeding, whichever will be the easiest and cheapest on client's part.

I am inclined to believe that we will go ahead with an appeal as there are some interesing aspects I would like to have the Third Court of Appeals look at and write on.

In any event, may we please hear from your by return mail.

Very truly yours,

Wendell S. Loomis

WSL:slm

cc: Mr. & Mrs. Marvin McQuiston

01061

LAW OFFICES

SOULES & REED

TENTH FLOOR

TWO REPUBLICBANK PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to MTS
Brief to file
9-28-88 Cayle

SCOTT T. COOK & Associates, P.C.
A PROFESSIONAL CORPORATION

Attorneys at Law
Suite 290
2820 South Padre Island Drive
Corpus Christi, Texas 78415

(512) 855-6655

Scott T. Cook
Board Certified in Family Law
Texas Board of Legal Specialization

William A. Dudley
Associate

September 27, 1988

Mr. Luther H. Soules, III
SOULES & REED
10th Floor
Two Republic Bank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Mr. Soules:

I attended your lecture on the 1988 Rules changes at the Advanced Family Law Seminar in Dallas. You mentioned during your lecture that you welcomed comments on the Rules of Civil Procedure and possible need for change. In my opinion, there exists a serious defect in the present Rules of Civil Procedure of which I have been confronted on two occasions.

As I understand Rule 306a, the date a judgment or order is signed is the date which determines the beginning of periods prescribed by other Rules of Civil Procedure for the Court's plenary power and for perfecting an appeal. Paragraph 4. states, "If no notice of the judgment or order is received by the adverse party within 20 days after execution by the trial court, that party's time periods begin to run from the date that party received notice or actual knowledge of the order or judgment." Stated otherwise, if a party first receives notice of judgment on the 21st through 90th day, his plenary and appellate time table begin on whatever day he actually receives notice. On the other hand, if the party receives notice at any time during the first 20 days after the judgment is signed, the day the judgment is actually signed is used to calculate a court's plenary power, or rather, time to perfect an appeal.

An often overlooked, but crucial, element in winning an appeal, is requesting findings of fact and conclusions of law. In fact, the case law says if no findings of fact and conclusions of law were requested nor filed, the appellate court must affirm the trial court if it may do so on any theory of recovery supported by the record. Findings of fact and conclusions of law are governed by Rules of Civil Procedure 296 et. seq. Rule 296 requires that a request for findings of fact and conclusions of law shall be filed within 10 days after the final judgment is signed. This presents

enough of a problem for a party who has had timely notice of an adverse order entered against them when they are aware the judgment or order has been signed. However, if the adverse party is unaware and has not been given notice that a judgment or order has been signed for 10 days after the order is signed, that party may very well be without an adequate recourse, and may very well stand to lose an appeal of said judgment, no matter how much merit the appeal might have.

I recently found myself being faced with such a situation. Neither opposing counsel, nor the trial court, delivered notice to me that an order had been signed. It was not until 17 days after the trial court signed an order that I discovered that an order had, in fact, been entered. Under Rule 306a, paragraph 4, because I received actual notice within 20 days, by the time I discovered an order had been entered against my client, it was already too late to demand findings of fact and conclusions of law. As I understand the present state of these two rules, an adverse party who received notice of judgment any time between the 11th day and 20th day, has no right to demand findings of fact and conclusions of law. While he may request them, the trial court is not bound to accomodate, under a literal interpretation of these rules.

In my research, I have found no case or other dissertation analyzing this situation. I do believe, however, it is something for the Rules Committee to review.

Thank you for your patience in reviewing the above.

Sincerely,

William A. Dudley

WD/dc

LAW OFFICES

SOULES & REED

TENTH FLOOR

TWO REPUBLICBANK PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
KIM I. MANNING
CLAY N. MARTIN
JUDITH L. RAMSEY
ROBERT D. REED
HUGH L. SCOTT, JR.
SUSAN C. SHANK
LUTHER H. SOULES III
THOMAS G. WHITE

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

October 10, 1988

Professor J. Hadley Edgar
Texas Tech University
School of Law
P.O. Box 4030
Lubbock, Texas 79409

Re: Tex. R. Civ. P. 296, 297, 298 and 306a

Dear Hadley:

Enclosed herewith please find copies of letters forwarded to me by William A. Dudley and Jimmy W. Nettles regarding proposed changes to Rules 296, 297, 298 and 306a. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

Copy to NTS
Orig. to file
9/23/88 Chgo

JIMMY W. NETTLES
ATTORNEY AT LAW
6690 CALDER AVE.
CALDER AT DOWLEN RD.
BEAUMONT TEXAS 77706
PHONE A/C (409) 860-3005

10/9

HWH
COAS
SCAC Supp
SCAC Agenda.

September 26, 1988

Luther H. Soules, III
Soules & Reed
Attorneys at Law
10th Floor
Two Republicbank Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Suggested Amendments: Rules 296, 297, 298, Tex. R. Civ. Pro.

Dear Mr. Soules:

Mr. Gilbert I. Low, of Beaumont has advised me that you are the coordinator for the Supreme Court's committee on suggestions for changes or amendments to the Texas Rules of Civil Procedure. I wish to point out some practical realities applicable to Rules 296-298, Tex. R. Civ. Pro. concerning the filing of conclusions of fact and law by the trial court on trials before the bench.

As a mechanical matter whenever a bench trial occurs, and a losing party requests a trial court to file such findings the prevailing party always prepares and presents the proposed findings of fact and conclusions of law to the trial court. I have on only one occasion known of the trial court preparing the findings. This is all right except for one thing, and that is the rules do not require notice of filing to the requesting party.

I understand that other rules require us to monitor and inspect the papers on file with the clerk of each court, but only a few firms have the resources and man power to send someone to each courthouse in the mornings or evenings to inspect the court papers on a daily basis; and it is unrealistic and physically impossible for each attorney to do this on a daily basis. There should be a requirement that the court or the prevailing party have to serve notice of filing on the requesting party, and that the time schedules set forth within such rules should not be triggered until notice is complied with.

Rule 306a., Tex. R. Civ. Pro. as pertaining to judgments was appropriately amended as to notice before certain time periods are started into motion for a party litigant, and such needs to be the case under Rules 296-298. In fifteen years I have only on one occasion had an attorney forward to me copies of proprosed findings, and have never had an attorney advise me of the date of signing of same by the trial court. The patent response I have always received upon inquiring has been, "Oh, you didn't get a copy," or, "I thought I told you". This was the obvious basis for the amendment to rule 306a.-judgment notice.

In todays modern practice it is physically impossible to monitor the court papers as required under the status of rules 296-298 as currently written, and a greater service would be provided for the public welfare if simple notice requirements were added to these particular rules of procedure.

Sincerely yours,

Jimmy W. Nettles

JWN/ml

cc: Mr. Gilbert I. Low

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

March 8, 1989

3/13

HJH,
SCAO Sub C R 295 + 324
Agenda
CJA
Prof Edgar.

Mr. Luther H. Soules III
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, TX 78205-2230

Re: Conflicting Answers and
T.R.C.P. 295 and 324

Dear Luke:

While the opportunity for conflicting answers has lessened, Little Rock Furniture Co. v. Dunn, 222 S.W.2d 985 (Tex. 1949) bothers me each time I teach it. You will recall that one of the Court's holdings was that a party could wait until after the jury had been discharged to complain of the conflict. Id. at 991.

When, then, must the loser complain? As a result of the recent amendment to Rule 324, one could argue that a motion for new trial is not required. Thus, can the judgment loser wait and complain for the first time in an appellant's brief? I hope not.

The problem can be cured in one of two ways. Since I disagree with the Little Rock holding, I would prefer that we add a sentence to Rule 295 to incorporate waiver for failure to call the conflict to the judge's attention before the jury is discharged. My subcommittee will consider this possibility.

An alternative would be to require that a complaint be made mandatory in Rule 324. Would you please refer this suggestion to the appropriate subcommittee so that we can resolve the matter at our next meeting?

Thanks.

No change

CJA recommends

What judgment would be entered.

Sincerely,

J. Hadley Edgar
Robert H. Bean Professor of Law

JHE/nt

01068

"An Equal Opportunity/Affirmative Action Institution"

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

March 14, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 324

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from J. Hadley Edgar regarding Rule 324. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Professor J. Hadley Edgar
Honorable Stanley Pemberton

01069

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

REPORT December 1, 1988

of the

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.

Stanton B. Pemberton

Stanton B. Pemberton, Chairman

PROPOSED RULE CHANGES

RULE 329b, Tex.R.Civ.P., TIME FOR FILING MOTIONS.

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within ~~thirty~~ twenty-eight days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within ~~thirty~~ twenty-eight days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion of modify, correct or reform a judgment is not determined by written order signed within ~~seventy-five~~ seventy days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within ~~thirty~~ twenty-eight days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeals has been perfected, has plenary power to grant a new trial

or to vacate, modify, correct, or reform the judgment until ~~thirty~~ twenty-eight days after all such timely-filed motions are overruled, either by written and signed order or by operation of law, whichever occurs first.

(f) [Same.]

(g) [Same.]

(h) [Same.]

REASONS FOR THE CHANGES

Every year numbers of appeals are dismissed or lost because lawyers miscalculated the time for filing documents in the appellate courts. As an appellate lawyer, I counted and recounted periods, marking up numbers of calendars, and still miscalculated the time.

I propose Rule 329b, Tex.R.Civ.P., and all other rules dealing with appeals, should be amended so that all time limits are figured in seven day increments. This will provide a simple way to figure filing dates.

This system of computing time is the system used in England, where all time limits are computed in seven day increments. The advantages are obvious: If something is filed on a Wednesday, the response will be due on a Wednesday. No longer will the last day for any action fall on a weekend. The only odd days will be the holidays.

I first encountered this system when I handled an appeal in the Alabama Supreme Court. The Alabama Supreme Court adopted the English system in their 1985 rules. The system is simple and effective.

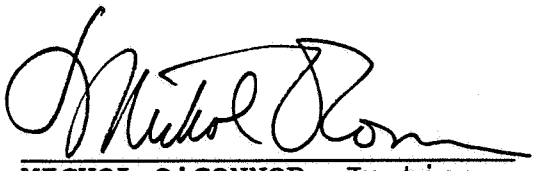
01074

In order to adopt this change, the Supreme Court would have to amend all the rules of appellate procedure which contain time limits. Those rules include: Tex.R.App.P. 41 (time to perfect the appeal), 42 (accelerated appeals), 52 (bills of exception), 54 (time to file record), 71 (motion re informalities in record), 72 (motion to dismiss), 73 (motion for extension of time), 74(k) (appellant's brief), 74(m) (appellee's brief), 100 (motion for rehearing to court of appeals), 130(b) (application for writ of error), 136 (application for writ by other party), 136 (respondent's answer), 190 (motion for rehearing to supreme court), 86 (mandate), 186 (mandate).

Besides Rule 329b, Tex.R.Civ.P., there are probably other rules of civil procedure that would have to be amended.

If the Advisory Committee is interested in this proposal, I will be glad to submit proposed rule changes for all of these rules.

Please contact me if this suggestion is placed on the docket of the Advisory Committee.



MICHOL O'CONNOR, Justice
First Court of Appeals
1307 San Jacinto Street
10th Floor
Houston, Texas 77002
(713) 655-2700

01075

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ††
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

February 15, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 329(b)

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Judge Michol O'Connoer regarding Rule 329(b). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Michol O'Connor

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 202
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

FRANK G. EVANS
CHIEF JUSTICE

JAMES F. WARREN
SAM BASS
LEE DUGGAN, JR.
MURRY B. COHEN
D. CAMILLE DUNN
MARGARET G. MIRABAL
JON N. HUGHES
MICHOL O'CONNOR
JUSTICES

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Copy to file
2-10-89

KATHRYN COX
CLERK

LYNNE LIBERATO
STAFF ATTORNEY

PHONE 713-655-2700

Rule 329

February 10, 1989

Mr. Luke Soules
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Here is another rule proposal. I think this change would dramatically reduce the number of cases lost for late filing.

Sincerely

Michol O'Connor

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 defendant showing good cause, supported by affidavit, filed within two years such after 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 therefor shall give a good and sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Appellate Rule 47 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 and 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 for the proceeds of such sale.

"(d) If an interest in property has been leased under the judgment, before the process was suspended, the defendant shall not be allowed to rescind the lease, but shall have judgment against the plaintiff for the proceeds resulting from the lease of such interest."

(e) If the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7).

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

August 31, 1988

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 329

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Skipper Lay regarding Rule 329. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin
Mr. Skipper Lay

Copy to LITS
Orig to file
8-18-88
lgh

LAY & COFFEY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 1000
400 WEST 15TH STREET
AUSTIN, TEXAS 78701-1647

SKIPPER LAY*
WILLIAM DAVID COFFEY III**
CARTER C. RUSH

*BOARD CERTIFIED - OIL, GAS & MINERAL LAW
**ALSO LICENSED IN CALIFORNIA

TELEPHONE
(512) 474-6556
FACSIMILE
(512) 469-0123

HJH
Sec Sub C
+ Agenda

August 16, 1988

Mr. Robert W. Fuller
Cotton, Bledsoe, Tighe & Dawson
Attorneys at Law
Suite 300
United Bank Building
500 West Illinois
Midland, TX 79701

RE: Proposed "Fuller-Cummings" Amendments to Statute and Texas Rules of Civil Procedure

Dear Bob:

Thank you for your submittal of July 28, 1988, a copy of which was sent to me. We have now placed your proposed amendment to the Texas Civil Practice & Remedies Code §64.091 with the State Bar, hopefully for inclusion in the State Bar legislation package.

As I understand your submittal, you actually submitted a proposed revision to the Texas Civil Practice & Remedies Code, and also to Rule 329 of the Texas Rules of Civil Procedure. The scope of the Oil, Gas & Mineral Law Section's work this year involved statutory revisions and revisions or amendments to rules for consistency with the statutes. As we read your proposed addition to Rule 329, it has no connection with your submission for revision of the Texas Civil Practice & Remedies Code.

Therefore we return to you the materials you submitted concerning Rule 329, and the proposed addition. We encourage you to submit this proposed revision directly to the Supreme Court Advisory Committee. A copy of the listing of committee membership (valid at least through June 1, 1988) is enclosed with this letter.

In addition, I am sending some slightly different wording to your Rules amendment than you previously submitted. Accordingly, you may do with them as you see fit.

Thank you again for your submittal of the statutory revision materials.

Sincerely yours,

LAY & COFFEY, P.C.

By: Skipper Lay
Skipper Lay

SL/fdw
Enclosure
cc: Mr. Jan E. Rehler
Chairman
Oil, Gas & Mineral Law Section
Feferman & Rehler
P. O. Box 23041
Corpus Christi, TX 78403

Mr. Philip M. Hall
Prichard, Peeler, Hatch, Cartwright,
Hall & Kratzig
Attorneys at Law
Suite 1500 Texas Commerce Plaza
Corpus Christi, TX 78470

Mr. Jon R. Ray
Cox & Smith
Attorneys at Law
600 National Bank of Commerce Building
San Antonio, TX 78205

Mr. Luther H. Soules, III
Chairman
Supreme Court Advisory Committees
Soules, Reed & Butts
Attorneys at Law
800 Milam Building
San Antonio, TX 78205

SUPREME COURT APPOINTED COMMITTEES

THE SUPREME COURT ADVISORY COMMITTEE

Purpose: To advise the Supreme Court on proposed changes in the Texas Rules of Civil Procedure.

MEMBERSHIP
SUPREME COURT ADVISORY COMMITTEE

Terms 1/1/85 to 1/1/91

Hon. Luther H. Soules III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio 78205

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

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

Frank L. Branson
Law Offices of Frank L. Branson, P.C.
Highland Park Natl. Bank Bldg.
Penthouse Suite, 4514 Cole Avenue
Dallas 75201

Elaine A.G. Carlson
5318 Western Hills Drive
Austin 78731

Solomon Casseb, Jr.
Casseb, Strong & Pearl, Inc.
127 East Travis Street
San Antonio 78205

Vester T. Hughes, Jr.
Hughes & Luce
1000 Mercantile Dallas Building
Dallas 75201

Charles Morris
Morris, Craven & Sulak
1010 Brown Building
Austin 78701

John M. O'Quinn
O'Quinn, Hagans & Wettman
3200 Texas Commerce Tower
Houston 77002

Hon. Jack Pope
2803 Stratford Drive
Austin 78746

Tom L. Ragland
Clark, Gorin, Ragland & Mangrum
P.O. Box 239
Waco 76703

Harry M. Reasoner
Vinson & Elkins
3000 1st City Tower
Houston 77002-6760

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

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

Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston 77002

Continued on next page

01082

Terms 1/1/82 to 1/1/88

David J. Beck
Fulbright & Jaworski
800 Bank of Southwest Bldg.
Houston 77002

Prof. Newell Blakely
University of Houston Law Center
4800 Calhoun Road
Houston 77004

Prof. William V. Dorsaneo III
Southern Methodist University
Dallas 75275

Prof. J. Hadley Edgar
Texas Tech University School of Law
P.O. Box 4030
Lubbock 79409

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

Franklin Jones, Jr.
Jones, Jones, Baldwin, Curry & Roth, Inc.
P.O. Drawer 1249
Marshall 75670

Gilbert I. Low
Orgain, Bell & Tucker
Beaumont Savings Bldg.
Beaumont 77701

Diana E. Marshall
Baker & Botts
One Shell Plaza
Houston 77002

Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Bldg.
Austin 78701-2494

Russell McMains
Edwards, McMains & Constant
P.O. Drawer 480
Corpus Christi 78403

Harold W. Nix
P.O. Box 679
Daingerfield 75638

Hon. Raul Rivera
Judge, 288th District Court
Bexar County Courthouse
San Antonio 78205

Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway Drive
Houston 77056

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

Sam D. Sparks
Webb, Stokes & Sparks
P.O. Bos 1271
San Angelo 76902

Hon. Bert H. Tunks
Abraham, Watkins, Nichols, Ballard, Alstead & Friend
800 Commerce Street
Houston 78284

Court Rules Member:
Hon. James P. Wallace
Justice, Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin 78711

01083

Rule 329c Motions to Set Aside Default Judgments

Rule 329b and the following rule shall be the exclusive rules applicable to motions for new trial designed to effect the setting aside of a default judgment:

(a) The motion must be supported by affidavit testimony alleging facts within the personal knowledge of the affiant reflecting that the default was not intentional or the result of conscious indifference; that the movant has a meritorious defense to the action; and that setting aside the default will not prejudice the nonmovant except by depriving him of the default judgment;

(b) The trial court can require a hearing on the motion for new trial on any just terms consistent with this rule and Rule 329b; and the trial court must hold a hearing on the motion for new trial if requested by the movant or the nonmovant, but the mere holding of a hearing shall have no effect on the evidentiary value of affidavits filed prior to the hearing;

(c) The movant's affidavit testimony may be controverted by affidavits (which, for the purposes of this rule, constitute evidence if filed prior to the hearing) reflecting personal knowledge of relevant facts or by other evidence of facts which would be admissible at trial under the Rules of Evidence, but the filing of opposing affidavits shall not be a prerequisite to the introduction of evidence at the hearing;

(d) If the movant's affidavit testimony is not controverted by any facts proved prior to or during the hearing, if any, or prior to the ruling on the motion for new trial if no hearing is held, and the testimony otherwise is sufficient to satisfy the requirements of subsection (a) of this rule, the trial court must grant the motion and set aside the default judgment on such terms as it deems just; and

(e) If the movant's affidavit testimony is controverted in the manner and at the time(s) permitted in this rule, the trial court must find the facts and render a decision consistent with those findings and the requirements of subsection (a) of this rule.

LH 5
Info.
Copy

LAW OFFICES
McCAMISH, INGRAM, MARTIN & BROWN
A PROFESSIONAL CORPORATION

650 MBANK TOWER
221 WEST 6TH STREET
AUSTIN, TEXAS 78701
(512) 474-6575
TELECOPIER (512) 474-1388

1200 FIRST REPUBLICBANK TOWER
175 E. HOUSTON
SAN ANTONIO, TEXAS 78205
(512) 225-5500
TELEX 9108711104
TELECOPIER (512) 225-1283

SUITE 915
WATERGATE SIX HUNDRED BUILDING
WASHINGTON, D.C. 20037
(202) 337-7900
TELECOPIER (202) 338-1299

January 6, 1987

1-15-88
Holly
P339b State Bar C
XC Jackson

Ms. Holly Halfacre
State Bar of Texas
800 Milam Building
Austin, Texas 78705

Dear Ms. Halfacre:

Enclosed is a copy of an article which will be published in the Baylor Law Review next month with the title "Default Judgments: Procedure(s) for Alleging or Controverting Facts on the Conscious Indifference Issue." The article concerns a proposed new rule of civil procedure which, for your convenience, I have copied and placed at the front of the article. I would appreciate it if you would submit the rule and the article to the State Bar's Advisory Committee on the Rules of Procedure for their consideration.

Thank you for your cooperation in this matter.

Very truly yours,

Aaron L. Jackson

ALJ:tes

Enclosures

01086

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

January 18, 1988

Mr. Harry L. Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

RE: Rule 329b

Dear Harry:

Enclosed herewith please find a copy of a letter I received from Aaron L. Jackson regarding Rule 329b. Please review this matter and be prepared to speak on same at our next committee meeting. I am including same on our agenda.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Mr. Aaron L. Jackson
Justice James P. Wallace

In any case involving an appeal from a default judgment, appellate courts slavishly cite the three-pronged test from Craddock v. Sunshine Bus Lines, Inc.,[1] as "the guiding rule or principle which trial courts are to follow in determining whether to grant a motion for new trial."[2] According to that test, a default judgment should be set aside if (1) failure of the defendant to answer before judgment was not intentional or the result of conscious indifference; (2) the motion for new trial sets up a meritorious defense to the plaintiff's cause(s) of action; and (3) setting aside the default judgment will not cause delay or otherwise prejudice the plaintiff.[3]

Despite the unanimity on the substance of the Craddock test, however, reported appellate court decisions reflect different beliefs about the procedure(s) the advocate must use in various contexts to comply with the test or to demonstrate the movant's noncompliance with it. In particular, no consensus seems to exist among appellate courts concerning the proper procedure for controverting facts alleged by the defaulting party in an attempt to show that the default was not intentional or the result of conscious indifference.

According to their published opinions, appellate courts would not agree on the answers to the following questions: Must the nonmovant file opposing affidavits as a prerequisite for introducing live testimony or other evidence at an evidentiary hearing on the motion for new trial?[4] If the movant submits uncontroverted affidavits to show the default was not intentional or the result of conscious indifference, are those affidavits sufficient to defeat the default judgment even if the trial court

holds a hearing on the motion for new trial?[5] If the movant submits affidavits which meet all the requirements of the Craddock test, are those affidavits sufficient to defeat the default judgment even if they are controverted?[6]

In an attempt to describe for the practitioner the proper procedure for showing or disputing that the failure to answer was intentional or the result of conscious indifference, this article offers two things:

1. An analysis of case law before and after the Supreme Court's watershed decision in Strackbein v. Prewitt;[7] and
2. A new rule of civil procedure designed to elucidate in detail the proper procedures for defending and opposing default judgments before the trial court.

Strackbein

In Strackbein v. Prewitt, supra, the Supreme Court reversed a default judgment upheld by the San Antonio Court of Appeals. The trial court refused to set the judgment aside after a hearing in which the defaulting party presented oral argument on his motion for new trial. Neither the movant nor the nonmovant made a record of the hearing;[8] so, when the case came to the appellate courts, the record contained only the uncontroverted affidavits of the movant. Accordingly, the Supreme Court held:

> Where factual allegations in a movant's affidavit are not controverted, a conscious indifference question must be determined in the same manner as a claim of meritorious defense. It is sufficient that the movant's motion and affidavit set forth facts which, if true, would negate intentional or consciously indifferent conduct.[9]

The Supreme Court does not say in this passage (or anywhere else in the opinion) that the nonmovant must controvert the movant's affidavits by filing controverting affidavits as opposed to other types of controverting evidence. Both the Supreme Court opinion in Strackbein, and the Supreme Court file in the case, indicate that the nonmovant had made no attempt of any kind to controvert the movant's affidavits.[10]

In such a context, it is easy to accept the following broad language which appears at the very end of the Strackbein opinion:

> Finally, Strackbein contends that if the trial court conducts a hearing on a defaulting defendant's motion for new trial, the appellate court should not substitute its discretion for that of the trial court. The issue is not one of which court's discretion shall prevail. Rather, it is a matter of the appellate court reviewing the acts of the trial court to determine if a mistake of law was made. The law in the instant case is set out in Craddock. That law requires the trial court to test the motion for new trial and the accompanying affidavits against the requirements of Craddock. If the motion and affidavits meet these requirements, a new trial should be granted. In this case those requirements have been met.[11]

Taken alone outside the context of the particular facts in Strackbein, however, this language can support such a broad reading of Strackbein that neither an evidentiary hearing nor controverting affidavits can defeat a motion supported by affidavit testimony indicating an absence of conscious indifference. See, Southland Paint v. Thousand Oaks Racket Club.[12]

After Strackbein: Southland

In Southland, the movant requested a hearing on the motion for new trial. Because Strackbein did not require the hearing simply because the nonmovant had filed conclusory affidavits

opposing the movants, and the opposing affidavits contained no facts about the events leading up to the default, the hearing need not have been requested for evidentiary reasons. Instead, the hearing simply could have given Southland an oral opportunity to persuade Judge Rivera to set aside the default judgment if the written motion for new trial had not persuaded him on its own.

A record on the proceedings in the hearing was presented to the appellate court. The record reflects that the nonmovant presented live testimony. The movant argued this testimony did not controvert the affidavit testimony supporting the motion for new trial because the testimony did not come from someone with personal knowledge of facts leading to the default, and because the evidence was in the form of an opinion grounded upon an erroneous definition of conscious indifference. The San Antonio court's majority opinion in Southland does not explicitly reject or accept the movant's argument in this regard. Instead, the court, citing Strackbein, simply broadly held that the movant's affidavits met the Craddock test and, therefore, the default had to be reversed.

Neither the majority nor the dissenting opinion in Southland addresses the effect of the nonmovant's affidavits or testimony. According to the weight of authority, the nonmovant's affidavits and testimony may have been irrelevant because neither controverted the facts leading up to the default, as alleged in the movant's affidavits. Because the San Antonio court does not make this clear in its opinion in Southland, however, the opinion could be read to support an argument that, once the movant files affidavit testimony which, if true, meets the Craddock test,

controverting evidence of any kind, even on the conscious indifference issue, is irrelevant, and the trial court must grant the motion for new trial.

In dissent in Southland, Chief Justice Cadena also did not mention the issue of controverting evidence. Instead, the Chief Justice opined that because the movant presented no testimony at the hearing, it had failed to discharge the burden it was required to bear to get the default set aside.[13] This dissent reflects a broad reading of Reedy Co., Inc. v. Garnsey,[14] according to which the movant's affidavits automatically become insufficient (become nonevidence) to support a motion for new trial upon request by the nonmovant for a hearing on the motion.

On May 13, 1987, the Supreme Court ruled that the San Antonio court had committed no reversible error in Southland. In so doing, the Supreme Court left standing the San Antonio's court broad language interpreting Strackbein, according to which controverting evidence of any kind is irrelevant as long as the movant files an affidavit which meets the requirements of Craddock.[15]

After Strackbein: Barber

In Peoples Sav. and Loan Ass'n v. Barber,[16] the San Antonio court offered another interpretation of Strackbein which may create problems for the practitioner. The procedural history of Barber provides a good introduction to the problems. The movant requested a hearing on the motion for new trial and called its own affiants live to supplement their affidavit testimony. The nonmovant filed a reply to the motion for new trial, but did not offer and could not have offered affidavits to controvert the

factual allegations of the movant's affiants. The nonmovant's inability in this regard may not have been significant at the time because the movant's affidavits seemed fatally deficient on the meritorious defense issue[17] (as pointed out in the reply to the motion for new trial).[18] At the time, Strackbein did not appear to require the filing of counter-affidavits before the nonmovant could take advantage of any controverting testimony elicited during cross-examination of the affiants at the hearing.

At the hearing, the nonmovant did elicit from the affiants testimony which contradicted their affidavit testimony. For example, as one of the excuses for the default, one of the movant's witnesses testified that, in a telephone conversation designed to notify him that the movant had been served with citation, he mistakenly thought he was being told only about a letter that had been previously sent by Mr. Barber.[19] This testimony impeached the witness' affidavit in which he admitted under oath that, on the ocassion in question, he was actually advised that the movant had been served with court papers concerning Mr. Barber's suit.[20]

During cross-examination, the trial court also asked questions of the impeached witness, questions which the witness avoided. The trial court denied the motion for new trial, and the movant appealed.

The San Antonio court, in an opinion by Justice Chapa, took a broad view of Strackbein and reversed the default judgment. The court held:

> Barber filed no controverting affidavits to the motion for new trial . . . . Since Barber filed no controverting affidavits, the trial court could only look to the record

before him at that time which included the motion for new trial and the attached affidavits . . . .[21]

* * *

Barber asserts that we should consider the evidence adduced at the evidentiary hearing [of which the court had a record] on the motion for new trial in reviewing the trial court's denial of the motion . . . . The Supreme Court, faced with the same contention [sic], held:

> Finally, Strackbein contends that if the trial court conducts a hearing on a defaulting defendant's motion for new trial the appellate court should not substitute its discretion for that of the trial court. The issue is not one of which court's discretion shall prevail. Rather, it is a matter of the appellate court reviewing the acts of the trial court to determine if a mistake of law was made. The law of the instant case is set out in Craddock. That law requires the trial court to test the motion for new trial and the accompanying affidavits against the requirements of Craddock. If the motion and affidavits meet those requirements, a new trial should be granted.[22]

(Emphasis added.)

The San Antonio court's holding in Barber creates at least the following problems for the practitioner in this area:

1. For the first time it seems to require that the nonmovant file controverting affidavits as a prerequisite for the introduction of other controverting evidence;

2. If for whatever reason, controverting or opposing affidavits are not available to the nonmovant, cross-examination testimony of the movant's affiants themselves cannot be considered by the trial court on the conscious indifference issue; and

3. If controverting or opposing affidavits are not available to the nonmovant, he has no way to defend the

default against an artfully worded, but false movant's affidavit.

Under most circumstances, as was true in Barber, the allegations made in the supporting affidavits as to intent or conscious indifference are wholly within the knowledge of the affiant(s) and concern facts which cannot be known personally to the nonmovant. For example, in Barber, to explain the default, the movant relied solely upon evidence of a telephone conversation during which a misunderstanding allegedly arose that resulted in the default. The only witnesses to this alleged telephone conversation were the two participants in it, and they were the only affiants offered in support of the motion for new trial.[23]

In the Barber situation, which experience has shown to be typical, the nonmovant can test the movants' proof only by cross-examining the affiant(s) regarding the truth or falsity of the facts alleged in affidavit testimony. According to the San Antonio court's holding in Barber, a nonmovant is effectively deprived of his right to cross-examine the movant's affiants in the vast majority of default judgment cases. In those cases, the nonmovant is left completely to the mercy of the affiants' conscience or lack thereof.

Of course, in the motion for rehearing and in the application for writ of error in Barber, the nonmovant argued that the live cross-examination testimony from the affiants themselves did controvert their affidavits; that the court did have before it a record of the controverting evidence; that the appellate courts in Strackbein did not have such a record; that the nonmovant had offered no controverting evidence of any kind in Strackbein;[24]

that, accordingly, Strackbein was not in point; and that the absence of controverting affidavits was irrelevant. At least three members of the Supreme Court agreed with these arguments when they granted the application for writ of error on October 7, 1987. Because the application was later withdrawn by agreement as a result of the settlement, however, the Supreme Court did not have a chance to address intermediate appellate court interpretations of the opinion in Strackbein.

If the Supreme Court had addressed the issues in Barber, it could have defended the following rules:

1. The nonmovant must controvert the movant's affidavits on the issue of conscious indifference; otherwise, they are taken as true;[25]
2. The nonmovant can controvert the movant's affidavits on the conscious indifference issue either by filing affidavits, or by adducing testimony live at a hearing as long as either contradicts the facts alleged by the movant's affidavits on the conscious indifference issue;[26]
3. The controverting evidence, if any, must be incorporated in the record presented to the appellate court; otherwise, the appellate courts will accept the movant's affidavits as true.[27]
4. An "evidentiary" hearing has no effect on the movant's affidavits if no evidence is presented at the hearing to controvert the facts alleged in the affidavits on the conscious indifference issue;[28]

5. If the movant's affidavits are controverted, the trial court must find facts, which findings will not be disturbed on appeal if supported by some evidence;[29] and

6. If the movant's affidavits are not controverted, the motion for new trial must be granted if no reasonable interpretation of the affidavits would suggest the default was intentional or the result of conscious indifference.[30]

These rules avoid the problematic holdings and statements in Barber and Southland. For example, contrary to the ruling in Barber, it seems self-evident that, without requiring prerequisites, the trial court should be able to consider admissions by the affiants themselves, admissions made during cross-examination at a hearing on the motion for new trial. Before Barber, no Texas court had established prerequisites for cross-examination of witnesses called by the other side,[31] and it would seem extremely unjust if affidavit testimony need be taken as true in the teeth of the affiant's live admission or testimony during cross-examination indicating the affidavit testimony was not actually true. Likewise, contrary to the apparent ruling by the majority in Southland, it seems unjust to accept artfully worded affidavits on the conscious indifference issue if evidence is offered (at least by the time of the hearing on the motion for new trial) to controvert the affidavits. Finally, it seems unjust to exalt form over substance as does the dissent in Southland in opining that a mere request for a hearing automatically negates the force of the movant's affidavits.

According to the views expressed in Barber and Southland, the key issue seems to be form and not substance. According to the Supreme Court's views, however, as reflected in the Strackbein opinion read as a whole, the key issue seems to be the absence or presence of controverting facts of any kind on the issue of conscious indifference, whether these facts are in the movant's affidavits themselves and reflect internal inconsistencies; or whether the facts alleged in the movant's affidavits are inconsistent with facts alleged in opposing affidavits; or whether facts alleged in the movant's affidavits are inconsistent with facts established other than by affidavit, for instance, during live testimony at the evidentiary hearing. The facts developed as of the time of the hearing should control.

There should be and usually is a "symmetry" in the risks of any given action in litigation. For example, if an advocate calls a witness to prove a favorable fact, X, the witness may admit Y, which is unfavorable. Likewise, if the advocate's opponent calls a witness to prove Y, which favors the opponent, the witness may prove X, which disfavors the opponent.

Similarly, if the advocate does not call a witness to prove X, the factfinder may consider other evidence to be too weak to support the advocate's position on X. Likewise, if the opponent fails himself to call the advocate's witness adversely, the factfinder may find other evidence to be strong enough to support the advocate's position.

The views expressed by the San Antonio court in Southland and Barber alter the natural symmetry of risks with respect to witnesses called or not called in connection with an attempt to

effect the setting aside of a default judgment. The majority view in Southland, for instance, if read literally, eliminates entirely the risk in a movant's decision not to call witnesses live to prove the absence of conscious indifference. This is true because, according to the Southland majority's view, the movant's witness(es)' affidavit testimony must be taken as true and, as long as the affidavit is artfully worded, the trial court must grant the motion for new trial.

Likewise, the dissent in Southland, if read literally, eliminates entirely the risk in the nonmovant's decision not to call or to depose the movant's witness(es) on the conscious indifference issue. This is true because, according to the Southland dissent's view, the nonmovant, simply by requesting a hearing, can force the movant to call his witness(es) live to prove the absence of conscious indifference.

Similarly, the majority opinion in Barber, if read literally, eliminates entirely the risk in the movant's decision affirmatively to call witnesses live at the hearing to prove the absence of conscious indifference. This is true because, as long as the nonmovant files no controverting affidavits, nothing the movant's witnesses say can be used against the movant.

An argument that the views in Southland and Barber destroy "symmetry of risks" in litigation is, at bottom, an argument that the views are unfair. The following rule is proposed as a reasonably fair guideline for defending and opposing default judgments. It is respectfully commended for consideration by the State Bar Advisory Committee on the Rules of Civil Procedure.

Rule 329c Motions to Set Aside Default Judgments

Rule 329b and the following rule shall be the exclusive rules applicable to motions for new trial designed to effect the setting aside of a default judgment:

(a) The motion must be supported by affidavit testimony alleging facts within the personal knowledge of the affiant reflecting that the default was not intentional or the result of conscious indifference; that the movant has a meritorious defense to the action; and that setting aside the default will not prejudice the nonmovant except by depriving him of the default judgment;

(b) The trial court can require a hearing on the motion for new trial on any just terms consistent with this rule and Rule 329b; and the trial court must hold a hearing on the motion for new trial if requested by the movant or the nonmovant, but the mere holding of a hearing shall have no effect on the evidentiary value of affidavits filed prior to the hearing;

(c) The movant's affidavit testimony may be controverted by affidavits (which, for the purposes of this rule, constitute evidence if filed prior to the hearing) reflecting personal knowledge of relevant facts or by other evidence of facts which would be admissible at trial under the Rules of Evidence, but the filing of opposing affidavits shall not be a prerequisite to the introduction of evidence at the hearing;

(d) If the movant's affidavit testimony is not controverted by any facts proved prior to or during the hearing, if any, or prior to the ruling on the motion for new trial if no hearing is held, and the testimony otherwise is sufficient to satisfy the requirements of subsection (a) of this rule, the trial court must grant the motion and set aside the default judgment on such terms as it deems just; and

(e) If the movant's affidavit testimony is controverted in the manner and at the time(s) permitted in this rule, the trial court must find the facts and render a decision consistent with those findings and the requirements of subsection (a) of this rule.

ENDNOTES

1. 134 Tex. 388, 133 S.W.2d 124 (1939).

2. Strackbein v. Prewitt, 671 S.W.2d 37 (Tex. 1984).

3. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124.

4. Yes--People's Savings & Loan Assoc. v. Barber, 733 S.W.2d 679 (Tex. App.--San Antonio 1987, writ dism'd by agr.);

No--Royal Zenith Corp. v. Martinez, 695 S.W.2d 327 (Tex. App.--Waco 1985, no writ); Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.)

5. Yes--Strackbein v. Prewitt, 671 S.W.2d 37; Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.);

No--Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.)

6. Yes--Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.);

No--Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.); Royal Zenith Corp. v. Martinez, 695 S.W.2d 327 (Tex. App.--Waco 1985, no writ).

7. Strackbein v. Prewitt, 671 S.W.2d 37; Order in Cause No. 82-CI-0794, signed October 1, 1982 (Strackbein v. Prewitt).

8. Strackbein v. Prewitt, 671 S.W.2d 37, 39.

9. Id. at 38-9.

10. The fact that the Strackbein case did not involve an evidentiary hearing, or at least no record of such was made, is documented in the transcript and pleadings found in the Supreme Court's file in Strackbein. The trial court's Order denying the Motion for New Trial states:

> The Court having considered the pleadings, affidavits and arguments of counsel, is of the opinion that the Motion for New Trial should be denied. Order in Cause No. 82-Cl-0794, signed October 1, 1982 (Supreme Court File No. C-2883).

Also, the movant in Strackbein described the procedural history of that case:

> Mr. Strackbein [non-movant] did not file or offer any affidavits to controvert Mr. Prewitt's motion nor did he present any evidence at the hearing on the Motion for New Trial. Respondent's Answer to Application for Writ of Error, Statement of Facts, p. 5 (Supreme Court File No. C-2883).

(Emphasis added).

Furthermore, no record was made of the hearing on the Motion for New Trial in Strackbein. 671 S.W.2d at 38.

11. Strackbein v. Prewitt, 671 S.W.2d 37, 39.

12. 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.)

13. Id. at 811.

14. 608 S.W.2d 755 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.), cited erroneously by Chief Justice Cadena as a decision of the Texas Supreme Court. 724 S.W.2d at 811. In Reedy, the movants filed a supporting affidavit on the conscious indifference issue, and the nonmovant presented controverting testimony at the evidentiary hearing on the Motion for New Trial. In its opinion,

the Dallas Court of Civil Appeals said nothing that would lead the reader to believe the nonmovant had filed opposing affidavits as a prerequisite for introducing the live testimony. The court did hold that the movants' affidavit on the conscious indifference issue was not evidence once controverted by the live testimony. 608 S.W.2d at 757. This seems to be unarguable based upon the weight of authority. However, the language in the Reedy opinion seems to go farther than a mere holding that, once controverted by live testimony or otherwise, a supporting affidavit is not evidence on the conscious indifference issue. At the very end of the opinion appears the following language:

> We hold that when a hearing is held on a motion to set aside a default judgment, . . . the movant has the burden of proving by a preponderance of the evidence that his failure to answer was not intentional or due to conscious indifference, but rather was due to mischance or mistake.

(Emphasis in original.)

Id. This language is not limited to a situation in which controverting evidence of some kind is presented at the hearing on the Motion for New Trial. Consequently, in Southland, the Chief Justice opined that merely because a hearing had been held on Southland's Motion for New Trial, Southland's affidavits on the conscious indifference issue lost their evidentiary value. 724 S.W.2d at 811. If this was a holding in Reedy, the Supreme Court in Strackbein seemed to repudiate it. There the Supreme Court held that the movant's affidavits on the conscious indifference issue constituted evidence even in the face of a hearing held in that case on the Motion for New Trial. 671 S.W.2d at 39. No controverting evidence was presented at the hearing in Strackbein.

15. Southland Paint Co., Inc. v. Thousand Oaks Racket Club, 724 S.W.2d 809 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.)

16. 733 S.W.2d 679.

17. It is well-established that the rule of Craddock does not require proof of a meritorious defense but rather a new trial should be granted if the motion for new trial "sets up a meritorious defense." Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex.

1966). No controverting evidence of any kind may be considered on the meritorious defense issue. Guaranty Bank v. Thompson, 632 S.W.2d 338, 340 (Tex. 1982).

18. Barber's Reply To People's Motion For New Trial, Barber v. People's Savings & Loan Assoc. and People's Mortgage Co., No. 86-CI-01820A (1986). Barber's Reply To People's Motion For New Trial asserted that the motion for new trial was fatally deficient because the motion failed to allege facts which, if true, would constitute a meritorious defense to the causes of action alleged. In particular, Barber's reply alleged that the motion for new trial contained mere conclusory allegations and other legal conclusions, which did not sufficiently set up a meritorious defense as required by the Supreme Court's decision in Ivy v. Carrell, 407 S.W.2d 212 (Tex. 1966).

19. Cause No. 04-86-00315-CV, Peoples Savings & Loan Assoc. and Peoples Mortgage Co. v. Barber, Byron (Tex. App.--San Antonio), Statement of Facts for April 30, 1986, P. 62, L. 17-25.

20. Id., Transcript at 18.

21. The language in the Barber opinion appears to track very

closely the language used in the Strackbein opinion, substituting the names from the Barber case where the names from the Strackbein case had been used previously.

22. People's Savings & Loan Assoc. v. Barber, 733 S.W.2d 679, 681.

23. Cause No. 04-86-00315-CV, Peoples Savings & Loan Assoc. and Peoples Mortgage Co. v. Barber, Byron (Tex. App.--San Antonio), Transcript, at 13-20.

24. Order in Cause No. 82-CI-0794, signed October 1, 1982 (Supreme Court File No. C-2883); Respondent's Answer To Application For Writ Of Error, Statement of Facts, p. 5 (Supreme Court File No. C-2883); Strackbein v. Prewitt, 671 S.W.2d 37.

25. Strackbein v. Prewitt, 671 S.W.2d 37; Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.)

26. Royal Zenith Corp. v. Martinez, 695 S.W.2d 327; Reedy Co., Inc. v. Garnsey, 608 S.W.2d 755.

27. Strackbein v. Prewitt, 671 S.W.2d 37.

28. Implied in Strackbein v. Prewitt, id.

29. Royal Zenith Corp. v. Martinez, 695 S.W.2d 327; Strackbein v. Prewitt, 671 S.W.2d 37.

30. Strackbein v. Prewitt, 671 S.W.2d 37; Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16.

31. Cases recognizing the fundamental right to cross-examination are legion. As a former Chief Justice of the San Antonio Court put it in 1952, "ordinarily parties are entitled to cross-examine witnesses and test their opportunity to know what they profess to know. . . ." City of Corpus Christi v. McCarver, 253 S.W.2d 456, 459 (Tex. Civ. App.--San Antonio 1952, no writ). A party's right to cross-examine witnesses would be meaningless if the trial court could not consider the admissible testimony produced by the cross-examination.

LAW OFFICES

LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHRISTOPHER CLARK
ROBERT E. ETLINGER
MARY S. FENLON
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

May 17, 1989

Mr. Harry Tindall
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002

Re: Tex. R. Civ. P. 330

Dear Mr. Tindall:

Enclosed herewith please find a copy of a letter I received from Justice Nathan L. Hecht regarding Rule 330. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Stanley Pemberton

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
RAUL A. GONZALEZ
OSCAR H. MAUZY
EUGENE A. COOK
JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711
(512) 463-1312

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

May 15, 1989

Luther H. Soules III, Esq.
Soules & Wallace
Republic of Texas Plaza, 19th Floor
175 East Houston Street
San Antonio TX 78205-2230

Dear Luke:

Please include on the Advisory Committee's next agenda the following issues which have arisen recently during conferences of the Supreme Court:

1. Regarding TRCP 267 and TRE 614: May "the rule" be invoked in depositions?

2. Regarding TRCP 330: Should there be general rules for multi-district litigation generally? Should there be rules prescribing some sort of comity for litigation pending in federal courts and courts of other states?

2. Regarding TRAP 4-5: Should the filing period be extended when the last day falls on a day which the court of appeals observes as a holiday even though it is not a Saturday, Sunday, or legal holiday?

3. Regarding TRAP 84 and 182(b): Should an appellate court be authorized to assess damages for a frivolous appeal against counsel in addition to a party?

4. Regarding TRAP 90(a): Should the courts of appeals be required to address the factual sufficiency of the evidence whenever the issue is raised, unless the court of appeals finds the evidence legally insufficient?

5. Regarding TRAP 130(a): What is the effect of filing an application for writ of error before a motion for rehearing is filed and ruled upon by the court of

appeals? Does the court of appeals lose jurisdiction of the case immediately upon the filing of an application for writ of error, or may the appellate court rule on a later-filed motion for rehearing, even if the ruling involves a material change in the court's opinion or judgment? *See Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex. 1988).

Two additional matters I would appreciate the Committee considering are whether to incorporate rules on professional conduct, such as those adopted in *Dondi Properties Corp. v. Commercial Savings and Loan Ass'n*, 121 F.R.D. 284 (July 14, 1988), and whether the electronic recording order should be included in the rules.

Also, please include on the agenda the issues raised in the enclosed correspondence.

Thank you for your dedication to the improvement of Texas rules.

Sincerely,

Nathan L. Hecht
Justice

Copy to LHS
Orig to HJH
5/10/89 hjl

SULLIVAN, KING & SABOM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5005 WOODWAY
HOUSTON, TEXAS 77056
(713) 871-1185

CHARLES J. SULLIVAN
JOHN J. KING
ROBERT T. SABOM
WILLIAM F. HENRI
ANTHONY J. SADBERRY
DOUGLAS R. DRUCKER
MELINDA WINN
JAMES T. MAHONEY*
SUZANNE K. O'MALEY
JOEL K. FRENCH
MARY E. SLAY

*BOARD CERTIFIED - ESTATE PLANNING AND PROBATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

MAILING ADDRESS:
POST OFFICE BOX 2482
HOUSTON, TEXAS 77252

TELECOPIER (713) 960-1741

May 9, 1989

FILE NO.:

FEDERAL EXPRESS

Honorable Luther H. Soules, III,
Chairman
Supreme Court Advisory Committee
SOULES & WALLACE
Tenth Floor
Republic of Texas Plaza
175 E. Houston Street
San Antonio, TX 78205-2230

RE: Standing Subcommittee on Rules 523-

Dear Luke:

This is the report of the referenced su

Two matters were brought to this sub
since the last meeting of the Supreme Cou
("Advisory Committee"), and these matters
members of this subcommittee for action.
reflected as follows.

1. Proposal to delete the provision
which states as follows: "The Citation sha
if not served within ninety (90) days after
it shall be returned unserved." This prov
Citation in justice court proceedings. The
is a letter dated February 9, 1988 address
from Val D. Huvar, County Clerk, Victoria Co

Subcommittee Action. The proposed change of deleting the ninety (90) day provision is recommended to the Advisory Committee for favorable recommendation to the Supreme Court. Those members of the subcommittee favoring the proposed change were Edgar, Morris and O'Quinn. Those members oppossed to the proposed change were Ragland and Walker. Specific comments were made by the following persons which I purport to summarize as follows: Morris voted in favor of the proposed change to place it on the Agenda for debate reserving the right to take a different position in debate of the full committee. Ragland opposed the proposed change indicating the provision may be helpful to those who institute suits in the

Copy to LHS
Orig to HJH
5/10/89 hjh

SULLIVAN, KING & SABOM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5005 WOODWAY
HOUSTON, TEXAS 77056
(713) 871-1185

CHARLES J. SULLIVAN
JOHN J. KING
ROBERT T. SABOM
WILLIAM F. HENRI
ANTHONY J. SADBERRY
DOUGLAS R. DRUCKER
MELINDA WINN
JAMES T. MAHONEY*
SUZANNE K. O'MALEY
JOEL K. FRENCH
MARY E. SLAY

*BOARD CERTIFIED - ESTATE PLANNING AND PROBATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

MAILING ADDRESS:
POST OFFICE BOX 2482
HOUSTON, TEXAS 77252

TELECOPIER (713) 960-1741

May 9, 1989

FILE NO.:

FEDERAL EXPRESS

Honorable Luther H. Soules, III,
Chairman
Supreme Court Advisory Committee
SOULES & WALLACE
Tenth Floor
Republic of Texas Plaza
175 E. Houston Street
San Antonio, TX 78205-2230

RE: Standing Subcommittee on Rules 523-591, T.R.C.P.

Dear Luke:

This is the report of the referenced subcommittee.

Two matters were brought to this subcommittee's attention since the last meeting of the Supreme Court Advisory Committee ("Advisory Committee"), and these matters were addressed to the members of this subcommittee for action. The action taken is reflected as follows.

1. Proposal to delete the provision in Rule 534 T.R.C.P. which states as follows: "The Citation shall further direct that if not served within ninety (90) days after date of its issuance, it shall be returned unserved." This provision pertains to the Citation in justice court proceedings. The source of the proposal is a letter dated February 9, 1988 addressed to Chairman Soules from Val D. Huvar, County Clerk, Victoria County, Texas.

Subcommittee Action. The proposed change of deleting the ninety (90) day provision is recommended to the Advisory Committee for favorable recommendation to the Supreme Court. Those members of the subcommittee favoring the proposed change were Edgar, Morris and O'Quinn. Those members oppossed to the proposed change were Ragland and Walker. Specific comments were made by the following persons which I purport to summarize as follows: Morris voted in favor of the proposed change to place it on the Agenda for debate reserving the right to take a different position in debate of the full committee. Ragland opposed the proposed change indicating the provision may be helpful to those who institute suits in the

justice court without the services of an attorney where the provision would eliminate the necessity of party tracking down unexecuted papers and instead would impose the duty upon the officer to return the unexecuted paper. Walker states there is no value in removing the 90 day provision and no harm in its presence.

The suggested form of the Advisory Committee to reflect this subcommittee's action is enclosed.

2. Proposal to create a uniform method of numbering of the Texas Rules of Civil Procedure. The source of the proposal is a letter dated July 21, 1987 addressed to Chairman Soules from F. John Wagner, Jr. of the firm Walsh, Squires & Tompkins, Houston, Texas. This proposal was presented to each of the subcommittees. There were no rules within the purview of this standing subcommittee that appeared to be affected. Therefore this subcommittee's report is one embracing the concept of the proposal.

Subcommittee Action: The subcommittee opposes the proposal. Those against the proposal are Morris, Walker and Edgar. Those favoring the proposal are Ragland and O'Quinn.

Specific comments were made which I purport to summarize as follows: Walker states, there appears to be no difficulty in locating a pertinent rule as they are presently numbered. Rule changes invariably create confusion. Ragland states he made the recommendation of a uniform system in connection with work on the 1988 amendments and feels that it should still be a viable consideration and moves that the Supreme Court adopt a uniform numbering system for the Texas Rules of Civil Procedure and the Texas Rules of Evidence with the same numbering system to be used by the Courts of Appeals and trial courts in formulating their local rules. O'Quinn states that the numbering system for our rules should be changed to be consistent.

This concludes the report of this subcommittee and with same I express my appreciation for the support of Chairman Soules and the work of the members of this subcommittee.

With best regards I am,

Yours sincerely,

SULLIVAN, KING & SABOM, P.C.

By: _____
Anthony J. Sadberry

AJS/stb
enclosure

cc: Mr. Charles Morris
Mr. John M. O'Quinn
Professor J. Hadley Edgar
Mr. Sam Sparks
Professor Orville C. Walker
Mr. Tom L. Ragland

√Copy to LHS
orig to file
3/3/88 hjh

SULLIVAN, KING & SABOM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
5005 WOODWAY
HOUSTON, TEXAS 77056
(713) 871-1185

MAILING ADDRESS:
POST OFFICE BOX 2482
HOUSTON, TEXAS 77252
TELECOPIER (713) 960-1741

CHARLES J. SULLIVAN
JOHN J. KING
ROBERT T. SABOM
WILLIAM F. HENRI
ANTHONY J. SADBERRY
DOUGLAS R. DRUCKER
PAUL R. DUPLECHAIN*
MELINDA WINN
JAMES T. MAHONEY**
MARGARET ANN KICKLER
PHILLIP R. LIVINGSTON
SUZANNE K. O'MALEY

*BOARD CERTIFIED - COMMERCIAL REAL ESTATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
**BOARD CERTIFIED - ESTATE PLANNING AND PROBATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

March 1, 1988

FILE NO.:

SCAC Agenda

Mr. Charles Morris
Morris, Craven & Sulak
600 Congress Avenue, Suite 2350
Austin, Texas 78701-3234

Mr. John M. O'Quinn
O'Quinn, Hagans & Wettman
2300 Texas Commerce Tower
Houston, Texas 77002

Professor J. Hadley Edgar
Texas Tech University
School of Law
Lubbock, Texas 790409

Mr. Sam Sparks
P. O. Drawer 1271
San Angelo, Texas 76902-1271

Professor Orville C. Walker
St. Mary's University School at Law
One Camino Santa Maria
San Antonio, Texas 78284

Mr. Tom L. Ragland
Clark, Gorin, Ragland & Mangrum
P. O. Box 329
Waco, Texas 76703

Re: Supreme Court Advisory Committee - Standing Committee on Rules 523-591

Dear Members:

Welcome to a new committee year. I am contacting you with respect to our committee work. There are two mattes that need to be brought to your attention, on which I request your response.

Enclosed is a cover letter from our Chairman, Luke Soules, dated August 10, 1987, transmitting a letter from Mr. John Wagner, dated July 21,1987, pertaining to a request to make uniform the references in our rules in alphabetizing and numbering. I have made a brief review of the rules that fall within our purview,

and do not find any rules that would be subject to any necessary changes in the event changes of this nature are preferred. Therefore, I would think our response would be no need to make any changes. However, please make a check on your own and confirm whether my observations are accurate. For your convenience I am enclosing a copy of this letter and asking as to this item whether you approve a recommendation to the advisory committee of "no change", or alternatively, whether you would propose to make a change, and if so, what that change should be.

Also, enclosed is a copy of Chairman, Luke Soules's letter, dated February 12, 1988, transmitting a copy of Mr. Vale Huvar's letter dated February 9, 1988, concerning Rule 534.

In my brief review of the matter, it appears that Mr. Huvar has correctly pointed out that Texas Rules of Civil Procedure Rule 101, which provided that the citation shall further direct that if it is not served within 90 days after date of its issuance it shall be returned unserved, was replaced by order of July 15, 1987, effective January 1, 1988. Thus, it appears that under the Rules for District and County Courts, the 90 day provision is not to be included in the citation, although it is still present in a provision under Rule 117a, Citations and Suits for Delinquent Ad Valorem Taxes, Section 6, which is a suggested form of citation of personal service in or out of state.

Mr. Huvar also correctly points out that Rule 534, pertaining to citaton in Justice Courts retains the 90 day provision, and his suggestion I suppose is that for consistency, the Justice Court's procedure on citations should be uniform with that of the County and District courts.

Therefore, I submit to you as members of this committe the proposition of whether this change should be made, and presuming Mr. Huvar's letter to be a request for same, I will consider the motion as being one in favor of the change to delete the 90 days privision in Rule 534 and request by your return of a copy of this letter whether you agree with that request or oppose it, or if you have some other suggestion separate form those two alternatives.

These are all of the matters that have been brought to my attention as of this date. I will continue to contact you and update you with material as it is received.

I look forward to your early response or comments.

Yours sincerely,

Anthony J. Sadberry

AJS/SD1001/kf

cc: Luther H. Soules, III, Esq.

1) Agree with no Change_____
Propose change as follows:_____

2) Agree with proposed change of deleting the 90 day provision:_____
Oppose the proposed change of deleting the 90 day provision:_____

OTHER COMMENTS:_____

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

February 12, 1988

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 534

Dear Tony:

I have enclosed a copy of a letter from Val D. Huvar, County Clerk of Victoria County, Texas regarding a proposed change to Rule 534. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure

COUNTY OF VICTORIA
TELEPHONE (512) 575-1478
VICTORIA COUNTY COURTS BLDG.
115 N. BRIDGE
VICTORIA, TEXAS

VAL D. HUVAR
COUNTY CLERK

MAILING
P. O. BOX 241
VICTORIA, TEXAS

February 9, 1988

Mr. Luther H. Soules III
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

It was a pleasure to hear you speak on the Rules of Civil Procedures. You asked that I write and remind you of the statement I asked you about return dates on citations, the rule governing this County and District Courts the statement is "if not served in 90 days after issuance it shall be returned unserved" was repealled but was left in Rule 534 which pertains to Justice Court.

Yours truly,

Val D. Huvar, County Clerk
Victoria County, Texas

VH:nlb

01120

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
SUZANNE LANGFORD SANFORD
HUGH L. SCOTT, JR.
DAVID A. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELEPHONE
(512) 224-9144

TELECOPIER
(512) 224-7073

August 10, 1987

TO ALL SUBCOMMITTEE CHAIRPERSONS:

Enclosed is a letter from Mr. F. John Wagner, Jr., requesting that the alphabetical and numerical designations of the Rules of Civil Procedure be conformed. Please have your subcommittee review the rules within your purview to ascertain whether such changes are necessary and prepare a report to be given at our next scheduled meeting.

Very truly yours,

LUTHER H. SOULES III

LHSIII/tat
enclosure
cc: Justice James P. Wallace
Mr. F. John Wagner, Jr.

. AINBINDER
INE S. AKINS
N. ANDERSON III
N FEIN COHN
MES R HERZBERG
WILLIAM B HOWARD
T. FREDERICK JONES III
JAMES H. LEELAND
WILLIAM C. McDONALD
LUANN WAGENER POWERS
SCOTT R. SOMMERS
KENNETH C. SQUIRES
JEFFREY J. TOMPKINS
F. JOHN WAGNER, JR.
MILLER H. WALSH
H. WAYNE WHITE

Walsh, Squires & Tompkins
a professional corporation
Attorneys at Law
900 Marathon Oil Tower
5555 San Felipe
Houston, Texas 77056

AREA CODE 713
961-4103
FACSIMILE NO
713/961-4147

July 21, 1987

Mr. Luther H. Soules, III
Law Office of Soules & Reed
800 Milam Building
East Travis at Soledad
San Antonio, Texas 78205

Re: Alphanumerical designation of the Texas Rules of Civil Procedure

Dear Mr. Soules:

I received information from the Texas State Bar that you are th Chairman of the Advisory Committee to the Supreme Court. I am not certai if your Committee is the proper one to receive this recommendation; if i is not, I would appreciate it if you would place it before the prope committee or agency. I am recommending that, prior to January 1, 1988, th Supreme Court uniformally subdivide the Texas Rules of Civil Procedur throughout.

As you probably know, a substantial amendment to the Rules take effect on January 1, 1988. In reviewing these amendments I noticed tha Rule 166-A will become Rule 166a, in keeping with other alphanumeri designations throughout the Rules. However, when you look at the subpart of what will be Rule 166a, you will see that the first division thereunde has a small alpha designation within parenthesis; i.e. (a), (b), etc. Bu when you examine Rule 166b as it presently exists, you see that the firs division is followed by a simple numerical, the second division by a simpl small alpha, the third division by a parenthetical numerical and so forth i.e., 2.e.(1). This kind of helter-skelter alphanumeric designation exist throughout the Rules. For instance, see Rule 113, where the first divisio is a parenthesized small alpha, while Rule 167 has unparenthesize numericals and alphas as its division.

It seems, that with the amendment of the Rules coming up shortly, nc would be an ideal time to standardize the manner by which the Rules ar subdivided. It is much easier to cite a subdivided rule if all divisior begin with a parenthetical, such as is the system in the Federal Rules c Civil Procedure. I.e., Federal Rule of Civil Procedure 12(h)(1) is muc less susceptible to citation error as would be Texas Rule of Civi Procedure 167.1.b.

I hope this suggestion proves to have some merit for the State Bar, and I believe its implementation would assist those of use who use the Rules in our daily practice. Thank you for your attention to this matter.

Very truly yours,

WALSH, SQUIRES & TOMPKINS

By: _____
F. John Wagner, Jr.

FJW/ga
(LTR7)

cc: Mr. James H. Leeland
Walsh, Squires & Tompkins

Standing Subcommittee - Rules 523-591

TEXAS SUPREME COURT ADVISORY COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE -
TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

Rule 534. CITATION

When a claim or demand is lodged with a justice for suit, he shall issue forthwith citations for the defendant or defendants. The citation shall require the defendant to appear and answer plaintiff's suit at or before 10:00 a.m. on the Monday next after the expiration of ten days from the date of service thereof, and shall state the place of holding the court. It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.

II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

Rule 534. CITATION

When a claim or demand is lodged with a justice for suit, he shall issue forthwith citations for the defendant or defendants. The citation shall require the defendant to appear and answer plaintiff's suit at or before 10:00 a.m. on the Monday next after the expiration of ten days from the date of service thereof, and shall state the place of holding the court. It shall state the number of the suit, the names of all the parties to the suit, and the nature of plaintiff's demand, and shall be dated and signed by the justice of the peace. The citation shall further direct that if it is not served within 90 days after date of its issuance, it shall be returned unserved.

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

The proponent suggested this deletion would make Rule 534 consistent with Rule 101, T.R.C.P., in which the 90 day provision was deleted effective January 1, 1988.

Respectfully submitted,

ANTHONY J. SADBERRY
Sullivan, King & Sabom, P.C.
5005 Woodway, Suite 300
Houston, TX 77056

For the Subcommittee

Date: 9 May, 1989

LAW OFFICES

SOULES, REED & BUTTS

800 MILAM BUILDING • EAST TRAVIS AT SOLEDAD

SAN ANTONIO, TEXAS 78205

(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
STEPHANIE A. BELBER
CHARLES D. BUTTS
ROBERT E. ETLINGER
MARY S. FENLON
PETER F. GAZDA
REBA BENNETT KENNEDY
DONALD J. MACH
ROBERT D. REED
HUGH L. SCOTT, JR.
DAVID K. SERGI
SUSAN C. SHANK
LUTHER H. SOULES III
W. W. TORREY

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

February 12, 1988

Mr. Anthony J. Sadberry
Sullivan, King & Sabom
5005 Woodway
Suite 300
Houston, Texas 77056

RE: Proposed Change to Rule 534

Dear Tony:

I have enclosed a copy of a letter from Val D. Huvar, County Clerk of Victoria County, Texas regarding a proposed change to Rule 534. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luke Soules III

LUTHER H. SOULES III

LHSIII/hjh
Enclosure

COUNTY OF VICTORIA
TELEPHONE (512) 575-1478
VICTORIA COUNTY COURTS BLDG.
115 N. BRIDGE
VICTORIA, TEXAS

VAL D. HUVAR
COUNTY CLERK

MAILING
P. O. BOX 2410
VICTORIA, TEXAS 77902

February 9, 1988

Mr. Luther H. Soules III
800 Milam Building
San Antonio, Texas 78205

Dear Mr. Soules:

It was a pleasure to hear you speak on the Rules of Civil Procedures. You asked that I write and remind you of the statement I asked you about return dates on citations, the rule governing this County and District Courts the statement is "if not served in 90 days after issuance it shall be returned unserved" was repealled but was left in Rule 534 which pertains to Justice Court.

Yours truly,

Val D. Huvar, County Clerk
Victoria County, Texas

VH:nlb

01127

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by *it/tefth/with/such/time/afted/singing//not/to/exceeded/ten/days as/the/court/fixes* [the Friday next after the expiration of two days, excluding the date of service], unless within the time so fixed by order, for good cause shown, be extended for a like period *ort* unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and take precedence of all matters except older matters of the same character, and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does

not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party a the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 12, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 680.

Dear Luke and Doak:

I am enclosing a letter from Judge John M. Marshall, of the Fourteenth Judicial District Court at Dallas, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable John M. Marshall
Judge, Fourteenth Judicial District Court
Government Center
Dallas, Tx 75202

01130

FOURTEENTH JUDICIAL DISTRICT COURT
JOHN M. MARSHALL, JUDGE

November 9, 1987

Re: Suggested New Rule 680, T.R.C.P.

Dear Mr. Chief Justice:

Pursuant to the suggestion of Allen Landerman, Esq., an attorney of our city, I am writing to you to propose that Rule 680, Texas Rules of Civil Procedure, be modified to cause the writ, since it is effective only upon service, to be returnable on "the Friday next after the expiration of two days, excluding the date of service." Enclosed is the suggested change.

This would recognize the encreasing workload of the courts and constables that often results in the paperwork's not being processed for service until a day or so before the setting date on the face of the order. At the same time, no violence would be done to the defendants rights to notice and an opportunity to be heard.

Elimination of the ten day period for the initial TRO, though not the extension, in fact shortens the overall time for the temporary injunction and should help minimize damage to the reastrained party.

With my thanks for your attention, I have the honor to remain

Very truly yours,

John McClellan Marshall

Hon. John L. Hill
Chief Justice,
Supreme Court of Texas
Supreme Court Bldg.
P.O. Box 12248
Austin, TX 78711

Encl.

JMM/jn

Government Center Dallas, Texas 75202 749-8337

01

incorporated or joint stock company, have been delivered to any sheriff or constable as provided for in Rule 669.

(Amended by order of Aug. 18, 1947, eff. Dec. 31, 1947.)

Source: Art. 4101, unchanged.

Rule 679. Amendment

Clerical errors in the affidavit, bond, or writ of garnishment or the officer's return thereof, may upon application in writing to the judge or justice of the court in which the suit is filed, and after notice to the opponent, be amended in such manner and on such terms as the judge or justice shall authorize by an order entered in the minutes of the court (or noted on the docket of the justice of the peace), provided such amendment appears to the judge or justice to be in furtherance of justice.

Source: New rule.

SECTION 5. INJUNCTIONS

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms ~~within~~ such time after signing, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period ~~or~~ unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought.

(Amended by order of Dec. 5, 1983, eff. April 1, 1984.)

Source: Federal Rule 65(b), with minor textual change, superseding Art. 4654.

Change by amendment effective April 1, 1984: The rule is changed to avoid successive restraining orders and to require an order setting the date for hearing on the injunction.

Rule 681. Temporary Injunctions: Notice

No temporary injunction shall be issued without notice to the adverse party.

Source: Federal Rule 65(a), with minor textual change.

Rule 682. Sworn Petition

No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.

(Amended by order of March 31, 1941, eff. Sept. 1, 1941.)

Source: Art. 4647, unchanged.

Rule 683. Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

(Amended by order of Dec. 5, 1983, eff. April 1, 1984.)

Source: Federal Rule 65(d), unchanged.

Change by amendment effective April 1, 1984: The last paragraph is added.

Rule 684. Applicant's Bond

In the order granting any temporary restraining order or temporary injunction, the court shall fix

01132

RULE 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisites:

(a) [no change]

(b) [no change]

(c) [no change]

(d) [no change]

(e) If it is a temporary restraining order, it shall state the day and time set for hearing, which shall not exceed fourteen ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(e) [no change]

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisited: No change

(a) No change

(b) No change

(c) No change

(d) No change

(e) If it is a temporary restraining order, it shall state the day day and time set for hearing, which shall not exceed <u>fourteen</u> ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) No change

COMMENT: This change was made to bring Rule 687 into conformity with the 1988 change in Rule 680.

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ‡‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

April 12, 1989

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Re: Proposed Change to Texas Rule of Civil Procedure 687(e)

Dear Steve:

Enclosed herewith please find a copy of a letter forwarded to me by Justice William Kilgarlin regarding T.R.C.P. 687(e). Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanley Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

THE SUPREME COURT OF TEXAS

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

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY
BARBARA G. CULVER

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

April 25, 1988

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

1. Enclosed is a memo discussing problems with Tex. R. App. P. 49(a) and 49(b). The memo concludes that the supreme court may not have the authority to review a supersedeas bond for excessiveness.

2. Tex. R. Civ. P. 687(e) still says 10 days on TRO's. It needs to conform with new Tex. R. Civ. P. 680.

3. Enclosed are the new rules for the Dallas CA. Please look over them and advise me if they can be approved.

4. Tex. R. Civ. P. 201-5 states that "depositions of a party . . . may be taken in the county of suit subject to the provisions of paragraph 4 of Rule 166b." I can't for the life of me see how Tex. R. Civ. P. 166b-4 is involved.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

should be "5"

Rule 686. Citation

Upon the filing of such petition and order not pertaining to a suit pending in the court, the clerk of such court shall issue a citation to the defendant as in other civil cases, which shall be served and returned in like manner as ordinary citations issued from said court; provided, however, that when a temporary restraining order is issued and is accompanied with a true copy of plaintiff's petition, it shall not be necessary for the citation in the original suit to be accompanied with a copy of plaintiff's petition, nor contain a statement of the nature of plaintiff's demand, but it shall be sufficient for said citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the temporary restraining order; and provided further that the court may have a hearing upon an application for a temporary restraining order or temporary injunction at such time and upon such reasonable notice given in such manner as the court may direct.

(Amended by orders of June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947.)

Source: Art. 4655.

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisites:

(a) Its style shall be, "The State of Texas."

(b) It shall be directed to the person or persons enjoined.

(c) It must state the names of the parties to the proceedings, plaintiff and defendant, and the nature of the plaintiff's application, with the action of the judge thereon.

(d) It must command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute such order as the judge has seen proper to make.

(e) If it is a temporary restraining order, it shall state the day and time set for hearing, which shall not exceed ten days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) It shall be dated and signed by the clerk officially and attested with the seal of his office and the date of its issuance must be indorsed thereon.

Source: Art. 4651.

Rule 688. Clerk To Issue Writ

When the petition, order of the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

Source: Art. 4652, with minor textual change.

Rule 689. Service and Return

The officer receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the officer indorsed thereon or annexed thereto showing how and when he executed the same.

Source: Art. 4653, unchanged.

Rule 690. The Answer

The defendant to an injunction proceeding may answer as in other civil actions; but no injunction shall be dissolved before final hearing because of the denial of the material allegations of the plaintiff's petition, unless the answer denying the same is verified by the oath of the defendant.

Source: Art. 4657, unchanged.

Rule 691. Bond on Dissolution

Upon the dissolution of an injunction restraining the collection of money, by an interlocutory order of the court or judge, made in term time or vacation, if the petition be continued over for trial, the court or judge shall require of the defendant in such injunction proceedings a bond, with two or more good and sufficient sureties, to be approved by the clerk of the court, payable to the complainant in double the amount of the sum enjoined, and conditioned to refund to the complainant the amount of money, interest and costs which may be collected of him in the suit or proceeding enjoined if such injunction is made perpetual on final hearing. If such injunction is so perpetuated, the court, on motion of the complainant, may enter judgment against the principal and sureties in such bond for such amount as may be shown to have been collected from such defendant.

Source: Art. 4659, unchanged.

01137

Rule 771. Objections to Report

~~Either~~ [Any] party to the suit may file [a written] objection~~s~~ to ~~any~~ [the] report [at any time within 30 days of the date the report is filed and not thereafter. ~~In the event that no written objection is filed by any party, then the Court shall enter a final decree partitioning said land in accordance with the report.~~] ~~of [In the event that a written objection is filed by any party to the suit, then~~] a trial of the issues thereon shall be had as in other cases. If [on trial of the issues] the report ~~be~~ [is] found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected, and other commissioners shall be appointed by the Court [or the Court may correct on its own motion any material error in the report. If other Commissioners are appointed], and the same proceedings [shall be] had as in the first instance.

COPY TO LTTS 11/24/87 TCT

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

THE SUPREME COURT OF TEXAS

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

CLERK
MARY M. WAKEFIELD

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 23, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205

Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 771

Dear Luke and Doak:

I am enclosing a letter from Mr. Emerson Stone of Jacksonville, regarding the above rule.

Will you please place this matter on your Agenda for the next meeting so that it might be given consideration in due course.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Emerson Stone
Stone And Stone
P. O. Box 60
Jacksonville, Tx 75766-4906

01139

LAW OFFICES OF
STONE AND STONE
A PROFESSIONAL CORPORATION
P.O. BOX 60
JACKSONVILLE, TEXAS
75766-4906

W. E. STONE (1894-1978)
EMERSON STONE
RICHARD L. STONE

306 EAST COMMERCE
PHONE (214) 586-2591

November 19, 1987

Supreme Court of the State of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Re: Proposed Rule Change

Gentlemen:

It is submitted that Rule 771 of the Texas Rules of Civil Procedure that deals with objections to the Report of Special Commissioners needs to be revised so that the Judges of the courts and the litigants can know when to act. As the rule now reads, there is no time limit within which a party must act to file his objections. The Court does not know when the report is final so that a judgment can be entered that effectively partitions the land.

Suggested language:

Rule 771. Objections to Report

Any party to the suit may file a written objection to the report at any time within 30 days of the date the report is filed and not thereafter. In the event that no written objection is filed by any party, then the Court shall enter a final decree partitioning said land in accordance with the report. In the event that a written objection is filed by any party to the suit, then a trial of the issues thereon shall be had as in other cases. If on the trial of the issues the report is found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected and other Commissioners shall be appointed by the Court or the Court may correct on its own motion any material error in the report. If other Commissioners are appointed, then the same proceedings shall be had as in the first instance.

There is no pride of authorship involved in this suggestion, and any improvement in clarity would be welcomed.

Respectfully submitted,

Emerson Stone

ES:sd

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION

TENTH FLOOR

REPUBLIC OF TEXAS PLAZA

175 EAST HOUSTON STREET

SAN ANTONIO, TEXAS 78205-2230

(512) 224-9144

WRITER'S DIRECT DIAL NUMBER:

TELEFAX

SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER†
MARY S. FENLON
GEORGE ANN HARPOLE
LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III ‡‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

May 8, 1989

Professor Elaine Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Re: Tex. R. Civ. P. 781

Dear Elaine:

Enclosed herewith please find a redlined version of Rule 781. Please be prepared to report on these matters at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable Nathan Hecht
Honorable Stanton Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
• BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

Rule 781. Proceedings as in Civil Cases

Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial in civil cases in this State. Either party may prosecute an appeal or writ of error from any judgment rendered, as in other civil cases, subject, however, to the provisions of Rule ~~384~~ [42, Texas Rules of Appellate Procedure], and the appellate court shall give preference to such case, and hear and determine the same as early as practicable.

Orig adopted

Holly –

Reference in TRCP 781 to TRCP384

needs to be changed to TRAP42.

Thanks,

Sarah

STATE BAR OF TEXAS

4/25

HJH,
Make a separate SCAC ~~outline~~ Tab for "COAJ Action 87/88 and 88/89" and put in back of Agenda book pls.
Thx

April 24, 1989

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

Dear Luke:

On April 21 I received from Judge Pemberton a copy of your letter enclosing a summary of actions taken by the Committee on Administration of Justice during 1987-1988 and requesting copies of the various rules referred to in the summary. Enclosed is a copy of the summary to which I have attached the related rules changes which were adopted by COAJ as well as the explanatory comments on proposed rules changes which were not adopted.

I will prepare a summary of actions of the committee for the 1988-1989 year just after the May 13 meeting so that you will have the information prior to the May 26-27 meeting of the Advisory Committee.

Sincerely yours,

Evelyn

Evelyn A. Avent

Enclosures

Copies with enclosures to:
Judge Stanton B. Pemberton
Professor J. Patrick Hazel

01145

ACTIONS TAKEN BY THE

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

1. Committee voted to recommend amendments to the following Rules: (The finally adopted version of each Rule with appropriate comments is attached)

Rule 107	Return of Citation
Rule 166b	Forms and Scope of Discovery; Protective Orders; Supplementation of Responses
Rule 167	Discovery and Production of Documents and Things for Inspection, Copying or Photographing
Rule 168	Interrogatories to Parties
Rule 169	Requests for Admission
Rule 208	Depositions Upon Written Questions
Rule 245	Assignment of Cases for Trial
Rule 269	Argument
TRAP Rule 15a	Grounds for disqualification and Recusal of Appellate Judges
TRAP Rule 121	Mandamus, Prohibition and Injunction in Civil Cases
TRAP Rule 182	Judgment on Affirmance or Rendition
Rule 687	Requisites of Writ

2. Committee voted to recommend that no change be made in the following Rules: (Comments are attached)

Rule 38(c)	Third Party Practice
Rule 51(b)	Joinder of Claims and Remedies
Rule 62	Amendment Defined
Rule 63	Amendments
Rule 103	Who May Serve
Rule 206	Certification by Officer; Exhibits; Copies; Notice of Delivery
Rule 239a	Notice of Default Judgment
Rule 279	Submission of Issues
Rule 680	Temporary Restraining Orders
Rule 771	Objections to Report
Unpublished Opinions	

3. Committee voted to recommend elimination of the following Rule: (Comment attached)

Rule 260	In Case of New Counties

4. The following Rules were deferred until the 1988-89 year as a more complete study of the Notice Rules is being undertaken by Judge Don Dean:

Rule 21a	Notice
Rule 72	Filing Pleadings; Copy Delivered to all Parties or Attorneys
Rule 120a	Special Appearance

5. Local Rules - Following discussion of the model local rules, the Committee ADOPTED a MOTION by Judge Curtiss Brown that the draft presented by Professor Bill Dorsaneo constituted the approach the Committee wished to take with regard to the local rules.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 107. RETURN OF ~~CITATION~~ SERVICE

The return of the officer or authorized person ... if he can ascertain. NO CHANGE.

Where citation is executed by an alternative ... by the court. NO CHANGE.

No default judgment shall be granted in any cause until the citation, or process under Rule 108 or 108a, with proof of service as provided by this rule or by Rule 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

COMMENT: The above amendment to Rule 107 is designed to clearly provide that a default judgment can be obtained where the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108a.

PROPOSED RULE CHANGE
Adopted by the
COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 166b. Forms and Scope of Discovery; Protective Orders; Supplementation of Responses

1. Forms of Discovery. No change

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follow: No change

   a. In General. No change

   b. Documents and Tangible Things. No change

   c. Land. No change

   d. Potential Parties and Witnesses. No change

   e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows: No change

   (1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

   (2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models,

compilation of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when ~~it forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness~~ the expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

(3) Determination of Status. No change

(4) Reduction of Report to Tangible Form. No change

f. Indemnity, Insuring and Settlement Agreements. No change

g. Statements. No change

h. Medical Records: Medical Authorization. No change

3. Exemptions: The following matters are protected from disclosure by privilege:

a. Work Product. No change

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tengible things containing such information if the expert will not be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness or if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

c. Witness Statements. No change

d. Party Communications. ~~With the exception of discoverable communications prepared by or for experts, and other discoverable communications,~~ Communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the

claims made a part of the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. No change

4. Presentation of Objections. No change

5. Protective Orders. No change

6. Duty to Supplement. No change

COMMENT: To eliminate the contradiction between Rule 166b 2.e(1) and (2) and corresponding Rule 166b 3.b, the three areas have been modified to make discoverable the impressions and opinions of a consulting expert if a testifying expert had reviewed these opinions and material, regardless of whether or not the opinions and material formed a basis for the opinion of a testifying expert.

With regard to Rule 166b 3.d, there has been some confusion over the meaning of the phrase "and other discoverable communications" as published by West Publishing Company in its current Texas Rules of Civil Procedure handbook. To eliminate this confusion, the rule was been redrafted and deletes the confusing phrase. As modified, the intent of the rule with regard to communications between employees of a party is now clear. To further improve upon the language of the rule, it is suggested that the provision with regard to experts be separately stated at the end of the Rule.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 167. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.

1. Procedure. No change
2. Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. Objections served after the date on which a response is to be served are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.
3. Custody of Originals by Parties. No change
4. Order. No change
5. Nonparties. No change

COMMENT: The purpose of the modification of Rule 167(2) is to provide for a waiver of objections provision so that Rule 167 and Rule 168 conform. Absent such a revision, it is unclear whether objections are waived under Rule 167, if not served on or before the date a response is to be served. The modification, as suggested, will not permit objections to be served after the date on which a response is to be served without agreement, order of the court or good cause. The amendment follows the similar provision of Rule 168.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 168. Interrogatories to Parties

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon the party. No change

1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court. No change

A party serving interrogatories or answers under this rule shall not file such interrogatories or answers with the clerk of the court unless the court upon motion, and for good cause, permits the same to be filed.

2. Scope. No change
3. Procedure. No change
4. Time to Answer. No change
5. Number of Interrogatories. No change
6. Objections. No change

COMMENT: Prior to the 1988 amendments to the Texas Rules of Civil Procedure, Rule 168 provided for the filing of interrogatories or answers with the clerk of the court. The 1988 amendment deleted that part of Rule 168 and accordingly, no longer imposed a filing requirement. The suggested modication will therefore not change the existing rule but merely clarify the intent of the amendment and expressly prohibit the filing of interrogatories or answers with the clerk of the court without court order. Also, the suggested modification of Rule 168 will conform this rule to the similar provision contained in Rule 167 with regard to the filing of interrogatories or answers with the clerk of the court.

PROPOSED RULE CHANGE
Adopted by the
COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 169. Requests for Admission

1. Request for Admission. At anytime after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it. No change

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, or as otherwise agreed to by the parties, the party to whom the request is directed serves upon the party requesting the admission, a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. No request shall be deemed admitted unless the request contains a notice that the matters included in the request will be deemed admitted if the recipient fails to answer or object within

the time allowed by this rule and stated in the request. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the ansering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An ansering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. Effect of Admission. No change

COMMENT: The change in Rule 169 is designed to provide notice to recipients of requests for admissions that failure to respond within the allowable time will result in the requests being deemed admitted without the necessity of a court order. This will prevent the potential for abuse of Rule 169 in actions involving pro se parties. The rule is also amended to provide for an agreement of the parties for additional time for the recipient of the requests to file answers or objections. This change will allow the parties to agree to additional time within which to answer without the necessity of obtaining a court order.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 208. Depositions Upon Written Questions

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

A party proposing to take a deposition upon written questions shall serve them upon every other party or his attorney with a written notice ten days before the deposition is to be taken. The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

A party may in his notice name as the witness a poublic or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these tules.

2. Notice by Publication. No change

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Objections. No change
4. Deposition Officer; Interpreter. No change
5. Officer to take Responses and Prepare Record. No change

COMMENT: Rule 208 is silent as to whether a deposition on written questions of a defendant could be taken prior to the appearance date. Rule 200 permits depositions upon oral examination of defendants prior to appearance date with permission of the court. As modified, Rule 208 will conform to Rule 200 and permit the deposition on written questions of dedendant prior to appearance date with permission of the court.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

Unless otherwise provided, the court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than forty-five ~~ten~~ days to the parties, or by agreement of the parties. Provided, however, that when a case previously has been set for trial, the court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. No ncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 269. Argument

(a) No changge

(b) No change

(c) No change

(d) No change

(e) No change

(f) No change

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but ~~by~~ should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant ground.

(h) No change

COMMENT: This change was made simply to correct a typographical error.

Rule 15a. Grounds For Disqualification and Recusal of Appellate Judges

(1) (No Change)

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. In the event the court is evenly divided the motion to recuse shall be denied.

COMMENT: The present rule does not contain a provision dealing with an en banc evenly divided court on a motion to recuse. The proposed amendment will deal with that situation without the necessity of bringing in a visiting judge to break the tie. The bringing in of another judge would cause unnecessary difficulties and delays and potential embarrassment.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Texas Rules of Appellate Procedure

Rule 121. Mandamus, Prohibition and Injunction in Civil Cases.

(a) Commencement. An original proceeding for a writ of mandamus, prohibition or injunction in an appellate court shall be commenced by delivering to the clerk of the court the following:

(1) No change

(2) Petition. The petition shall include this information and be in this form:

(A) No change

(B) If any judge, court, tribunal or other person or intity ~~respondent~~ in the discharge of duties of a public character is required by law to be made a party, ~~named as respondent,~~ the petition shall disclose the names of the parties to the cause below and the real parties ~~party~~ in interest, if any, ~~or the party~~ whose interests would be directed affected by the proceeding. In such event, the caption of the petition shall, in lieu of the name of the judge, court, tribunal or other person or entity acting in the discharge of duties of a public character, name as relator or respondent the parties to the cause below who would be affected by the proceeding, according to their respective alignment in the matter. The body of the motion or petition shall state the name and address of each relator and respondent, including any judge, court, tribunal or other person or entity acting in the discharge of duties of a public character and each party to the cause below who would be affected by the proceeding, and real party in interest whose interest would be directly affected by the proceeding. A real party in interest is a person or entity other than a party to the cause below, but does not include any judge, court, tribunal or other person or entity in the discharge of the duties of a public character.

COMMENT: The proposed amendment eliminates a misleading impression created by the existing rule. Under the current version of subdivision (a)(2)(B) the judge or the court involved is named as respondent. This creates the erroneous impression in the minds of the public that the judge or court is being sued in the traditional sense. An even more serious problem arises where a trial judge files a petition for mandamus against a court of appeals in the Supreme Court to seek "review" of the respondent's previously rendered order granting a litigant's petition for mandamus filed in the respondent court. As Judge Michael Schattman so aptly stated: "This allows a credulous press and public to write and believe that the judges are suing each other. It is bad form and bad public relations."

The proposed amendment requires the caption to name as petitioner the parties to the cause below adversely affected by the court's action complained of, instead of the actual petitioning judge, if any, and the name of the respondent to be that of the parties to the cause below favored by such action, instead of the actual respondent judge or court. In situations where there is no party to the cause below aligned with the actual petitioner or respondent who is a public official or entity, such as where no law suit is pending and the petition is directed to an executive officer or some agency official, that officer or official would be the named respondent in the caption as well as disclosed in the body of the petition as the actual respondent.

An example of a real party in interest as defined in the proposed amendment is a child who is the subject of a motion to modify child support and the managing conservator has filed a petition for mandamus to compel the trial judge to transfer the cause to the county of the child's residence. The child's name and address must be disclosed in the petition. The managing conservator is the actual petitioner and the petitioner named in the caption. The trial judge is the actual respondent, but the possessory conservator is named as respondent in the caption because he is the party to the cause below who was favored by the trial court's action, i.e., the denial of the motion to transfer.

Rule 182. Judgment on Affirmance or Rendition

(a) (No change)

(b) Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may [~~,—as—part—of—its judgment,~~] award each prevailing respondent an amount not to exceed ten percent of the amount of damages awarded to such respondent as damages against such petitioner. If there is no amount awarded to the prevailing respondent as money damages, then the court may award [~~,—as—part—of—its—judgment,~~] each prevailing respondent an amount not to exceed ten times the total taxable costs as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not been otherwise properly preserved or presented for review.

COMMENT: Justice Kilgarlin raised the question on whether or not the Supreme Court under this rule was required to grant a writ and enter a judgment before being able to assess the sanction authorized by the rule. By deleting the language noted from the rule, the court will have authority to assess sanctions without granting a writ and entering a judgment in the case.

PROPOSED RULE CHANGE

Adopted by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisited: No change

(a) No change

(b) No change

(c) No change

(d) No change

(e) If it is a temporary restraining order, it shall state the day day and time set for hearing, which shall not exceed fourteen ~~ten~~ days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) No change

COMMENT: This change was made to bring Rule 687 into conformity with the 1988 change in Rule 680.

PROPOSED RULES CHANGES

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee that NO CHANGE be made in the following Rules:

Rule 38(c) and Rule 51(b) - The subcommittee felt that if the language regarding direct actions is eliminated from the Rules, it might give the impression that a cause of action of that nature now exists. Since the Supreme Court Advisory Committee is considering "Direct Actions", the subcommittee recommended that no change be made by COAJ at this time.

Rule 62 and Rule 63 - These Rules deal with amendments to pleadings and a question was raised as to whether the filing of a counterclaim is considered to be an amended pleading. Prof. Dorsaneo said a counterclaim is not considered to be separate from the answer and is a pleading. A straw vote by held and the Committee voted to make no change in the Rules.

Rule 103 - Royce Coleman, an attorney from Denton, had requested a change in this Rule, which deals with the officer who may serve, which would allow the present procedure set out in the Rule or for service by any private individual. The Rule was amended January 1, 1988 to permit service by mail by an officer of the county in which the case is pending or the party is found and also service by the clerk of the court. It was the Committee's consensus that the 1988 amendment took care of the problem.

Rule 206 - George Pletcher of Houston expressed his concern about Rule 206 with reference to the original of a deposition being delivered to the attorney or party who asked the first question and thereafter, "upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit." The subcommittee felt the Rule should be left as it is insofar as the oblication of the custodial attorney to permit any party to review the deposition. If copying is to be done, it must be done by the reporter who made the transcript. Committee voted no change.

Rule 239a - Attorney Ralph Kinsey of Lamesa had suggested that it would be helpful if the clerk in compliance with Rule 239a would send a copy of the notice to the plaintiff or attorney and file a copy of the notice in the file of the case. The subcommittee agreed unanimously that there was no immediate reason to change Rule 239a at this time.

Rule 279 - New language added to the Rule on January 1, 1988 stated that a claim that the evidence was legally or factually insufficient to warrant the submission of any questions made be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant. Several people had objected to the new language because "factual insufficiency" is never a valid complaint to the submission of any issue but only to the answer. An amendment was offered that the last sentence of the Rule be amended to read: A claim

that a question should not have been submitted because either the evidence was legally insufficient to warrant its submission or the answer was conclusively established by the evidence as a matter of law may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant." A MOTION to TABLE the proposed amendment was ADOPTED by a vote of 8 to 4.

Rule 680 - Judge John Marshall of Dallas had requested that this Rule be modified to cause the writ, since it is effective only upon service, to be returnable on the Friday next after the expiration of two days, excluding the date of service. Mr. Baggett, chairman of the subcommittee, talked with Judge Marshall about the Rule and recommended that no change be made.

Rule 771 - Emerson Stone of Jacksonville stated that this Rule does not provide a time limit within which a party must act to file his objections. The subcommittee considered the request but voted to make no change in the Rule.

Unpublished Opinions - Some members of the Court felt that the Supreme Court should promulgate a rule authorizing the current practice of ordering an unpublished court of appeals' opinion to be published in appropriate circumstances and had asked COAJ to look at the matter. Judge Brown stated that he felt the Court of Appeals needed to control these matters as opposed to the Supreme Court. If the Supreme Court wants to have an opinion published it has the power to enter an order. The Committee voted to make no change at this time.

PROPOSAL

Considered by the

COMMITTEE ON ADMINISTRATION OF JUSTICE
1987-88

The Committee voted to recommend to the Supreme Court Advisory Committee elimination of Rule 260 from the Texas Rules of Civil Procedure:

Rule 260. In Case of New Counties - Judge Charles Bleil of Texarkana pointed out the Rule appeared to be obsolete. He said in looking through annotations, he found that only one case had been cited on this Rule and this was in 1891 and that case held that the Rule did not apply. The subcommittee recommended that the Rule be eliminated and the recommendation was ADOPTED.